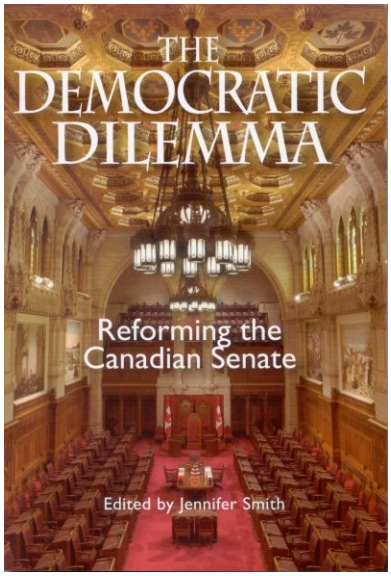
THE
DEMOCRATIC
DILEMMA
Reforming the
Canadian Senate
Edited by Jennifer Smith

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REFORMING THE CANADIAN SENATE

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FOREWORD

From its inception, the Senate of Canada has been a source of controversy and proposals for its reform have never been long absent from the political scene. It was no surprise, therefore, that, in the general election of 2006, such proposals figured prominently in the agenda for democratic reform advanced by the Conservative party led by Stephen Harper. What was surprising was that, rather than endeavouring to proceed by way of constitutional amendment, the government chose to proceed legislatively, evidently assuming that s. 44 of the Constitution provides the requisite authority for Parliament to make the change on its own. Accordingly, the Harper government tabled in the Senate Bill S-4 (to change the tenure of senators from appointment till age seventy-five to an eight-year renewable term) and, in the Commons, Bill C-43 (to conduct consultative elections to identify candidates for appointment by the Prime Minister). Both bills died on dissolution of the session, but C-43 was subsequently reintroduced as C-20, together with C-19, which would restrict a senator to one eight-year term.

Given the evident seriousness of the current federal government's intention to act on Senate reform, and the likely impact of the proposed reforms on the operation of both the Canadian Parliament and federation, the Institute of Intergovernmental Relations was delighted when Dr. Jennifer Smith, Professor of Political Science, Dalhousie University, suggested the Institute host a Senate-reform working-paper series on its website. It was but a short step from there to invite Professor Smith to be the guest editor of the series and, shortly thereafter, when the invitation to submit papers elicited a most enthusiastic and informed response, to edit the collection for publication. We very much appreciate her willingness to undertake both tasks. We would also like to acknowledge the contribution made by Dr. Nadia Verrelli, our post-doctoral fellow, in co-ordinating the work on this project here, at the Institute.

The IIGR is pleased to publish *The Democratic Dilemma: Reforming the Canadian Senate*, and hopes that it will help inform the ongoing debate on whether, and in what manner, the Canadian Senate should be reformed.

Thomas J. Courchene,
Director, IIGR

John R. Allan,
Associate Director, IIGR

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PETER AUCOIN is Eric Dennis Memorial Professor of Government and Political Science at Dalhousie University. He was Research Coordinator for National Institutions, the Royal Commission on the Economic Union and Development Prospects for Canada, and Research Director of the Royal Commission on Electoral Reform and Party Financing. The former recommended Senate reform; the latter considered campaign finance issues in depth. He has also been an expert witness in several court cases concerning campaign finance law.

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DON DESSERUD holds Bachelor and Master's degrees in English and Political Science from Dalhousie University, and a PhD in Political Science from The University of Western Ontario. He has also completed an MA in Creative Writing from the University of New Brunswick. He was recently the recipient of the James R. Mallory research grant from the Canadian Study of Parliament Group for his project "The Separation of Powers and Responsible Government in the Canadian Parliamentary System." He is currently the Associate Dean of Graduate Studies at UNBSJ.

ANDREW HEARD is an Associate Professor in the Political Science Department at Simon Fraser University. His research interests centre on the Canadian Constitution and political institutions. He has authored numerous articles and chapters on parliament, the electoral system, the division of powers, judicial behaviour, and the Charter of Rights. He has also published the only book-length examination of Canadian constitutional conventions.

TOM KENT, a Companion of the Order of Canada, served in wartime intelligence, was an editor and a corporation executive, before becoming in 1963 principal

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STEVEN MICHAEL MACLEAN received a Master of Philosophy in Humanities from Memorial University of Newfoundland in 1997, specializing in political philosophy. He has been involved in community economic development and local historical projects. His current research focuses on Anglo-Canadian Toryism and Catholic Social Teaching, particularly subsidiarity and the common good. He has been published in *Reformer*, the journal of the Tory Reform Group (UK). Stephen lives in Cape Breton, Nova Scotia.

LORNA R. MARSDEN is currently President Emerita and professor of sociology at York University. Previously, she was a faculty member and administrator at the University of Toronto (1972-92) and President of Wilfrid Laurier University (1992-1997). She was appointed to the Senate of Canada by Prime Minister Pierre Trudeau in 1984 and resigned in 1992. She has authored several books and many articles, including "What Does a Senator Actually Do?" in Paul Fox (ed.) Politics in Canada, 1987.

VINCENT POULIOT is a lawyer and entrepreneur. Following the Quebec Referendum to secede from Canada in 1995, he became Leader of the Libertarian Party of Canada to promote provincial representation in the Senate, as the means to end the conflict of power in our federation. He intervened before the Supreme Court of Canada in the reference regarding the secession of Quebec.

HUGH SEGAL is a senior fellow at the Queen's University School of Policy Studies, and former president of the Institute for Research on Public Policy in Montreal. He was appointed to the Senate by Paul Martin in 2005, as a Conservative, and served on the special committee on Senate reform in the last parliament.

DAVID E. SMITH holds degrees from the University of Western Ontario (Hons BA), Duke University (MA and PhD), and the University of Saskatchewan (DLitt). A past president of the Canadian Political Science Association, he was elected Fellow of the Royal Society of Canada in 1981. His most recent publications include the parliamentary trilogy, *The Invisible Crown: The First Principle of Canadian Government* (1995),*The Canadian Senate in Bicameral Perspective* (2003), and *The People's House of Commons: Theories of Democracy in Contention* (2007). The Senate book was nominated for the Donner Prize in Canadian Public Policy (2004); the Commons book won the Donner Prize (2007).

JENNIFER SMITH is a professor of Political Science at Dalhousie University. She is the author of *Federalism* (2004), a volume in the Canadian Democratic Audit. She writes on a range of subjects associated with Canadian government and politics, including parliamentary government, intergovernmental relations and

campaign finance law. She has served on both federal and provincial electoral boundaries commissions for Nova Scotia.

NADIA VERRELLI is a post-doctoral fellow at the Institute of Intergovernmental Relations. Her research looks principally at Canadian federalism, the Supreme Court of Canada, constitutional politics and Quebec politics. Her publications include (with F. Rocher) "Questioning Constitutional Democracy in Canada: From the Canadian Supreme Court Reference on Quebec Secession to the Clarity Act" (in Gagnon et al. (ed.) *The Conditions of Diversity in Multinational Democracies*, 2003. She has edited *The Role of the Policy Advisor: An Insider's Look*, (forthcoming).

RONALD L. WATTS is Principal and Vice-Chancellor Emeritus and Professor Emeritus of Political Studies at Queen's University where he has been since 1955. He was a founding board member of the international Forum of Federations. He has been a consultant to the Government of Canada during constitutional deliberations, most notably 1980-1 and 1991-2, and has been an advisor to governments in a number of other federations. He has written or edited twenty-nine books, monographs and reports and over one hundred articles, chapters and books. His most recent book is *Comparing Federal Systems*, third edition, 2008. He has received five honourary degrees. He became a Companion of the Order of Canada in 2000.

JOHN WHYTE currently holds the Law Foundation of Saskatchewan Chair at the College of Law, University of Saskatchewan. He has taught constitutional law at a number of Canadian universities and from 1987 to 1992 he was the Dean of Law at Queen's University. He also served as Saskatchewan's Deputy Minister of Justice and has held a number of other positions in government including constitutional advisor to Saskatchewan during the patriation process.

1

INTRODUCTION

Jennifer Smith

En premier lieu, dans l'introduction, l'auteur replace dans leur contexte les propositions de réforme du Sénat du gouvernement Harper. Elle établit un lien entre la proposition du Parti réformiste de créer un sénat triple E (élu, égal et efficace), présentée il y a presque 20 ans, et les propositions qui sont devant nous aujourd'hui. Elle décrit brièvement les propositions du gouvernement de raccourcir la durée du mandat des sénateurs et que ces derniers soient élus. Puis, elle passe en revue tous les articles de la collection, et résume les idées principales des auteurs. Elle conclut en citant les leçons à tirer de ces articles et nous fait voir toute la complexité de la réforme du Sénat.

The idea of an elected Senate dates to the Confederation debates. Maritime critics of the proposed Constitution, the Nova Scotian anti-confederate Joe Howe prominent among them, complained bitterly about the idea of a body appointed by a federal government that would necessarily draw most of its support – and bias – from seat-rich central Canada. The idea has bounced about ever since, to no effect, until it was featured prominently in the platform of the federal Reform party.

Established in 1987, the Reform party advocated the so-called "Triple-E" Senate – equal, elected, effective. The proposal gained some traction among the public during the constitutional rounds that preoccupied the country from 1984 to 1992, a version of it – elected and effective – appearing in the Charlottetown Accord that was voted down by Canadians in a referendum in 1992. The idea of an elected Senate remained alive through the transformation of the Reform party into the Canadian Alliance, and then the merger of the Canadian Alliance and the Progressive Conservatives to form the Conservative Party of Canada. That party's general election win in 2006 was the opportunity for it to move on the file. And move it has, although not in the way most might have expected.

It was widely assumed that to change the Senate from an appointed body to an elected one would require an amendment to the Constitution under a process requiring the consent of Parliament and at least two-thirds of the provinces, which together contain at least half the population of the country. By reason of democratic form if not legal requirement, the people might need to be consulted as

well. It was equally widely assumed that such consent would be extremely difficult to gather. Faced with the bleak prospect of Senate reform as a constitutional matter, the minority Conservative government of Prime Minister Stephen Harper has developed an alternative strategy based on the assumption that Parliament can make the change on its own under s. 44 of the Constitution that permits such action in relation to the executive government of Canada, the House of Commons and the Senate.

In 2006, in its first legislative session, the government tabled S-4 in the Senate to change the tenure of senators from appointment to the age of 75 to an eight-year, renewable term. It also introduced C-43 in the House of Commons to change the method of appointment from the decision of the prime minister on his own heft to the decision of the prime minister based on the results of Senate "consultative" elections. Both bills died on the order paper following the dissolution of the session. In the second session, the government reproduced the bill on the election of senators, now C-20. It also tabled – this time in the House rather than the Senate – a slightly amended Senate tenure bill (C-19) that would restrict a senator to one eight-year term.[1]

Not content simply to let the chips fall where they may on the bills in the minority Parliament, the government has pursued aggressive strategies to move along its project. Initially, the prime minister said he would refuse to fill vacant seats in the Senate by individuals who have not been elected to them. He persisted in this strategy until, at the time of writing, there now are 18 vacant seats. Then in December 2008, a scant two months after the general election in which his government was returned to office for a second time with only minority support in the House, and days after the opposition parties threatened to bring down the government over economic issues, the prime minister changed tack. He announced his intention to fill the vacancies with individuals who support his plan of reform. This is a remarkable demonstration of will. It presents the spectacle of a government that is openly toying with a foundational institution of the country in order to get its way on reform. It should be noted that some senators themselves have prepared bills to reform the institution. Senator Moore has introduced Bill S-224 in an effort to require the prime minister to fill vacancies in the Senate in a timely manner. Senator Banks has introduced Bill S-229 to remove the property qualifications that candidates for a Senate appointment are required under the constitution to fulfill as well as a resolution to amend the Constitution to eliminate the senatorial districts in Quebec.

Legislative committees in the House and the Senate have held hearings on the bills, and experts and interested parties have appeared before them to offer their views on the constitutionality and the substance of the proposals. However, to date the public has not been engaged by the issue. This might reflect the media's lack of interest in it based on their judgement that nothing much is likely to happen

[1] For details on bills S-4, C-43, C-20 and C-19, please see appendix.

unless the Conservatives win a majority government. In the meantime, why waste the effort? On the other hand, given the current government's determined approach to the issue, there is every reason to make the effort. The Senate is a central institution to which the federal government wants to make serious changes – transformative ones. But it is not a stand-alone institution. If it changes, its relationships with other institutions – the House of Commons, the Cabinet, the Crown, the provinces – will change as well. That's the trouble with Senate reform. It is actually a very big issue with complex ramifications for the conduct of Canadian politics. The purpose of this book is to study carefully the government's proposed reforms and to explore the issues they raise for other institutional players in the system as well as Canadians themselves.

The book is organized in four sections. In the first or background section, the authors set the table by writing about the Canadian Senate in particular and upper houses in general. David Smith and Janet Ajzenstat write about the origins of the Canadian Senate. Smith reminds us that the Senate was central to the Confederation agreement. Without the guarantee of regional equality of representation (the 24 seats assigned to Ontario, Quebec and the Maritime provinces), he writes, the Maritime provinces simply would not have agreed to join the federation. He also points out – and Ajzenstat agrees – that the Senate was conceived as the legislative upper house of a bicameral parliament, not a provincially appointed body along the lines of the German Bundesrat.

Pondering the reasons for the difficulty of Senate reform, Smith identifies four, beginning with the longevity of the average term of a senator – about 12 years. Senators outlast their parliamentary competitors who are out to reform them. A second reason is that the existing Senate, the members of which are appointed from the provinces and the territories, has allies in the provinces, most of which have shown no interest at all in reforming the institution. Then there is the constitutional indeterminacy of the function of the Senate, which inevitably leads to enormous variety in people's ideas of reform. Finally, there is the fact that Canada is a constitutional monarchy, which means a system of the Crown-in-Parliament: Crown, Senate, House of Commons. It is not at all certain that the Senate can be treated breezily as an entity apart from the other two.

Ajzenstat, too, writes forcefully about the Senate as a legislative upper house, the members of which are involved in national deliberations on national issues rather than local ones. As she explains, they can bring local perspectives to the deliberations, but they are not there to press local issues. There is a mighty difference between the two standpoints. She arrives at this point by making the case that the Senate is part of an egalitarian and inclusive parliamentary system in which all who live here are represented by the elected members of the House of Commons and the appointed senators. One way or another, she writes, all political positions get an airing in these institutions. The Senate – a body of sober second thought – has a related, additional obligation to resist efforts by the governing party to use its weight in the House to limit discussion of its policy agenda. In this respect it contributes to what she calls the most important factor buttressing the inclusiveness of the system, that is, the lack of finality in decision making.

Even when bills become laws, they are not necessarily permanent laws. Opponents can live to fight another day.

Recalling the effort of Prime Minister Pierre Trudeau to reform the Senate, Nadia Verrelli reminds us that, like the current prime minister, Trudeau pursued the objective in unilateral fashion. Trudeau's reform idea was much more modest. He proposed to maintain an appointed body, but to permit the provinces to appoint half of the senators while the federal government appointed the other half. More importantly, his decision to proceed unilaterally precipitated a legal battle on the role of the provinces in the amendment of the Senate. In its decision on the point handed down in 1980, the Supreme Court of Canada determined that the provinces had a stake in the issue and needed to be involved in the process. The court's decision might well prove critical to the determination of the Harper government's efforts at Senate reform.

In a fitting conclusion to the first section, Ron Watts places two important considerations before us in his comparative analysis of second chambers. One is simply the fact of the variety of second chambers in the national governments of countries throughout the world. There are many ways in which four key factors can be combined in any one of them. These factors are the method of selection of the members; the regional composition of the body; the powers assigned to it; and the roles that the body undertakes. The second consideration is the impact of political processes on second chambers. The process Watts explores is the political-party system. As he points out, political parties can override, or at least mitigate, structural features like the regional differences that are often articulated in second chambers. One cannot leave Watts's analysis without realizing how complex is the task of institutional reform. To those inclined to throw up their hands and opt for abolition in the face of complexity, however, he points out that almost all federations use second chambers to represent regional concerns in their national – that is, shared – institutions.

The second section of the book is focused on the constitutionality of the government's unilateral approach to Senate reform. The authors who addressed the issue regard the approach to be dubious in this respect. Perhaps the most straightforward analysis is authored by Watts, who considers the bill on the election of senators. He refers to the relevant provision of the constitutional amending formula that requires any change to the selection and powers of senators to be supported by Parliament and the provincial legislatures of two-thirds of the provinces that together contain 50 percent of the population of the country – the general formula. By his lights, a change from appointment to election merits the use of this amending provision, even if the elections in question are styled "consultative" rather than definitive. At the very least, he writes, the attempt to pursue change "on the sly through the devious use of ordinary legislation constitutes an anti-constitutional process." Watts himself thinks reform of the Senate is an urgent matter for the health of the federation, but through the hard work of gathering the needed consensus for change, not by taking shortcuts.

Don Desserud shares Watts' dim view of the government seeking indirectly to amend the Constitution when it is forbidden under the Constitution to do so. In

Desserud's case, the analysis is trained on Bill C-19, the gist of which is to institute an eight-year, non-renewable term of office. He employs three arguments, the first of which is a study of the history of s. 44 of the Constitution, the one the government says gives Parliament the green light to proceed unilaterally. According to him, this is a misunderstanding of the restrictive scope of the provision. The second argument rests on s. 42, which requires the use of the general formula for changes to the selection of members of the Senate and their powers. Desserud argues that the proposed change from retirement at age 75 to a fixed term in fact affects the powers of senators. Finally, like Smith, he points to the consequences of Senate reform for so much of the governmental system. His bottom line? The general formula that requires a broad consensus of many players bound to be affected by the issue, he concludes, is the superior way to go.

Andrew Heard also questions the constitutionality of the government's unilateral approach. In Desserud's case, the argument is a historical one that hinges on the history of s. 44 and the implications of it for a change in term. Heard is focused on the use of the unilateral approach to Bill C-20, which would establish a process to elect senators. On his analysis, an elected Senate signifies a radical change in the parliamentary system because it would refashion entirely the relationship between the House of Commons and Senate. He argues that under the amending formula, no such change is possible without the consent of the provinces. John Whyte agrees. He also raises some different issues associated with the government's approach, among them that of the 24 senatorial districts in Quebec. How, he asks, could the Quebec government manage an election from districts that, taken together, do not cover the entire province?

What about the content of the government's proposals? Even if the unilateral process is a constitutional one, is the Senate that the government envisages an improvement over the existing one? Five of the authors address the question, each from a distinct point of view. Stephen Michael MacLean worries about the effects of wholesale Senate change for the parliamentary system. Andrew Heard considers the likely effects of the proposed eight-year term on senatorial behaviour. The other three look at aspects of the election proposal, beginning with Vincent Pouliot's consideration of provincial representation in the election of senators. Peter Aucoin pursues the campaign-finance provisions that would govern aspiring senators who run for office and Louise Carbert analyzes the likely effect on the prospects for women candidates of the electoral system that the government favours for the election of senators.

MacLean takes the position of the traditional conservative who is not inclined to pursue institutional change unless there is near institutional breakdown in store. Obviously that is not the case with the current Senate – or if so, it is the federal government triggering the breakdown by refusing to appoint senators who have not been elected in Senate elections. In any event, MacLean foresees a number of difficulties that an elected Senate portends, an example of which is the fact that under Bill C-20, the prime minister retains the practical constitutional responsibility to advise the Governor General on the appointment of senators. At some point, he says, a prime minister might

have very good reason not to appoint a successful contestant in Senate elections. What then?

Looking at the issue of the term of office, Heard argues that in the immediate future the combination of a non-renewable, eight-year term and the end of the mandatory retirement at age 75 (currently serving senators exempted) would privilege current senators over their elected counterparts in such matters as committee chairs. In the long term, he says, the eight-year term – shorter than the current average of 12 years – is likely to weaken the Senate as a chamber of legislative review since it is a slight bar to the demands of party discipline, especially when elected senators are permitted to stand for election to the House of Commons before serving out their Senate term.

On the election front, Pouliot is troubled by the fact that senatorial candidates are not required to live in the province from which they would stand for election and by the prospect that the federal political parties might monopolize senate elections. In other words, there is no guarantee that members of provincial political parties that are not represented at the federal level would find their way into the Senate, thereby diminishing that body's credentials in representing the people in their provincial capacity. Pouliot offers historical evidence that such representation was held to be an important objective of the Senate and he recommends that in a reformed Senate the provinces be authorized to choose their senators as they see fit.

A keen student of women and politics, Carbert is interested in the implications of the preferential vote for the election of women. Will it help? Or will it hinder? She identifies four factors in Bill C-20 that bear on these questions: the preferential vote; the campaign-finance provisions; the slate or panel of nominees; and the district magnitude, or number of senators to be elected from a specified region or province. She finds that the key is the district magnitude. The greater the number of senators to be elected from a district – in other words, the longer the list of nominees – then all others things being equal, the better the chance of women candidates getting elected. Better than under the first-past-the-post system used for elections to the House, in which parties nominate a single standard bearer who in turn competes against a field from which only one winner is chosen. Carbert concludes that the proposed system is promising for women. But then there are the campaign-finance provisions of Bill C-20.

According to Peter Aucoin, these provisions mark a complete change from the campaign-finance regime that Canadians have developed to govern elections to the House of Commons. The Commons regime, which he labels an egalitarian model, attempts to inject fairness into the competition essentially by restricting the amount of money that the candidates and the political parties can spend in the campaign and by supplying them with public money as well. Bill C-20 does neither. Instead, it would establish what Aucoin labels a libertarian model under which candidates can spend as much as they choose and can afford (depending on how much money they raise). The latter is important because, like the Commons regime, the proposed Senate regime maintains strict limits on campaign contributions. Aucoin draws attention to the fact that under Bill C-20, candidates for election

to the House of Commons can stand for election to the Senate. He argues that should elections to the two houses coincide, then the Senate campaign-finance regime is bound to diminish the effectiveness of the spending limits still in effect for elections to the Commons.

In the last section of the book, Tom Kent, Senator Hugh Segal and Lorna Marsden offer different views of the need for Senate reform. For Kent it is a matter of some urgency, so much so that he is prepared to overlook the risk that the government's plan entails. It is urgent, he writes, because the national government is in a funk. Whatever its merits, the existing Senate does not contribute to a robust federal government, but instead detracts from it, largely because the chamber's electoral legitimacy long ago opened the door for the provincial premiers to assume a larger role in national affairs than was intended at the outset. Since it is not their brief to think nationally, their local grievances tend to dominate federal-provincial relations at the expense of national concerns. Kent is aware of the problem of an elected Senate with the same powers as the existing chamber. However, he concludes that that is a problem for another day, and that it is important now simply to get the ball rolling on a revitalized second chamber.

Like Kent, Segal thinks it is high time Canadians turn their attention to the transformation of the Senate into a modern, democratic body. He is concerned about the legitimacy of the appointed Senate, particularly in the light of the vast legal powers that it possesses. Conceding that senators are careful not to abuse their powers, he points out that a benign Senate is not a democratic one. Segal argues that under the current amending formula, Senate reform is likely out of the question – just too difficult to do. But accepting that fate, he says, sends out the wrong message – that Canadians cannot make the changes they need to do. His is a vigorous defence of the government's effort to cut the Gordian knot of the amending formula to find a way to an elected Senate.

Marsden is not opposed to Senate reform, although she is dubious about the prospects of it. She counsels reformers to attempt to maintain the existing role of the Senate as a check on the government of the day, a body capable of getting the government to rethink the more doubtful provisions of its proposed bills. She points out that the existing chamber has managed to perform this role – sober second thought – largely because the lengthy terms of many senators allow them to master their role as parliamentarians, including the craft of drafting good legislation. Election, she notes, need not diminish this service if the term of office is long enough, which in her view means ten years at least. Finally, Marsden cautions that an elected Senate is likely to introduce a level of political competition between senators and premiers that Canadians might not understand or appreciate.

The authors in this volume offer intelligent insights on the Conservative government's proposals for Senate reform. Some address the constitutionality of the proposals. Others bring to light features of them that have not yet been analyzed and assess their significance for the conduct of a reformed chamber. They consider whether the objectives of the reformers are likely to be met by these proposals. Or, whether the result will be unintended consequences, some unimportant, others potentially harmful. If nothing else, readers certainly will realize how complicated

a subject is Senate reform, full of unexpected twists and turns. Successful reform requires a deep understanding of the country's parliamentary system and culture and a delicate approach to institutional change.

THE SENATE OF CANADA: HISTORICAL BACKGROUND

2

THE SENATE OF CANADA AND THE CONUNDRUM OF REFORM

David E. Smith

Dans cet article, l'auteur s'intéresse à l'énigme que constitue la réforme du Sénat. Il rappelle au lecteur que le Sénat, telle que la Chambre des lords, a été conçu en tant que corps législatif, l'une des chambres d'un parlement bicaméral, et non en tant qu'assemblée composée de bureaucrates ou en tant que conseil formé de politiciens choisis par les provinces. L'autorité législative suprême devait résider entre les mains des deux chambres. Il croit que la réponse à l'énigme de la réforme du Sénat se trouve dans la compréhension que l'entente au sujet de la structure du Sénat était le principe sur lequel reposait l'accord de la Constitution.

The Preamble to the *Constitution Act, 1867*, states that the uniting provinces desire "a Constitution similar in Principle to that of the United Kingdom." The meaning of the phrase is open to dispute, although a persuasive case may be made that it encompasses, for instance, the principles of responsible government and an independent judiciary. Still, additional attributions presumably exist, and it is to one of these that my initial comments on the Senate of Canada and the conundrum of reform are addressed.

There was a time when Canadian commentators on the Senate saw it as an imperfect representation of the House of Lords. Appointment for life was not the same thing as hereditary membership, but the inference critics drew was that the composition of both bodies constrained expression of the popular will in their respective Commons.[1] Nonetheless, despite similarities in form the chambers were not identical, while the function of each was in significant respects distinct. This became clear most recently, when in March 2007 the House of Commons at Westminster voted in support of an elected House of Lords, and the question was

[1] In twentieth century Great Britain, life peerages were introduced in 1958, while most hereditary peers ceased to be eligible to sit in the Lords in 1999; in Canada, life appointment to the Senate was replaced by mandatory retirement at age 75 in 1965.

asked in Canada: "If such reform is possible in the Mother of Parliaments, why not here?"

One would have thought that the answer was obvious: however similar "in Principle" the two constitutions, with regard to upper chambers they are far from being the same. The House of Lords is a vestigial institution of historic lineage; the Senate of Canada is neither. It is original, tailor-made – in other words statutorily prescribed – to fit the conditions of a new federal union. That contrast alone should make Canadians wary of following British example when contemplating reform of the upper chamber. A case in point is the proposal by now retired Senator Dan Hays that, among other actions, "the Senate of Canada should emulate the UK example and encourage the government of the day to appoint a royal commission on Senate reform" (Hays 2007, 23).[2]

Arguably, whether the subject is institutions (such as Parliament), or politics (the Cooperative Commonwealth Federation and socialism), or economic doctrine (Social Credit and social credit), British models have always been strongly entertained in Canada. This was true in 1867, when "an essentially atypical second chamber, the House of Lords, [was taken to] represen[t] a basic element of a stable constitution" (Jackson 1972, ix). Yet this was a curious claim when seen through British eyes. The year of Confederation was the year of Great Britain's second reform bill, which further expanded the franchise and confirmed the moral of the 1832 reform bill – that is, the House of Commons was to be Parliament's pre-eminent legislative chamber. Paradoxically, at the very time the Senate of Canada appeared set to follow the British model, a House of Lords problem had begun to appear, and would remain unresolved for some decades – what role was the Lords to have and, depending upon the answer to that question, what was to be its relationship to the House of Commons?

If this seems an indirect way to launch a discussion of the conundrum of Senate reform, I apologize. The point I wish to emphasize is that the Senate – like the House of Lords – was conceived as a legislative body, one chamber of a bicameral Parliament, not a Bundesrat-like assembly of bureaucrats, or an advisory body of provincially selected politicians. If the phrase "a Constitution similar in Principle to that of the United Kingdom" meant anything, it meant this – supreme legislative authority was to reside in two chambers.

Nor was the subject of legislatures and their number of chambers confined to the Parliament of Canada. Embedded within the *Constitution Act, 1867* are the provincial constitutions of Ontario and Quebec, wherein Ontario is given a legislative assembly and Quebec a legislative assembly and a legislative council. It is relevant to the topic of this paper that Ontario, the largest colony of settlement in the British Empire, and loyal to the core, should opt for a unitary legislature and

[2] The British royal commission is Royal Commission on the Reform of the House of Lords, *A House for the Future,* London: The Stationery Office, January 2000 (Cm 4534). For an analysis, see Smith 2000; for a personal critique, see Cook 2003.

that Quebec should seek a bicameral legislature, with an upper chamber of appointed members each drawn from one of the province's twenty-four electoral divisions. Those divisions were the same ones from which Quebec's twenty-four senators were to be selected for appointment by the governor general.

As Garth Stevenson has shown in his research on the anglophone minority in Quebec, the requirement that appointments be made from the individual divisions had as its purpose the protection of the religious and linguistic rights of the province's minorities (Stevenson 1997). In one respect that is an obvious conclusion to draw, although it does not detract from the contrast it poses between the Canadian Senate and the House of Lords. At no time, until the report of the Royal Commission on the Reform of the House of Lords (chaired by Lord Wakeham) made it one of its recommendations, did the House of Lords have sectional or minority interests as part of its responsibilities. By contrast, from Confederation onward, protection of these interests was a primary function of the Canadian Senate.

How well the Senate actually performed the task is secondary to the point being made here, which is about legislative structure, in particular bicameralism at the centre and unicameralism in the parts. Quebec retained its upper chamber until 1968, but the other provinces that had upper chambers (Manitoba, New Brunswick, Prince Edward Island and Nova Scotia) abolished them decades earlier, partly on grounds of economy but also on the theoretical grounds that they were redundant.[3] At the Quebec conference, George Brown argued for provincial unicameralism, because the new Senate would "extinguish or largely diminish the Local Legislative Councils" (Pope 1895, 76-7). Almost a century later, Senator Norman Lambert reiterated the point: "Equal representation in the Senate was to be the collective equivalent of the original Legislative Councils of the provinces" (Lambert 1950, 19).

Canada is unusual among federations for the asymmetrical composition of its national and provincial legislatures. It is a contrast that has seldom elicited scholarly comment, although one academic who did reflect on its significance was Harold Innis: "The governmental machinery of the provinces has been strengthened in struggles with the federal government by the gradual extinction of legislative councils" (Innis 1946, 132). Another observation would be that provincial politicians today have no experience of second chambers, and thus neither

[3] One of the first occasions for a discussion of Senate reform was the Interprovincial Conference of 1887, called by Honore Mercier, premier of Quebec, and attended by five of the then seven provincial premiers (British Columbia and Prince Edward Island absented themselves). Among the resolutions passed was one (number 4) that recommended the provinces be permitted to choose one half of their senatorial allocation. Another resolution (number 12) advocated the abolition of provincial second chambers because "experience … shows that, under Responsible Government and with the safeguards provided by the *British North America Act*, a second chamber is unnecessary" (Canada 1951: Minutes Interprovincial Conference, 1887).

understanding nor sympathy for their place in the legislative process. The exception to that generalization is where provinces recognize the value of the Senate as a forum for opposing policies of the federal government. A recent example saw a majority of provinces present position papers to the Standing Senate Committee on Legal and Constitutional Affairs, which either rejected or expressed concern at the Harper government's Bill S-4, "An Act to Amend the Constitution Act, 1867 (Senate Tenure)." In the words of the New Brunswick presentation, term limits (the subject of S-4) would "dilute the independence [of Senators]" and it "would lead to a further marginalization of small Provinces at the federal level" (New Brunswick 2007, 7).

Membership in Canada's upper house is by senatorial region, of which there are four – Ontario, Quebec, the Maritime provinces and the four western provinces (Newfoundland and Labrador and the northern territories are treated as exceptions), each with twenty-four senators. A familiar complaint about this arrangement is that a province such as British Columbia, with close to four million inhabitants, has six senators, while PEI, with a population of less than 150,000, has four.

Standing grievance or not, the inequity has an explanation, and one important to understanding the place of the Senate in the federation. The guarantee of equal (regional but not provincial) representation with the more populous provinces of Ontario and Quebec was responsible for the entry of the Maritime provinces (Nova Scotia and New Brunswick). According to George Brown: "On no other condition could we have advanced a step" (*Confederation Debates* 1865, 88). Regional equity was *essential* to concluding the Confederation bargain; no other issue took so long to resolve.

In consequence of that agreement, it was possible for some decades after 1867 to think of the young Dominion as Christopher Dunkin, minister in charge of Canada's first census, described it in the House of Commons, that is, as "the three kingdoms" (HOC Debates 8 March 1870, 280). The allusion was to the United Kingdom, which encompassed England, Scotland and Ireland, along with the Principality of Wales, and notwithstanding whose diversity appeared to the Fathers of Confederation the paradigm of a successful nation.

What was missing in this analogy was federalism. Despite talk late in the nineteenth century of imperial federation and of federal solutions to the Irish Question, Great Britain was not a federal system. Canada was a federal union, although on the part of its principal politicians there was little discussion of the theory of federalism. For instance, the Macdonald government had no vision as to how the federation would be expanded, but rather was forced into a response following the rebellion at Red River. When introducing the *Manitoba Act* in 1870, the prime minister told the House that "it was not a matter of great importance whether the province was called a province or a territory. We have Provinces of all sizes, shapes and constitutions … so that there could not be anything determined by the use of the word" (HOC Debates 2 May 1870, 1287). The postage stamp province of Manitoba that resulted – with its bicameral legislature, official bilingualism and denominational schools – conformed to no blueprint past or future. In the words of David Mills, Liberal journalist and later minister in the Mackenzie

government, Parliament but more particularly the Conservatives had failed to do what "the theory of their system required" (HOC Debates, 25 April 1870, 1178). It should be said, however, that an anemic federal idea was not to be confused with weak national purpose, as the National Policy bore witness.

When it came to the Senate, however, the Liberals were no different. In this regard, the Liberal interregnum of 1873–8 is a puzzle. Why did the government of Alexander Mackenzie – who created the Supreme Court of Canada, secured a revised commission and set of instructions for the governor general, proposed ending appeals to the JCPC, and who allowed an expanded provincial franchise to determine the federal franchise – apparently never contemplate reform of the Senate? A perverse explanation for Liberal inactivity on the Senate front is this: more than the Conservatives, the Liberals were provincially minded; more than the Conservatives, they favoured a local and broadened franchise (even in federal elections). Uniting these two proclivities in aid of a reformed (most likely, an elected) Senate would probably have led to the demand for representation by population in the upper house as well as the lower. And this result would strike at the very roots of the Confederation compromise.

Canadians like to contrast their history with that of Americans as evolution versus revolution. This perspective locates the pre-Confederation past on a continuum leading to the post-Confederation era. Here, in George Etienne Cartier's words, was one justification for equal treatment of the Maritime provinces with Ontario and Quebec when it came to Senate membership:

> It might be thought that Nova Scotia and New Brunswick got more than their share in the originally adopted distribution, but it must be recollected that they had been independent provinces, and the count of heads must not always be permitted to outweigh every other consideration. (HOC Debates 3 April 1868, 455)

No longer independent colonies, Nova Scotia and New Brunswick had become provinces of a much larger colony. For this reason as much as for any other, the heavy hand of Maritime history, evident in the original Confederation settlement as regards the Senate, has continued into the present in a remarkably extensive way.

The story begins in 1912, when Parliament added portions of the Northwest Territories to the adjoining provinces of Ontario, Quebec and Manitoba. Why territory was added to existing provinces rather than creating new provinces, as the Northwest Ordinance (1787) had required for expansion of the United States, is a mystery. Nonetheless, it did have the effect of keeping the Senate formula stable. Ultimately, it led to its constitutional entrenchment.

In 1915, a half century after Confederation and following a debate in which no member of Parliament dissented from the principle of senatorial regions, an act of Parliament (*Constitution Act, 1915*) recognized the four provinces of western Canada as the fourth such region. In a "Memorandum on Representation of the Maritime Provinces," the Maritime provinces expressed disquiet at the prospect of these developments and their eventual effect on the composition of Parliament: "Representation by population while accepted as a guiding principle in fixing the

representation of each province in the Dominion parliament, was intended to be made subservient to the right of each colony to *adequate* representation in view of its surrender of a large measure of self-government" (Memorandum 1913, ital. in orig.). Echoing Cartier's rationale of fifty years before, the Memorandum continued: "A self-governing colony was something more than the number of its inhabitants."

Sacrifice as well as history was invoked: "[The Maritime provinces] gave their sons and daughters to the west. From Manitoba to the Pacific coast the Maritime Provinces people form an important element of the population who have played no small part in the development of these new lands." Justice too: "[The Maritime Provinces] had as good a right to share in the public demesne of Canada as had those provinces upon which it was bestowed"; and, finally, future prospects: "[The territory added to the three provinces] will increase to a limit not now possible of calculation the representation of these provinces in the federal Parliament." The concern of the Memorandum was to restore the "representation of the Maritime Provinces in the House of Commons … to the number allowed upon entering confederation upon terms that the same may not in future be subject to reduction below that number."

The federal government responded sympathetically to this request but in a manner not anticipated in the Memorandum. The *Constitution Act, 1915* amended the 1867 Act by the addition of section 51A, which read: "Notwithstanding anything in this Act a province shall always be entitled to a number of members in the House of Commons not less than the number of senators representing such province." The nexus thus created between a province's Commons and Senate seat allocations has had at least two long-term implications for federal-provincial relations. First, it has fixed the attention of small provinces in particular upon the guarantee the nexus provides and strengthened their resolve to resist any change that might threaten it. Secondly, and in company with another amendment to the Constitution's representation provisions, adopted in 1952, which said (s. 51.5) that "there shall be no reduction in the representation of any province as a result of which that province would have a smaller number of members than any other province that according to the results of the then last decennial census did not have a larger population," it has given ammunition to Senate critics who seek equality of provincial representation in the upper chamber comparable to that found in the United States and Australia.[4]

The desire of the Maritime Provinces in 1913 for predictability as to their numbers in Parliament achieved a level of unimagined certainty decades later in the *Constitution Act*, *1982* (s. 44), when one of the four specified matters requiring unanimous consent for their amendment—the Crown, the Supreme Court of Canada, the use of English or the French language were the others—was the

[4] The story of the politics surrounding this provision is well told by Norman Ward 1952.

guarantee that no province should have fewer members of the House of Commons than it had senators.

Here is a Herculean obstacle to any proposed Senate reform that touches upon the subject of membership numbers. It is also one to whose history reformers would be advised to pay close attention. None of the impediments to reform listed in the preceding paragraphs were original to the *Constitution Act, 1867*. They occurred because of territorial and demographic expansion, and took the form of compensation, largely by the central government, to those who did not expect to grow. (There are parallels here to the history of another fundamental component to Canadian federalism, and now constitutional guarantee – equalization.)

In addition to the representational nexus between the two chambers of Parliament, there is a further parliamentary dimension to the conundrum of Senate reform: Canada is a constitutional monarchy in a system of responsible (cabinet) government. These are important features in a discussion of the Senate. To begin with, constitutional monarchy makes explicable – if not acceptable to some – appointment of senators by the Crown on advice of the prime minister. There is no need to rehearse the arguments against an appointed upper house. They are well known. What can be said is that constitutional monarchy offered a practicable method of selecting senators to the upper chamber at a time when there were few alternatives. Election was not popular in United Canada after the experiment initiated in the mid-1850s, while selection by provincial legislatures of delegates from among their numbers to sit at the centre, as was done in nineteenth- century United States, violated the common sense of Parliament as the supreme legislative power (as in the UK) and the belief British North Americans held that the creation of a national parliament marked an important step to constitutional maturity.

Senate critics have fixed on patronage and partisanship as twin scourges that come from political domination of the appointment process. Political life in Canada after 1867 could not have been predicted from colonial experience. Party discipline and long periods of single party domination of government (and thus a monopoly on patronage) had been unknown in the colonies. Now politics in the Dominion worked to centralize power in the political executive, that is, the Cabinet. The reason why lay in the development of national political parties through the constituencies, a practice that produced local party notables, who in turn personified the provincial party at the centre. These people became cabinet ministers in Ottawa because of a second practice which was quickly treated as a convention of the Constitution – the federalization of the Cabinet. Other influences were at work as well, such as the custom governments of United Canada had had of including within their ranks representatives of significant groups, be they religious, or linguistic, or regional.

The extent to which the cabinet was federalized deprived the Senate from playing a similar, integrative role. The late American scholar Martin Landau wrote about federalism in the United States as a system of redundancies (Landau 1973). One example would be the presidential power shared with the Senate to confirm treaties and key executive and judicial appointments. Such sharing was never

possible in a constitutional monarchical system where treaties and appointments are the prerogative of the Crown and made on advice of a single (first) minister. Significantly, for those who look to the Australian Senate as a model for a reformed Canadian Senate, these are not part of its powers either.

Nonetheless, the intrastate argument – that federations require a legislative mechanism to integrate the parts at the centre – remains alive in Canada, where the Senate does not perform this role. Just how well the upper chambers of Australia and the United States fulfill it is another matter. In *Platypus and Parliament: The Australian Senate in Theory and Practice,* Stanley Bach makes clear that the Australian Senate is more accurately described as a house of state parties rather than a house of the states (Bach 2003).

Dunkin's 1868 metaphor of the three kingdoms to describe the original Union was artistic in its historical allusion to the mother country but artfully simplistic in its treatment of the new Dominion's vast geography. Two years later, with the acquisition of Rupert's Land and the North-Western Territory, the physical frame for the "novel" constitution (the adjective was Lord Monck's in the first Speech from the Throne, 1868) quadrupled, creating a challenge for the Canadian federation it has yet to meet. The reason why is part of the conundrum of Senate reform.

Essentially, there are two reasons for experimenting with federal systems: to recognize cultural difference and to incorporate territory. Canada's is a double federation in that both imperatives are present. The *Constitution Act, 1867* is largely about realizing the first, by recognizing French Canada's distinctiveness through its own set of institutions. Note that it was French Canada's and not Quebec's distinctiveness that was at issue, as was confirmed in 1870 by the almost identical terms found in the *Manitoba Act*. But as all who know their Canadian history know, the *Manitoba Act* foundered in the face of the other, "transcontinental" imperative. Because of massive immigration of non-French farmers, French Canadians were to have negligible influence on the future of West, at least for a century, until appointment of the Royal Commission on Bilingualism and Biculturalism, passage of the *Official Languages Act* and entrenchment of the *Canadian Charter of Rights and Freedoms* (Behiels 2004). At the same time, geographic scale and colonial experience delayed realization of the second federal imperative. Instead, the West was seen as another empire, whose constitutional development would recapitulate that of central Canada and the Maritime provinces, that is, it would pass by stages from representative, to responsible, to eventual provincial government. Absent from this imperial persuasion was the federal idea.

Beginning in 1887 and until the present day, territories not yet provinces are represented in Parliament by MPs and senators. What does this membership signify? The *Constitution Act, 1915*, which created the western Senatorial Division, also provided that when Newfoundland entered Confederation, it "shall be entitled to be represented in the Senate by six members." According to the 1911 census, Saskatchewan had a population of 492,432; Newfoundland had less than half that number (242,619). What larger reasoning dictated this future allocation? Whatever the answer, it helps explain, perhaps, the comment by Canada's high commissioner to Newfoundland almost thirty later that Newfoundlanders "really

[do not] appreciate or understand the workings of the Federal system of Government" (Canada. External Affairs, 16 November 1943, 87).[5]

The central government's view of the Prairie West as its empire, as testified to in its retention of the natural resources of Manitoba, Saskatchewan and Alberta until 1930 and in the use of these resources as in the case of land for national purposes, such as building the transcontinental railroads, contributed to a sense of regional grievance that no amount of good fortune afterward appeared able to moderate. Twenty-five years after the addition of section 92A to the *Constitution Act, 1867*, intended to affirm the provinces' jurisdiction over the exploration, development and transportation of non-renewable natural resources, distrust of the centre on this matter continued. Consider Peter Lougheed's prediction in a speech to the Canadian Bar Association in August 2007 that federal environmental and provincial resource development policies are on a collision course and that the discord will be "ten times greater" than in the past (Makin 2007).

The tension between the centre and the parts, particularly the western part of the country, is evident in both cultural and economic spheres. The questions of denominational schools and of language have roiled relations for over a century. This happened by making those subjects, which had been at the core of the original Confederation settlement, matters that were seen to trespass on provincial rights (Lingard 1946, 154). The effect was to slow down the rounding out of Confederation. The same tension, but cast in economic terms – the tariff, freight rates, the National Energy Policy, the Canadian Wheat Board are examples – goes a long way toward explaining the regional decline of national parties on the prairies and the rise and perpetuation of third-party opposition from the West in Ottawa. Here is another factor that contributes to Canada's Senate being different from its counterparts in Australia and the United States. Many, maybe most, of the best known politicians of western Canada have been from neither of the major national parties. Even if it were the ambition of reformers to make the Canadian Senate like Australia's – using Bach's language, a house of provincial parties – how could this be done, given the manner of senatorial selection and the condition of national parties, in some instances almost vestigial, in the provinces?

The effect of the frontier was to increase federal power. Since acquisition of Rupert's Land and the North-Western Territory in 1870, this has been evident in economic matters. If, however, frontier is more liberally construed to mean the

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[5] If there was a shallow understanding of federalism one reason might be inadequate preparatory information. Despite its title, "Some Notes on the Constitution and Government of Canada and on the Canadian Federal System" (A Reference Paper Prepared for the Information of a Delegation from the National Convention of Newfoundland), prepared in Ottawa in June 1947, four (of 43) paragraphs dealt with "division of powers as laid down in the *BNA Act,"* while five described "provincial governments" in terms of their legislatures (unicameral), adult franchise and office of lieutenant governor. Parties and inter-governmental relations receive no mention. (NAC 1947)

new and the unknown, as with the Charter and its interpretation by the courts, it applies as well to the Constitution, law and rights. This is a subject where the Senate has a claim to some expertise and experience. Its great advantage is that it has nothing to do with numbers, either equal or fixed. There is a Canadian penchant for using fixed numbers to offer protection: 65 MLAs each for Canada East and Canada West after 1840; 65 MPs from Quebec after 1867, all other representation to be proportionate; an irreducible 75 MPs today; and, as already noted, s. 41 of The *Constitution Act, 1982*, which guarantees that no province shall have fewer senators than it has members of Parliament.

The belief that more means better is not borne out in Senate experience. The Senate is a chamber of the people but it is not a representative body. A motion by Senators Lowell Murray and Jack Austin in 2006, to create a fifth Senatorial Division comprised solely of the province of British Columbia, with twelve senators, presupposed otherwise (Canada. Senate 2006). (The same motion envisioned a new prairie region with twenty-four seats – seven each for Saskatchewan and Manitoba, and ten for Alberta). Implicit in the motion is the assumption that the Senate is deficient as an institution of intrastate federalism and that increasing the number of senators from a particular region, as well as the total number (in this case from 105 to 117), will begin to remedy that condition. Whether British Columbia is a "region" distinct from the Prairie provinces is open to debate. For instance, such designation runs counter to intra-regional developments in western Canada in the last twenty-five years that treat the four western provinces as an entity with common but not identical economic and regulatory interests in its relations with the federal government. Even if British Columbia has distinct public policy interests in its relations with the federal government, it begs the question whether the Senate is the forum and senators the voice for their effective expression.

Increasing numbers in one region does not deal with the criticism of inequity elsewhere, a reality the federal government confronted also in the House of Commons in 2007 with its Bill C-56, "An Act to Amend the Constitution Act, 1867 [Democratic Representation]." In part this is the other, or Commons, side of the "senatorial floor" guarantee adopted as a constitutional amendment in 1915. The upper house ceiling on Commons representation for a province amounts to a continuing distortion to the principle of rep-by-pop. John Courtney, who is the authority on this matter, has shown that, for example, "if on the basis of the 2001 census Ontario had been awarded one seat for every 33,824 people (as was the case for Prince Edward Island), it would send 337 MPs to Ottawa—a larger delegation than the current House of Commons"(Courtney 2007, 11). The Harper Government's way of dealing with this matter is the way of past governments – to increase the total size of the chamber. That would be the outcome of the Murray/Austin motion for the Senate too. To guarantee protection Canadian politicians favour fixed numbers for representation; to recognize growth they opt for additional seats. As a result, no province loses. Thus the distortion of the principle of rep-by-pop mounts, and the quest for equality proves fruitless and without historical justification.

Although elected politicians took the decisions, it was the unelected Senate which provided the keystone for modern Canada's structure of representation. A maze of compromises, deals and agreements, its architecture is central to the conundrum of Senate reform. Central but inadequately acknowledged, since debate seldom strays from the tried and true. Should the Senate be appointed or elected, and, in either case, should this be done at the centre (nationally) or in the parts (provincially)? Should the tenure of senators be limited to terms, of whatever length, as opposed to a mandatory retirement age? When it comes to function, should the Senate be limited to a delaying or suspensive veto only, like its Westminster counterpart, or should weighted voting be introduced for measures in specific categories (for example, use of the federal spending power), or double-majority voting on measures of "special linguistic significance," or should the Senate be given power to approve order-in-council appointments as well as consent to treaties?

Proposed reforms come and go, and come again, but always with the same outcome – no change. Why is institutional and constitutional change in the matter of Canada's upper chamber – whether major, in the form of the Meech Lake and Charlottetown Accords, or minor, in the form of the Harper Government's Senate Tenure Bill, which the government described as incremental, so difficult to achieve? Is stasis in this matter any different from the half-century search for a constitutional amendment formula in Canada or the eighty-eight year hiatus in Great Britain between the introduction of the suspensive veto in 1911, as a first step to Lords reform, and the next, the severing of the hereditary peers from membership in the Lords, in 1999?

Part of the explanation lies in the longevity of senators – appointed for life until 1965 and until age seventy-five since then. Although that provision may lead to extraordinarily long tenure, generally it does not: the average length of office is almost twelve years (Smith 2003). Still, this is far longer than the parliamentary career of most MPs, and, more particularly, of cabinet ministers who pilot reform through Parliament. Moreover, the overlap of generations in the Senate is more pronounced than in the Commons.[6] Nor is it immaterial that senators are at the end of their political careers. There is no political uncertainty or calculation as to their future. Time is on their side.

Part of it lies in the composition of the Senate, where despite specified senatorial divisions senators are allocated among the provinces. In the eyes of each province, their senators – or, better still, their number of senators – belongs to them. Proposed reforms that would affect the numbers or the function of senators are carefully scrutinized by the provinces (as in the case of Bill S-4, noted above). Thus, the Senate never stands alone. The Senate has allies who, regardless of party complexion, usually come to its aid.

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[6] On the matter of overlap and, more generally, temporality in politics, see Pierson 2004 and Smith 2005.

Another part of the explanation can be found in the constitutional indeterminacy of the Senate's role and function. One reason there are so many different proposals for its reform is that there is great latitude, even ambiguity, about what the chamber might be expected to do. Although it may be a factually incorrect statement, almost everyone agrees that the job of the House of Commons is "to make laws that are acceptable to the public." In a bicameral Parliament, the Senate is a legislative chamber but with one important limitation on its activities: Section 53 of The *Constitution Act, 1867*, states that appropriation measures must originate in the House of Commons. Otherwise, the Senate's powers are those of the Commons, with the conventional limitation that it shall not act in a manner to thwart the will of the people as expressed by their elected representatives. Here is "the space," if you will, for sober second thought, even sober first thought – the Senate as an investigative and deliberative chamber, bringing to bear on public policy the weight of long experience and broad knowledge.

In 1980 the Supreme Court of Canada was asked by the federal government to give its opinion on the authority of Parliament to amend the constitution unilaterally as regards the Senate (Canada. Supreme Court of Canada, 1980). At issue was the Trudeau government's constitutional reform package of 1978 – Bill C-60, the Constitutional Amendment Bill, which among other matters provided for a House of the Provinces, in place of the Senate, with members indirectly elected by provincial legislative assemblies and the House of Commons. The details of that proposed reform of thirty years ago are immaterial, except for the long reach of the Court's opinion in two respects. First, it said that "it is clear that the intention [of the Fathers of Confederation] was to make the Senate a thoroughly independent body which could canvass dispassionately the measures of the House of Commons" (77). Further, it stated that "the Senate has a vital role as an institution forming part of the federal system …Thus, the body which has been created as a means of protecting sectional and provincial interests was made a participant of the legislative process" (56).

"Thoroughly independent," and "an institution forming part of the federal system ... [as well as] a participant in the legislative process." These phrases have come to severely test proposals for Senate reform. Unlike the general procedure for amending the Constitution, as set down in s. 42 (that is, support from seven provinces with 50 percent of the population) and which applies to the powers of the Senate, the method of selecting senators and the numbers of senators to which a province is entitled, threats to independence are less easy to calculate, although not to imagine. At the same time, the 1980 advisory opinion made clear that the Senate was already a part of the federal system and an actor in the legislative process. Schemes to alter the upper chamber in a manner that could be said to weaken these judicially ascribed characteristics face informed opposition from their outset. For instance, would Triple_E with its emphasis on representation undermine the dispassionate contemplative role envisioned for the Senate by the Supreme Court? Or again, are senatorial terms compatible with "thorough independen[ce]"?

Senators may hold office until age 75; with the hereditaries gone, members of the Lords (for the time being) are appointed for life. What conclusion is to be drawn from these facts? That Canada is not a democracy? That Great Britain has never been a democracy? If the questions sound extreme, they are meant to, for they underline an essential aspect of the conundrum of Senate (and Lords) reform: there is no popular will, no popular movement to make it happen, because there is insufficient discontent with the status quo. Attempts at Senate reform have no staying power. Triple-E, which had some claim to a popular component, although regionally concentrated, appears to be fading.

Everybody, when asked, will dismiss an appointed Senate, but nobody, when left alone, will do anything about changing the Senate. Senate reform is a preoccupation of academics and bureaucrats. Of 24 relatively recent proposals on the subject, 15 are the product of governments, royal commissions or legislatures. Three others come from political parties. Concern about strengthening the mechanisms of intra-state federalism or institutionalizing intergovernmental relations through a recast Senate have no popular appeal, or understanding. It is an incomprehension proponents of such schemes do little to dispel (Canada. Library of Parliament. Stilborn 1999).

Increasingly, debate about Senate reform has less to do with maintaining the tapestry of federalism (the focus of reform activity in the last quarter of the last century), than it has with an evolving sense of constitutionalism which, as the Supreme Court of Canada opinion of 1980 demonstrates, preceded the adoption of the *Canadian Charter of Rights and Freedoms* but which has been reinforced by it. Proponents of term limits for senators or of advisory elections to determine the nominee for appointment by the governor-in-council find the debate that results from this change in register conducted at a level of constitutional abstraction distant from the object they seek. Thus the frustration evident in Mr. Harper's remark to the Australian Senate – that Canadians suffer from "[Australian] Senate envy" (Galloway 2007).

The irony of recent debates on Senate reform is hardly subtle – that the unelected, retirement-at-75 upper house might have a role to play redressing the "democratic deficit" attributed to all-powerful prime ministers, and that any reform that would politicize its members and make them more subject to partisan direction is to be avoided.

Far easier in Great Britain, one might think – no nexus to bind the distribution of members in one chamber to the distribution in the other; no federation of provinces and territories who look to the upper house to articulate regional, sectional, and minority interests; no double federation, of cultures and provinces; no federalized cabinet; no written constitution with a difficult amending formula to discourage formal change – and yet the same outcome. Robin Cook, Leader of the House of Commons at Westminster between 2001 and 2003, was in charge of the Blair government's initiatives on reform of the House of Lords. He supported the elective principle, his leader (when pressed) the appointive principle. Cook makes clear that Tony Blair's indecisiveness was a crucial, but not determinative,

factor in explaining lack of movement on Lords reform. Everyone had a view of what a future Lords should look like. More important, however, everyone had a priority of legislative objectives, and for many on the government side Lords reform was not their most paramount concern.

The object of reform should not be confused with a priority for reform. In this last respect the Blair Government was exceptional for introducing a period of constitutional inquiry not seen in Great Britain for nearly a century. The same might be said of the initiatives of the Trudeau Government in Canada, which led to bargaining with the provinces that culminated in the *Constitution Act, 1982*, except that for most of the twentieth century Canada had been preoccupied with constitutional questions, either as it sought autonomy in its relations with the imperial power or as it confronted sovereignist sentiment within its boundaries after 1960. Yet despite the promising and accommodative language, in neither country did upper chamber improvement have the same political or popular bite as, for instance, devolution and local government reform in Britain or the advent of the Charter in Canada.

In part, the conundrum of Senate reform is that it has had more popular competitors. More fundamental still, is that reform of the Senate in terms of the selection of its members, or in the redistribution of their number among the provinces, according to some standard of equity, have immediate implications for the other two parts of Parliament – the senatorial floor to provincial representation in the Commons and the prerogative power of appointment possessed by the Crown. The unity of the Crown-in-Parliament and the theory that sustains it – that there is no constituent power outside of that tripartite institution – acts as an original and powerful disincentive to articulating and initiating reform of the Senate, and then carrying it through to a successful conclusion.

The OED gives as one definition of conundrum the following: "a riddle, especially one with a pun in its answer." (A second definition is: "a hard or puzzling question.") In the context of the subject of this paper, any attempt to follow this injunction will not equal Churchill's memorable description of the Soviet Union – a riddle wrapped in a mystery inside an enigma. A best effort results in something more prosaic – a phonetic anagram of the word itself, "cum round"; and that, admittedly, is an approximation. This is a strained way of saying that the answer to the conundrum of Senate reform lies not in myriad prescriptions for change but in understanding that agreement on the structure of the Senate was the principle on which the Confederation accord rested. Central to that accord was the idea of balance – "the three kingdoms." With the arrival of a new transcontinental federation, balance gave way to concern for protection, achieved not through the Senate alone but by creating a senatorial floor for representation of the provinces in the Commons. Over time that guarantee became constitutionally entrenched. The last step in that development occurred with adoption of the *Constitution Act, 1982*. The 1980s and succeeding decades witnessed a constitutionalization of federalism far beyond old concerns about the division of powers. It is a re-constitution of federalism according to norms distinct from those

evoked by the preambular phrase, "a Constitution similar in Principle to that of the United Kingdom," that further deepens the conundrum of Senate reform.

REFERENCES

Bach, S. 2003. *Platypus and Parliament: The Australian Senate in Theory and Practice*. Canberra: Department of the Senate.

Behiels, M. 2004. *Canada's Francophone Minority Communities: Constitutional Renewal and the Winning of School Governance*. Montreal and Kingston: McGill-Queen's University Press.

Canada. 1868–71. House of Commons Debates.

— 1951. Dominion Provincial and Interprovincial Conferences from 1887 to 1926. Ottawa: King's Printer.

— 1951. King's Printer. *Parliamentary Debates on Confederation of* the *British North American Provinces. (*Reprint) Quebec: Hunter, Rose & Co., Parliamentary Printers, 1865.

— 1984. Department of External Affairs. *Documents on Relations between Canada and Newfoundland: Vol. 2, 1940–49, Confederation, Part 1*. ed. P. Bridle. Ottawa: Supply and Services Canada.

— 1999. Library of Parliament. J. Stilborn, "Comments on Twenty-Four Senate Reform Proposals Provided for Analysis," 5 July.

Reference re: Legislative Authority of Parliament in relation to the Upper House, [1980] 1 S.C.R. 54.

Courtney, J.C. 2006. "The Conundrum of Electoral Districting in Canada." Festschriftkonferenz in Honor of Paul Weiler. Harvard University, Cambridge, MA. 27p.

Cook, R. 2003. *The Point of Departure*. London: Simon and Schuster UK.

Galloway, G. 2007. "PM Launches Blow at Liberal-dominated Senate," *The Globe and Mail*, 11 September, A 11.

Hays, Senator D. 2007. "Renewing the Senate of Canada: A Two-Phase Proposal," 25 May. Unpublished paper, 42p.

Innis, Harold A. 1946. "Political Economy in the Modern State," in *Political Economy in the Modern State*, ed. H.A. Innis. Toronto: Ryerson Press: 103-44.

Jackson, W.K. 1972. *The New Zealand Legislative Council: A Study of the Establishment, Failure and Abolition of an Upper House*. Toronto: University of Toronto Press.

Lambert, Senator N. 1950. "Reform of the Senate: Historical Justification," in *The Winnipeg Free Press*, 15 April.

Landau, M. 1973. "Federalism, Redundancy and System Reliability," *Publius* 3 (2): 173-96.

Lingard, C.C. 1946. *Territorial Government in Canada: The Autonomy Question in the Old North-West Territories*. Toronto: University of Toronto Press.

Makin K. 2007. "High Stakes Battle Looms over Oil-Sands Pollution," *The Globe and Mail*, 15 August.

Memorandum on Representation of the Maritime Provinces. Canadian Sessional Papers, 1914, no.118a, pp.1-3, reprinted in *Constitutional Issues in Canada, 1900-1931*, ed. R. MacGregor Dawson. Toronto: University of Toronto Press, 1933, 173-5.

National Archives of Canada. 1947. MG 26 L, vol. 36, Newfoundland National Convention and Canada. Government Meetings 1947, Part 1.

New Brunswick. 2007. Position Paper of the Government of New Brunswick: Bill S-4-An Act to Amend the Constitution Act, 1867 (Senate Tenure). Presented to the Standing Senate Committee on Legal and Constitutional Affairs, 20 April, 12p.

Pierson P. 2004. *Politics in Time: History, Institutions, and Social Analysis*. Princeton and Oxford: Princeton University Press.

Pope, Sir Joseph, ed.1895. *Confederation: Being a Series of Hitherto Unpublished Documents on the British North America Act*. Toronto: Carswell.

Senate of Canada. 2006. Special Senate Committee on Senate Reform. "Report on the Motion to Amend the Constitution of Canada (western regional representation in the Senate)."

Smith D. E. 2000. "A House for the Future: Debating Second Chamber Reform in the United Kingdom." *Government and Opposition,* 35(3): 325-44.

— 2003. "The Improvement of the Senate by Non-Constitutional Means," in *Protecting Canadian Democracy: The Senate You Never Knew.* ed. Serge Joyal. Montreal and Kingston: McGill-Queen's University Press. 229-70.

— 2005. "Path Dependency and Saskatchewan Politics," in *The Heavy Hand of History: Interpreting Saskatchewan's Past*, ed. G.P. Marchildon. Regina: Canadian Plains Research Center. 31-50

Stevenson, G. 1997. "A Long Farewell: The Declining Representation of Quebec Anglophones in Parliamentary Institutions since 1867," *National History: A Canadian Journal of Inquiry and Opinion* 1(1): 22-34.

Ward, N. 1953. "The Redistribution of 1952," *Canadian Journal of Economics and Political Science* 19(3):341-60.

3

HARMONIZING REGIONAL REPRESENTATION WITH PARLIAMENTARY GOVERNMENT: THE ORIGINAL PLAN

Janet Ajzenstat

Les Pères de la Confédération ont désigné le Parlement du Canada, incluant le Sénat, pour délibérer sur des questions politiques touchant tous les gens de la même manière au sein de la nation, et ce sans exception. Quant aux questions touchant certains groupes en particuliers, surtout les questions liées à la religion et au pays d'origine, elles devaient relever des provinces. Bien que, de nos jours, il y ait des raisons de vouloir réformer le Sénat, nous devrions éviter d'introduire de nouvelles mesures, telle la représentation ministérielle, qui réduiraient les pouvoirs du Sénat en tant qu'organe délibérant à part égal et de manière inclusive.

The people

> could never be safe nor at rest, nor think themselves in Civil Society, till the Legislature was placed in collective Bodies of Men, call them Senate, Parliament, or what you please. By which means every single person became subject equally with other the meanest Men, to those Laws, which he himself, as part of the Legislative had established. (Locke 1690, para. 94)

Following the British legal tradition familiar from Locke, the Fathers of Canadian Confederation "placed" the legislative power in a Parliament consisting of three "Bodies of Men": the political executive, and two legislative houses; today, Cabinet, Senate, and Commons. They intended that "every single person" would be "subject equally with other the meanest Men, to those Laws which he himself, as part of the Legislative had established." The general legislature of the federation was to be egalitarian and inclusive.

There are features of the *Constitution Act, 1867* that might be taken to call in question this assertion. One is that the members of the Senate were appointed for life on a property qualification. Another is that *regional* representation in the Senate breaches the idea of provincial equality and the principle of representation by population. Ontario and Quebec were given twenty-four senators each; the three

Maritime provinces together were to have an additional twenty-four. Thus although the regions were represented equally, the provinces were not. Each of the smaller provinces had fewer representatives in the upper house than did the giants of the heartland, Upper and Lower Canada, but more representatives than population warranted. I will argue nevertheless that the Fathers indeed believed that the general legislature of the federation would be egalitarian and inclusive, and that the Upper Chamber they designed would reinforce those characteristics.

They had two tasks. Making the national legislature was the first. The second was to determine the division of legislative powers. From the American example the Fathers learned *that* a division of powers could be reconciled with parliamentary government and the rule of law. But they did not propose to follow the American scheme to the letter. They assigned the general government, including the Upper Chamber, a different role.

MAKING PARLIAMENT

They understood well that the general legislature represented "every single person," that is, everyone subject to the legislature's edicts. In the debates on Confederation in the Province of Canada, Joseph Cauchon argues that "Each representative, although elected by one particular *county* [region, electoral constituency], represents the *whole country*, and his legislative responsibility extends to the whole of it" (Cauchon, Canadian Legislative Assembly, 6 March 1865, in *Canada's Founding Debates* 448; my emphasis).[1] The Parliament of Canada still today, including the Senate, represents not merely the majority party, not merely the electorate, but every last child, woman and man in the land, from sea to sea.

The fact that a senator speaks for both region and *nation* enables him or her to bring local perspectives into national debates and, by the same token, to bring to bear on regional perspectives the national concerns that are the federal Parliament's responsibility. Parliamentary debate is not characterized by a head-butting confrontation in which members speak exclusively for a particular interest or region. Parliament is, as I have said, an *inclusive* institution; parliamentary deliberation must satisfy Locke's requirement that no person be excluded.

The Fathers and the legislators like Cauchon, who were called on to ratify the federation proposal in their provincial legislatures, knew as well as we do that in the Westminster system, majority-party and government leaders dominate the legislative process. They were experienced parliamentarians and intimately familiar with this aspect of procedure. Some had themselves been involved in the overthrow of the colonial oligarchies and the introduction of parliamentary democracy in 1848; all knew the story. My point is that no one at Confederation – or

[1] Quotations from the Confederation debates are taken from Janet Ajzenstat, Paul Romney, Ian Gentles, and William D. Gairdner, eds., *Canada's Founding Debates* (Toronto: University of Toronto Press, 2003); hereafter, CFD.

very few – believed that majority decision-making is incompatible with Parliament's inclusiveness. On the contrary, they regarded it as the mark of an inclusive institution.

The single most important factor securing the necessary inclusiveness, I would argue, is that Parliament's decisions are not final. If we are to live together in peace, Parliament must reach decisions and those decisions must have the force of law. But there is no requirement that measures will have effect once and for all time. Laws can be repealed. Defeated issues and arguments spring to life in subsequent parliamentary sessions. Discussion continues in the extra-parliamentary arena. Majorities erode; new majorities form; minorities join coalitions or swell to majority proportions. The process will often seem imperfect; it will never satisfy the impatient. Yet it is difficult to imagine one that does more to include all voices and to give all political perspectives an equal chance.

In short, the Lockean idea of human equality underpins not only the process of making a constitution but also the process of parliamentary deliberation on statute law. Consider this statement by John A. Macdonald:

> [We] ... enjoy the privileges of constitutional liberty according to the British system ... We will enjoy here that which is the great test of constitutional freedom – we will have the rights of the minority respected. In all countries the rights of the majority take care of themselves, but it is only in countries like England, enjoying constitutional liberty and safe from the tyrannies of a single tyrant or of an unbridled democracy that the rights of minorities are regarded. (Macdonald, Canadian Legislative Assembly, 6 February 1865; CFD 209)

By "the minority," and "minorities," Macdonald means the political groups and parties that disagree with the government of the day – dissenters in the government caucus, perhaps, and individuals and parties on the opposition benches.

The Senate is a vital part of the scheme. It must stall or veto legislation when a prime minister attempts to use his majority in the Commons to ride roughshod over the opposition's questions and complaints. The importance that Macdonald attached to the Senate's obligation is shown by his reluctance to countenance appointment of additional senators to break a deadlock between the legislative houses.

In the Quebec Resolutions there was no provision for appointment of additional senators and Brown and Macdonald had a lively exchange on the subject when the Resolutions came before the Canadian assembly. Brown hinted at the idea that he had been inclined originally to approve of appointments to break a deadlock but was dissuaded by the realization that such a measure might upset the scheme of regional representation in the upper house. Macdonald perhaps cared less about regional representation. What alarmed him was the idea that governments might use the appointing power to push through measures in the face of determined and principled opposition.

> No ministry in Canada in future can do what they have done in Canada before – they cannot, with the view of carrying any measure or of strengthening the party, attempt

> to overrule the independent opinion of the upper house by filling it with a number of its partisans and political supporters (Macdonald, Canadian Legislative Assembly, 8 February 1865; CFD 79-80).

When he said this, Macdonald was the leader of the majority party in the provincial assembly. He was in his prime. He could expect to lead the Conservatives, the province, and if all went as expected the new country for years to come. Yet here he is defending the rights of the opposition parties, that is, the Independents, the Liberals, and the Rouges. He wants the new nation to have an effective Parliament including an effective upper house, with powers secured by the law of the Constitution.

To sum up: Parliament's inclusiveness is ensured by the outstanding features of the Westminster system: first, that members (including senators) must not forget either local or national perspectives in a process of political deliberation that protects the political opposition and brings dissenting views into the open; and second, that the Upper Chamber has an additional obligation: to resist attempts by the party in office to use its clout in the Commons to limit deliberation.

THE DIVISION OF LEGISLATIVE POWERS

I turn to the framers' second task. Parliament, including the Senate, was not intended to debate all political issues. The Fathers gave each level of government its "list" of powers. Indeed they adhered to what comes to be called the doctrine of "water-tight compartments." The most helpful spokesmen on the division of powers are George-Etienne Cartier, H.V. Langevin, and George Brown.

Brown describes the Fathers' intentions and difficulties at length: the "framers of this scheme ... had the prejudices of race, language and religion to deal with; and we had to encounter all ... the jealousies of diversified local interests" (Brown, Canadian Legislative Assembly, 8 February, 1865; CFD 115). As he tells the story, the Fathers of Confederation took away from the general legislature the power to entertain debate on the contested issues of race, language and religion. "The questions that used to excite the most hostile feelings among us have been withdrawn from the general legislature" and "thrown over onto the provinces" (ibid., 289).

My argument to this point has been that Parliament's inclusiveness enables senators to bring local perspectives into national deliberations. I am now amplifying this assertion. The senators bring a local perspective, but not local *issues*. Neither the Senate nor the Commons was intended to bring into the national legislature substantive matters that were of exclusive interest to one province or region. Thus: French-speaking senators would not introduce matters of importance to French Canadians alone. Their task rather as representatives of a French-Canadian region was to ensure that the English-speaking majority in Parliament did not entertain measures to curtail the rights of French-speakers or demote their status as equal subjects of the Crown.

It is hard to imagine a bolder argument on the division of powers than Brown's:

> We are endeavouring to adjust harmoniously greater difficulties than have plunged other countries into all the horrors of civil war. We are attempting to do peacefully and satisfactorily what Holland and Belgium, after years of strife, were unable to accomplish. We are seeking by calm discussion to settle questions that Austria and Hungary, that Denmark and Germany, that Russia and Poland, could only crush by the iron heel or armed force. We are seeking to do without foreign intervention that which deluged in blood the sunny plains of Italy. We are striving to settle for ever issues hardly less momentous than those that have rent the neighbouring republic and are now exposing it to all the horrors of civil war. (ibid., 14)

Is there anyone in Canada today who claims to have the one and sovereign remedy for civil strife and the contestation of what we now call "identities"? Brown is contending that the Fathers of Confederation found a remedy for what is perhaps the greatest political ill of modern regimes, a remedy that had eluded Europe and eluded the United States.

Note that he was not proposing to rely on civility or enlightened attitudes as means to forestall strife. He was certainly not saying in the manner of today's multiculturalists merely that individuals should be polite or that groups should get to know one another better. He believed that civility had failed utterly in the united Province of Canada. He spoke of "agitations in the country" (the Province of Canada), "fierce contests" in the Legislative Assembly, and "the strife and the discord and the abuse of many years" (ibid., 285). The remedy that he and the French Canadians devised was wholly institutional. To repeat: the proposal was to allocate to the general government, that is, the Parliament of Canada, the issues of concern to everyone in the federation without exception and to relegate exclusive and particular matters to the provinces.

Cartier presents the complementary argument. Forbidding the general legislature power to deliberate on particular issues would strengthen the provincial legislatures, better enabling them to preserve provincial particularities:

> Some parties pretended that it was impossible to carry out federation, on account of the differences of races and religions. Those who took this view of the question were in error. It was just the reverse. It was precisely on account of the variety of races, local interests etc., that the federation system ought to be resorted to and would be found to work well (Cartier, Canadian Legislative Assembly, 8 February 1865; CFD 285).

H.V. Langevin makes the same point: "Under the new system ... our interest in relation to race, religion and nationality will remain as they are at the present time. But they will be better protected" (Langevin, Canadian Legislative Assembly, 21 February, 1865; CFD 235). He then continues, supporting Brown's contention: in the legislature of the general government of the federation, "there will be no questions of race, nationality, religion, or locality, as this legislature will only be charged with the great, general questions which will interest alike the whole federacy and not one locality only" (ibid., 297-8). The better protection for

particularity at the *provincial* level depends on the exclusion of particularity from the federal Parliament. Langevin, Cartier, and Brown are as one on this point. It is a pleasure to see them, political enemies of old, working so deftly together to secure approval for the union resolution. Here is another passage from Brown's speech:

> Mr. Speaker, I am ... in favour of this scheme because it will bring to an end the sectional discord between Upper and Lower Canada. It sweeps away the boundary line between the provinces so far as regards matters common to the whole people – it places all on an equal level – and the members of the federal legislature will meet at last as citizens of a common country. The questions that used to excite the most hostile feelings among us have been taken away from the general legislature and placed under the control of the local bodies. No man hereafter need be debarred from success in public life because his views, however popular in his own section, are unpopular in the other – for he will not have to deal with sectional questions; and the temptation to the government of the day to make capital out of local prejudices will be greatly lessened, if not altogether at an end (Brown, Canadian Legislative Assembly, 8 February, 1865; CFD 288-9).

The hope was that because the general legislature dealt with – and dealt only with – matters concerning everyone, it would make of the various colonial populations, one country. And it was because the federation was to be one country in the civic sense that it could allow and protect expression of separate cultural loyalties at the provincial level. I hardly need to say that other speakers raised objections: many wanted to know what Cartier and his colleagues had to say about the "racial" minorities *within* the provinces. How would they fare? And I hardly need to say that the Canadian constitutional division of legislative powers has undergone changes in the years since Confederation, some initiated by constitutional amendment, some brought about by the courts, and some, it appears, the more or less unanticipated result of ongoing political pressures. The elegant scheme defended by Cartier, Langevin, and Brown has been severely battered.

CONCLUSION: PROPOSALS FOR REFORM

The Senate was intended to be an arena of national deliberation on the matters that affect everyone in the country equally, and was expected to use its status as arena of national deliberation to resist attempts by the House of Commons to trespass on the rights of the political opposition and the rights of the provinces. But Canadians no longer understand the Fathers' prescription. The time has come for reform.

There are good reasons today for increasing the numbers in the Senate. There are reasons to consider the election of senators and limits on the term of office. These are measures that are appropriate in the twenty-first century. They are also measures that will not impair the Senate's traditional roles and may indeed enhance them.

We cannot return to the original plan in all its details. But we can do much to avoid measures that would further erode the Senate's powers as an inclusive and equalitarian deliberative body. If we take our cue from the Fathers of Confederation we will not set aside seats in the upper house for particular interests and groups. The role of the Senate is not to drag into national politics matters that would be better left in the private sphere, or better looked after by provincial and local governments. The role of the Senate – let me repeat – is to deliberate on the issues that affect equally every last person in the nation without exception, because such deliberation is our best security that government will not resolve itself into a gang of bullies that protects the politicians of the majority and the government's favourites against the ordinary citizen.

REFERENCES

Ajzenstat, J., P. Romney, I. Gentles and W. D. Gairdner, eds. 2003. *Canada's Founding Debates*. Toronto: University of Toronto Press.

Locke, J. 1690. "Second Treatise of Government," in *Two Treatises of Government*, ed. P. Laslett. Cambridge: Cambridge University Press, 1988.

4

FEDERAL SECOND CHAMBERS COMPARED

Ronald L. Watts

Dans cet article, l'auteur effectue une analyse comparative de secondes chambres au sein de différentes fédérations. Il souligne quatre aspects principaux : (1) la relation entre le bicaméralisme et le fédéralisme; (2) une comparaison entre les différentes méthodes de nomination, la composition, les pouvoirs et les rôles des secondes chambres législatives fédérales; (3) l'influence des partis politiques sur le fonctionnement des secondes chambres fédérales; et (4) la question de savoir si les secondes chambres fédérales facilitent ou limitent les processus démocratiques. Malgré les différences d'une fédération à l'autre, les contrôles effectués par les secondes chambres fédérales ont habituellement eu un effet positif sur la démocratie de « consensus », et les secondes chambres ont contribué à la vitalité et à la reconnaissance du caractère distinct des différents groupes dont elles font partie.

INTRODUCTION

This paper attempts to provide a broad outline of the main comparative features of second chambers in a wide range of federations to provide a context for the discussion of Senate reform in Canada. This paper is in four parts: (1) a brief consideration of the relation of bicameralism to federalism; (2) a comparative outline of the methods of appointment, composition, powers and roles of federal second legislative chambers in a variety of federations; (3) the impact of political parties on the operation of federal second chambers; and (4) whether federal second chambers constrain or enhance democratic processes. An overall theme of the paper is to emphasize the variety of federal second chambers and the importance of examining not only structures but equally, political processes, in understanding the nature of federations.

BICAMERALISM WITHIN FEDERATIONS

Most federations have adopted bicameral federal legislatures. This has led to the notion held by some that bicameral federal legislatures are *by definition* a

characteristic feature of a federation (see, for instance, King 1982, 44; Davis 1978, 142; Amellier 1966, 3). Amellier (1966, 3) for instance, argued a priori that "In federal states no choice [between unicameral and bicameral systems] is open because [federations] are *by definition* two-tier structures."

If such statements are meant to argue that only federations instance a bicameral legislature, then this is clearly mistaken. As King (1982, 94) notes, a great many non-federal states have featured legislatures divided into two or more bodies. For instance, the British, French, Dutch and Japanese Parliaments are just a few of the many non-federal states that are bicameral or multicameral (see also Megan Russell 2000).

If the point of Amellier's statement is to argue that all federations have bicameral legislatures, then clearly this too is mistaken. Indeed, of the some 24 current federations generally so identified (see Griffiths 2005), five do not have bicameral legislatures: these are the United Arab Emirates, Venezuela, and the small island federations of Comoros, Micronesia, and St. Kitts and Nevis. Until its recent division, Serbia-Montenegro also had a unicameral federal legislature. Earlier, prior to the secession of Bangladesh, Pakistan also had a unicameral federal legislature in which the two provinces were equally represented. Even where there has been a federal second legislative chamber the principle of equality of representation of the constituent units of a federation in a second federal chamber has not been universally applied. Among the many exceptions are Canada, Germany, Austria, India, Malaysia, Belgium and Spain. It would seem, therefore, that it is inappropriate to regard a bicameral federal legislature as a definitive characteristic of federations.

Nevertheless, it has to be noted that the principle of bicameralism has been incorporated into the federal legislatures of most federations. Most federations have found a bicameral federal legislature to be an important institutional feature for ensuring the entrenched representation of the regional components in policy making within the institutions of "shared rule" that are an important element for the effective operation of a federation.[1]

In establishing bicameral federal institutions, subsequent federations have been influenced by the example of the precedent of the United States. Debate over whether representation in the federal legislature should be in terms of population

[1] Following Elazar (1987), the essence of federations has often been described as a combination of "shared rule" and "self-rule." The concept of "shared rule" has been open to some ambiguity, however. As Elazar used the term, the combination referred to institutions and processes by which citizens in different territories related directly to the common institutions for dealing with shared problems, while retaining self-rule on other matters through the governments of the constituent units. Some commentators have interpreted "shared rule" to refer, not to the citizens, but to the constituent governments. The latter, however, would infer a form of confederal governance in which the common institutions relate to the member governments rather than directly to the citizens.

or in terms of the constituent states was intense at the time of the creation of the first modern federation in the United States. The clash between the proponents of these two positions had brought the Philadelphia Convention to a deadlock, and this impasse was finally resolved only by the Connecticut Compromise whereby a bicameral federal legislature was established with representation in one house, the House of Representatives, based on population, and representation in another house, the Senate, based on equal representation of the states with the senators originally elected by their state legislatures. This, it was believed, ensured that differing state viewpoints would not be overridden simply by a majority of the federal population dominated by the larger states.[2]

Since then, most (though not all) federations have found it desirable to adopt bicameral federal legislatures. But while most federations have established bicameral federal legislatures, there has been in fact an enormous variation among them in the method of selection of members, the regional composition, and the powers of the second chambers, and consequently of their roles. The next four sections of this paper will deal with those four aspects, which are also summarized in two tables. Table 1 sets out the varieties of these elements that have existed in various federations, and table 2 summarizes the particular combination of elements in each of the federal second chambers in a representative selection of ten federations and quasi-federations. It should be noted that the Latin American federations have generally followed the pattern of the United States, with senators directly elected, states equally represented but by three senators each (with some additional senators nationally elected in Mexico), and strong veto powers. What stands out in these tables is the enormous degree of variation elsewhere.

SELECTION OF MEMBERS OF FEDERAL SECOND CHAMBERS

There is considerable variety in the ways in which members of federal second chambers are elected or appointed. In three federations, Australia since its inception in 1901, the United States since 1913, and Switzerland (by cantonal choice but eventually in all the cantons), members of the federal second chamber are directly elected by the citizens of the constituent units. A feature unique to Switzerland is the provision enabling cantonal legislators to sit concurrently in a federal legislative house. In practice about one-fifth of the members of each federal house concurrently hold seats in a cantonal legislature thus providing a channel for cantonal views to influence federal policy making. Originally in the US (from 1789 to 1912) members of the federal second chamber were indirectly elected by the state legislatures. This is currently the case in Austria and India for most members of the federal second chamber. In Germany, the members of the Bundesrat are

[2] It should be noted that in some federations (e.g. Canada and Spain) the principle of representation by population in the first chamber has been partially modified to take some account of territorial representation.

TABLE 1
Variations in Selection, Composition, Powers and Role of Second Chambers in Selected Federations

Selection	*Composition*	*Powers*	*Role*
1. Appointment by federal government (no formal consultation) (e.g. Canada term until age 75, Malaysia 63% of seats)	1. Equal "regional" representation (e.g. Canada for groups of provinces)	1. Absolute veto with mediation committees (e.g. Argentina, Brazil, Mexico, Switzerland, USA)	1. Legislative chamber only (e.g. Argentina, Australia, Brazil, Canada, India, Malaysia, Mexico, Switzerland, USA)
2. Appointment by federal government based on nominations by provincial governments (e.g. Canada: Meech Lake Accord proposal)	2. Equal state representation (e.g. Argentina, Australia, Brazil, Mexico, 37% of Malaysian senate, Nigeria, Pakistan 88% of seats, Russia, South Africa, USA)	2. Absolute veto on federal legislation affecting any state administrative functions (e.g. Germany, South Africa)	2. Combined legislative and intergovernmental roles (e.g. Germany, South Africa)
3. Appointment ex officio by state government (e.g. Germany, Russia 50% of seats, South Africa 40% of seats)	3. Two categories of cantonal representation (e.g. Switzerland: full cantons and half cantons)	3. Suspensive veto: time limit (e.g. Malaysia, South Africa (except above), Spain)	3. Ultimate interpretation of the constitution (e.g. Ethiopia)
4. Indirect election by state legislatures (e.g. US 1789–1912, Austria, Ethiopia, India, Pakistan, Malaysia 37% of seats, Russia 50% of seats, South Africa 60% of seats)	4. Weighted state voting: four categories (e.g. Germany: 3, 4, 5 or 6 block votes)	4. Suspensive veto: matching lower house vote to override (e.g. Germany for some)	
5. Direct election by simple plurality (e.g. Argentina, Brazil, Mexico 75% of seats, US since 1913)	5. Weighted state representation: multiple categories (e.g. Austria, India)	5. Deadlock resolved by joint sitting (e.g. India)	
6. Direct election by proportional representation (Australia, Nigeria, Mexico 25% of seats)	6. Additional or special representation for others including aboriginal (e.g. Ethiopia, India, Malaysia, Pakistan)	6. Deadlock resolved by double dissolution then joint sitting (e.g. Australia)	
7. Choice of method left to cantons (e.g. Switzerland: in practice direct election by plurality)	7. A minority of regional representatives (e.g. Belgium, Spain)	7. Money bills: brief suspensive veto (e.g. India, Malaysia) or no veto (Pakistan)	
8. Mixed (e.g. Belgium, Ethiopia, Malaysia, Mexico, Russia, South Africa, Spain)			

TABLE 2
Selection, Composition, and Powers of Some Federal Second Chambers

Argentina	Senate: elected by direct vote; one-third of the members elected every two years to a six-year term; absolute veto.
Australia	Senate: direct election (by proportional representation); equal state representation; absolute veto (but followed by double dissolution and joint sitting).
Austria	Bundesrat: elected by state legislatures; weighted representation (range 12:3); suspensive veto (may be overridden by simple majority in lower house, the Nationalrat).
Belgium	Senate: combination of directly elected (40), indirectly elected by linguistic Community Councils (21), and co-opted senators (10); variable representation specified for each unit; equal competence with House of Representatives on some matters but on others House of Representatives has overriding power.
Brazil	Senado Federal (Senate): 3 members from each state and federal district elected by a simple majority to serve eight-year terms; one-third elected after a four-year period, two-thirds elected after the next four-year period; absolute veto.
Canada	Senate: appointed by federal government; equal regional representation for 4 regional groups of provinces (Ontario; Quebec; 4 Western provinces; 3 Maritime provinces) plus 6 for Newfoundland and one each for the 3 territories; absolute veto (legally) but in practice weakened legitimacy.
Ethiopia	House of Federation (Yefedereshn Mekir Bet): 71 members (63%) appointed by regional bodies and 41 (27%) appointed based on population and ethnicity. This body serves as the supreme constitutional arbiter. Members serve five-year terms. For members selected by states, directly or indirectly elected according to decision of state councils.
Germany	Bundesrat: state government ex officio delegations; weighted voting (3, 4, 5 or 6 block votes per state); suspensive veto on federal legislation overridden by corresponding lower-house majority, but absolute veto on any federal legislation affecting state administrative functions (60% of federal legislation reduced to about 40% by reforms in 2006); mediation.
India	Rajya Sabha (Council of States): elected by state legislatures (plus 12 additional representatives appointed by the President for special representation); weighted representation of states (range 31:1); veto resolved by joint sitting.
Malaysia	Dewan Negara (Senate): 26 (37%) elected by state legislatures plus 44 (63%) additional appointed representatives for minorities; equal state representation (for 37% of total seats); suspensive veto (six months).
Mexico	Camara de Senadores (Senate): 128 seats in total; 96 (3 per state) are elected by popular vote to serve six-year terms and cannot be re-elected; 32 are allocated on the basis of each party's popular vote; absolute veto.
Nigeria	Senate: each state has three seats while one senator represents the Federal Capital Territory. A total of 109 senators are directly elected for a four-year term; absolute veto (except taxation and appropriation bills resolved by joint sitting) with joint committees to resolve deadlocks.

... continued

TABLE 2
(Continued)

Pakistan	Senate: 100 seats indirectly elected by provincial assemblies to serve 4-year terms. Of the 22 seats allocated to each province, 14 are general members, 4 are women and 4 are technocrats. Federally Administered Tribal Areas (FATAs) and the Capital Territory fill seats through direct election, with 8 seats given to the FATAs and 4 for the Capital Territory; no veto on money bills, budget, borrowing or audit of federal accounts
Russia	Federation Council (Soviet Federatsii): Asymmetry of length of term and method of selection depending on the republic or region. Each unit has 2 representatives in the Federation Council, one elected by of the constituent unit legislature, the other appointed by the governor; dispute resolution by joint committee which may be overridden by two-thirds majority in lower house.
South Africa	National Council of Provinces (NCOP): 90 seats, consisting of 54 representing provincial legislatures and 36 representing provincial executives; equal provincial representation (6 legislators plus 4 executives per province); veto varied with type of legislation.
Spain	Senate: 208 directly elected members and 51 appointed by parliaments of 17 Autonomous Communities; categories of 4, 3 or one directly elected senator(s) per provinces (sub-units of Autonomous Communities) supplemented by representation of one or more (related to population) appointed by each autonomous parliament; suspensive veto (2 months).
Switzerland	Council of States: in practice direct election (direct election by plurality; method chosen individually by all cantons); 2 representatives for full cantons and 1 for half cantons; absolute veto (mediation committees).
United States	Senate: direct election since 1913 (by simple plurality); equal state representation (six-year terms with one-third elected every two years); absolute veto (mediation committees).

delegates of their Land cabinets, holding office in the federal second chamber ex officio as members of their Land executive and voting in the Bundesrat for each Land in a block on the instructions of their Land government. In Canada, senators are appointed by the federal prime minister and currently hold office until their retirement at 75. Although appointed to represent regional groups of provinces, they have as a result of the method of appointment tended to display little accountability to regional interests, and to vote instead generally on party lines. The federal second chambers in Malaysia, Belgium and Spain have a mixed membership. In Malaysia, only 38 percent of the senate seats are filled by indirect election by the state legislatures, the remaining 62 percent being central appointees. The Spanish senate has 204 directly elected members and 55 regional representatives. In Belgium, 40 senators are directly elected, 21 indirectly elected by the Flemish, French and German Community Councils and 10 are co-opted (appointed by the directly elected senators).

In those federations where the members of the federal second chamber are directly elected, generally they are representative of the interests of the regional electorates. Where they are indirectly elected by state legislatures they are also generally representative of regional interests although regional political party interests also play a significant role. Where, as in the German case, they are ex officio instructed delegates of the constituent governments, they represent primarily the views of the dominant parties in those governments and only indirectly those of the electorate. Where senators are appointed by the federal government, as in Canada and to a large extent in Malaysia, they have the least credibility as spokespersons for regional interests, even when they are residents of the regions they represent. Federal appointment does, however, provide a means for ensuring representation of some particular minorities and interests who might otherwise go unrepresented. It was for that reason that the Indian constitution specifically provided for 12 such appointed members out of an overall total of 250 members in the Rajya Sabha and the Malaysian constitution currently provides for 43 out of 69 senators to be appointed by the federal government. The mixed basis of selection of senators in Spain and Belgium represents political compromises intended to obtain the benefits of the different forms of selection for members of the federal second chamber.

BASIS OF REGIONAL REPRESENTATION IN COMPOSITION OF FEDERAL SECOND CHAMBERS

It is often assumed that equality of state representation in the federal second chamber is the norm in federations. In only nine of the federal second chambers in the federations specifically referred to in tables 1 and 2 are the states strictly equally represented, however. These are the United States, Australian, Argentinean, Brazilian, Mexican, Nigerian, Pakistani, Russian and South African senates. In most other federations where there is not equality of constituent unit representation, there is, however, some effort to weight representation in favour of smaller regional units or significant minorities. On the other hand, account has also been taken of the unequal consequences of equal state representation (for an analysis of the consequences of equal state representation in the US Senate see Lee and Oppenheimer (1998)). Switzerland basically has equal cantonal representation in the Council of States although "half cantons" are distinguished: these have only one member instead of two. In the Malaysian senate the seats filled by indirectly elected senators are equally distributed among the states, but the substantial proportion that are filled by centrally appointed senators have not followed a consistent pattern of balanced state representation, thus the net effect has been one of considerable variation in state representation. In most other federations the population of the units is a factor in their representation in the federal second chamber, although generally this has been moderated by some weighting to favour the smaller units. There have been various degrees of weighting. In Germany, the constitution (article 51) establishes four population categories of Länder having three, four, five or six block votes in the Bundestrat. In India, Austria and Spain the

range of state representation is wider: for example, 31:1 in India and 12:3 in Austria. In Belgium the differential representation of each Community and Region in the senate is specified in the constitution, but for some especially significant issues the constitution (art. 43) requires majorities within both the French-speaking and Dutch-speaking members in the Senate (as well as within the House of Representatives). Canada, as is the case with so much about its Senate, is unique among federations in basing senate representation on regional groups of provinces with the four basic regions having 24 seats each, plus an additional 6 for the province of Newfoundland and Labrador and one each for the three Territories.

POWERS OF SECOND CHAMBERS RELATIVE TO THE FIRST CHAMBERS

Where there is a separation of powers between the executive and the legislature, as in the U.S.A., Switzerland, and the Latin American federations, normally the two federal legislative houses have had equal powers (although in the USA the Senate has some additional powers relating to ratification of appointments and treaties). Where there are parliamentary executives, the house that controls the executive (invariably the chamber based on population) inevitably has more power. In these federations the powers of the second chamber in relation to money bills are usually limited. Furthermore, in the case of conflicts between the two houses provisions for a suspensive veto, for joint sittings where the members of the second chamber are less numerous, or for double dissolution have usually rendered the second chamber weaker (see table 1, column three, for examples). This has sometimes raised questions within parliamentary federations about whether their second chambers provide sufficient regional influence in central decision making. This concern is reinforced by the usually greater strength of party discipline within parliamentary federations. Nonetheless, some of the federal second chambers in parliamentary federations, such as the Australian senate and the German Bundestrat, have been able to exert considerable influence. The particular membership of the German Bundestrat and the fact that its constitutional absolute veto over all federal legislation involving administration by the Länder has in practice applied to more than 60 percent of all federal legislation, have been major factors in its influence. Concerns about the resulting deadlocks have led to currently proposed reforms intended to limit this.

RELATIVE ROLES OF FEDERAL SECOND CHAMBERS

The primary role of most of the federal second chambers in the federations reviewed in this study has been legislative: reviewing federal legislation with a view to bringing to bear upon it regional and minority interests and concerns. By contrast with the others, the German Bundestrat performs an additional and equally important role of serving as an institution to facilitate intergovernmental cooperation and collaboration. It is able to do this because, unlike the other federal second chambers, as already noted, it is composed of instructed delegates of the Land

governments and because its suspensive veto power over all federal legislation and absolute veto over federal legislation affecting state legislative and administrative responsibilities has given it strong political leverage. This model heavily influenced the South Africans in the design of their national second chamber in the new constitution adopted in May 1996, although some significant modifications were made to include representation of both executives and legislators from the provinces in the National Council of Provinces (NCOP). From time to time during the past two decades the reform of the Canadian Senate has been suggested, but while most Canadians agree that the Senate should be reformed, disagreement about the model that would be appropriate has left it unreformed. Nevertheless, in the Speech from the Throne, 16 October 2007, the Harper government announced that it "will continue its agenda of democratic reform by reintroducing important pieces of legislation from the last session, including direct consultations with voters on the selection of Senators and limitations on their tenure."

How are we to account for this enormous variety among federal second legislative chambers? One factor has been the different circumstances at the time each federation was created. In some notable cases such as Germany and Canada, historical precedents were significant. In Germany in 1949 a Senate was considered, but in the end the Bundesrat created in 1949 owed much to the earlier model of the Bismarkian Empire. In Canada, the Senate was a major issue in the deliberations at the Quebec Conference, 1864, taking up more time than any other issue. The adoption of an appointed Senate was a conscious rejection of an elected second chamber which had existed previously under the *Act of Union, 1840* and which had caused so many difficulties in combination with cabinets responsible to the lower chamber. It should also be noted that the operation of federal second chambers has frequently proved significantly different from the expectations of the founders, often due to the operation of political parties (see below). This has often led to subsequent pressures for reform of federal second chambers and of their role, but once institutionalized, efforts to reform them in practice have proved extremely difficult. The repeated failure of efforts at Senate reform in Canada illustrate this. More recently, efforts to modify the blocking role of the German Bundesrat have achieved some success, but only after protracted negotiations.

While the European Union is a hybrid of federal and confederal institutions, it is worth noting that it too has bicameral legislative institutions. Both the Parliament, representing the citizens, and the Council, representing constituent governments, have co-decision powers. The Council has an intergovernmental character and there is weighted voting on many matters. In this sense the Council has corresponded to the second chambers in federations, although playing a stronger role than many of them.

THE IMPACT OF POLITICAL PARTIES

An important factor affecting the operation of any federal second chamber is the character and role of the political parties. As Friedrich (1966) has noted, an examination not only of structures but of political processes is fundamental to

understanding the very nature of federations. The interaction of political parties with federal structures is, therefore, particularly important. Political parties tend to be influenced by both institutional characteristics, particularly the executive-legislative relationship and the electoral system, and by the nature and characteristics of the diversity in the underlying society. There are four aspects of political parties that may particularly affect their operation within a federation: 1) the organizational relationship between the party organizations at the federal level and provincial or state party organizations, 2) the degree of symmetry or asymmetry between federal and provincial or state party alignments, 3) the impact of party discipline upon the representation of interests within each level, and 4) the prevailing pattern for progression of political careers.

In terms of party organization, the federal parties in the United States and especially Switzerland have tended to be loose confederations of state or cantonal and local party organizations. This decentralized pattern of party organization has contributed to the maintenance of non-centralized government and the prominence in their federal legislatures, and particularly their second chambers, of regional and local interests. Nevertheless, in recent years the voting pattern in the US Senate has tended to be more dominated by party interests than state interests. In the parliamentary federations, the pressures for effective party discipline within each government, in order to sustain the executive in office, have tended to separate federal and provincial or state branches of parties into more autonomous layers of party organization. This tendency appears to have been strongest in Canada. The ties between federal and regional branches of each party have remained somewhat more significant, however, in such parliamentary federations as Germany, Australia and India. In the case of Belgium, the federal parties have in fact become totally regional in character, with each party based in a region or distinct linguistic group.

In virtually all of these federations there is a degree of asymmetry in the alignment of parties at the federal level and the alignments of parties within different regional units. Within different regions, the prevailing alignment of parties in regional politics has often varied significantly from region to region and from federal politics. These variations in the character of party competition and predominance in different regional units have usually been the product of different regional economic, political and cultural interests, and these regional variations in prevailing parties have contributed further to the sense of regional identification and distinctiveness within these federations.

The presence or absence of strong party discipline in different federations has also had an impact upon the visible expression of regional and minority interests within the federal legislatures and particularly their second chambers. Where parliamentary institutions have operated, the pressure has been to accommodate regional and minority interests as far as possible behind closed doors within party caucuses so that the visible facade is one of cabinet and party solidarity. This contrasts with the shifting alliances and visibly varying positions much more frequently taken by legislators in federal legislatures where the principle of the separation of powers has been incorporated. Regional and minority concerns are

more openly expressed and deliberated in the latter cases, although that has not necessarily meant that they are translated any more effectively into adopted policies.

Here, it is clear that there has been considerable variation among federations in the impact of political parties on the operation of their federal second chambers. Whether due to the pressures for party discipline within parliamentary federations, or the emphasis upon party representation in proportional representation electoral systems, or the combined effect of both, party considerations have tended to override regional differences (although not totally) within federal second chambers. This has especially been the case where party representation has differed between the two houses. A particularly notable example of clashing party representation between the two federal legislative chambers in recent years has been the operation of the German Bundesrat. Indeed, this tendency there has led to pressures for reform. Even in federations where the separation of powers exists between executive and legislature resulting in less pressure for strict party discipline, there has been an increasing tendency for polarization along ideological rather than regional lines, as has become apparent within the US Senate. Generally, the net effect of the impact of the operation of political parties has been to moderate (although not eradicate) the role of federal second chambers as a strong voice for regional interests in federal policy making.

An area that illustrates the contrasting representational patterns in different federations is the differences in the normal pattern of political careers. In some federations, most notably the United States and Switzerland, the normal pattern of political careers is progression from local to state or cantonal and then to federal office. Presidential candidates in the US, for instance, have usually been selected from among governors or senators rooted in their state politics. By contrast, in Canada, few major federal political leaders have been drawn from the ranks of provincial premiers, and it is the norm for Canada's most ambitious politicians to fulfill their entire careers solely at one level or the other, either in federal or in provincial politics. The political career patterns in most of the other parliamentary federations fall between these extremes, examples of the links between provincial experience and filling positions of federal office being more frequent in such federations as Germany, Australia and India than in Canada.

DO FEDERAL SECOND CHAMBERS CONSTRAIN DEMOCRACY?

In addressing this question, it should be noted at the outset that much will depend on our definition of democracy, a concept whose definition has over the years been much debated. Modern democracy may be about rule of, by and for the people, but as Scott Greer (2006, 262-6) has noted, different interpretations have given primary emphasis to "participation," "accountability," or "group self-government."

Critics of federalism who emphasize the majoritarian essence of democracy as "rule by the *demos*" have noted particularly that most federations have established bicameral federal legislatures weighted in differing degrees to favour the smaller constituent units, thus violating a cardinal principle of democracy based

on one-person-one-vote. Consequently, they characterize such federal second chambers as "demos-constraining" (Riker 1964, 1982 and Stepan 2004a, b, c). For instance, to take just one example, in the United States Senate, a single vote in Wyoming counts 65 times more than its equivalent in California. Such contrasts are replicated in many other federal second chambers.

But an important point that Stepan (2004, a, b, c) and Tsebelis (1995, 2002) note is that among federations there are variations in the position and strength of the federal second chamber as "veto player" and as "demos-constraining" or "demos-enhancing" in character. One might quarrel with the factual basis on which Stepan characterizes the impact of particular federal second chambers, but fundamentally he is correct in noting the enormous variation in the role and powers of federal second chambers in different federations. Earlier in this paper it has already been noted that there has been considerable variation in the weight given to territorial representation and to the methods of selection, composition, powers and consequent roles of federal second chambers. For instance, although virtually all federations give some weighting to favour smaller constituent units, they range from equal representation in the US, Australia and the Latin American federations and the virtually equal representation in Switzerland, to the strongly weighted (Germany) and lightly weighted (Austria and India) representation in the territorial chamber for smaller constituent units. In some cases such as Belgium and Spain, regional representatives are in fact only a minority of the members of the second chamber. In Canada, the composition of the Senate was originally based on equal representation, not of provinces, but for regional groups of provinces with varying numbers of provinces in these regional groups. As we noted previously, there have been variations too in the methods of appointment: by direct election, by indirect election by state legislatures, by state executives, by appointment by the federal government, or by a mixture of these. Furthermore, there is considerable variation in the relative powers of these federal second chambers as "veto players," and hence in the degree to which they are "demos-constraining." Second chambers in parliamentary federations, where the federal cabinet is responsible to the popularly elected house, have normally been weaker (although in Germany and Australia these have had some special or significant veto powers), while those in non-parliamentary federations, such as the United States, Switzerland and the Latin American federations have had at least equal powers and hence have been in a stronger position as "veto players." It is these variations that led Stepan to place federations on a continuum in terms of their "demos-constraining" or "demos-enhancing" character, based on the varied role of their federal second chambers as "veto players."

While discussing the degree to which federations are "demos-constraining" or "demos-enhancing," some further points should, however, be noted. It can be argued that while federal institutions may place some limits upon majoritarian democracy, democracy more broadly understood as liberal democracy may actually be expanded by federalism. Democracy and governmental responsiveness are enhanced by federalism because multiple levels of government maximize the opportunity for citizens' preferences to be achieved (Pennock 1959), establish

alternative arenas for citizen participation, and provide for governments that are smaller and closer to the people. In this sense federalism is "demos-enabling" and hence might be described as "democracy-plus."

From a liberal-democratic point of view, by emphasizing the value of checks and balances and dispersing authority to limit the potential tyranny of the majority, federal second chambers contribute to the protection of individuals and minorities against abuses (*Federalist Papers*, No. 9). Furthermore, as Lipjhart (1999) has noted, the checks on democratically elected majorities imposed by federal second chambers have often pushed these federations in the direction of "consensus" democracy, contributing to the accommodation of different groups in multinational federations. Indeed, as Burgess (2006, 206) comments, the acceptance in most federations of the need for federal second chambers points to the vitality and recognition in these federations of the distinct *demoi* in their various constituent units.

Switzerland, with its extensive application of the processes of direct democracy in relation to legislation both at the cantonal and the federal levels, represents a special case. These processes give the citizens in relation to both levels of government the opportunity to accept or reject constraints, and the operation of direct democracy has had an important impact upon the operation of political parties in both federal legislative houses.

CONCLUDING SUMMARY

While bicameral federal legislatures are not a definitive characteristic of federations, most federations have found it desirable to establish bicameral federal legislatures to provide an entrenched institution for the representation of distinct territorial *demoi* in federal policy-making. A review of second federal legislative chambers makes it clear, however, that there is an enormous variety among federations in the methods of appointment, composition, powers and hence roles of these bodies in different federations, particularly differentiating those in parliamentary and non-parliamentary federations. Furthermore, political party systems have also often affected the operation of federal second chambers, frequently limiting their role as "regional chambers." As a result of these variations, federal second chambers fall along a broad continuum in terms of their role as "veto players" and "demos-constraining" in relation to democratic processes as defined in terms of rule by simple majority. But from a liberal-democratic point of view, the checks and balances provided in processes of federal policy making through the operation of federal second chambers have often enhanced "consensus" democracy and contributed to the vitality and recognition of the distinct *demoi* in their various constituent units.

REFERENCES

Amellier, M., ed. 1966. *Parliaments*. London: Inter-Parliamentary Union by Cassell.
Burgess, M. 2006. *Comparative Federalism: Theory and Practice*. Abingdon: Routledge.

Davis, S.R. 1978. *The Federal Principle: A Journey through Time in Quest of a Meaning*. Berkeley: University of California Press.

Elazar, D.J. 1987. *Exploring Federalism*. Tuscaloosa, AL: University of Alabama Press.

Friedrich, C.J. 1968. *Trends of Federalism in Theory and Practice*. New York: Praeger.

Greer, S.L., ed. 2006. *Territory, Democracy and Justice: Regionalism and Federalism in Western Democracies*. Houndsmills, Basingstoke, Hampshire: Palgrave Macmillan.

Griffiths, A.L., ed. 2005. *Handbook of Federal Countries, 2005*. Montreal and Kingston: McGill-Queen's University Press for the Forum of Federations.

King, P. 1982. *Federalism and Federation*. London and Canberra: Croom Helm.

— 1993. "Federation and Representation," in *Comparative Federalism and Federation: Competing Traditions and Future Directions*, eds. M. Burgess and A.-G. Gagnon. Hemel Hempstead: Harvester Wheatsheaf.

Lee, F.E. and Oppenheimer, B.I. 1998. *Sizing up the Senate: The Unequal Consequences of Equal Representation*. Chicago: University of Chicago Press.

Lijphart, A. 1999. *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*. New Haven: Yale University Press.

Madison, J., A. Hamilton, and J. Jay. 1987. *The Federalist Papers, 1787-8*. New York: Penguin Books.

Pennock, J.R. 1959. "Federalism and Unitary Government – Disharmony and Reliability," *Behavioural Science* 4(2): 147-157.

Riker, W.H. 1964. *Federalism: Origin, Operation and Significance*. Boston: Little Brown.

— 1982. *Liberalism against Populism: A Confrontation between the Theory of Democracy and the Theory of Social Choice*. Prospect Heights: Waveland Press.

Russell, M. 2000. *Reforming the House of Lords: Lessons from Overseas*. Oxford: Oxford University Press.

Stepan, A. 1999. "Federalism and Democracy: Beyond the US Model," *Journal of Democracy* 10(4): 19-34.

— 2004a. "Toward a New Comparative Politics of Federalism, Multinationalism, and Democracy," in *Federalism and Democracy in Latin America*, ed. E.L. Gibson. Baltimore: Johns Hopkins Press.

— 2004b. "Electorally Generated Veto Players in Unitary and Federal Systems," in *Federalism and Democracy in Latin America*, ed. E.L. Gibson. Baltimore: Johns Hopkins Press.

— 2004c. "Federalism and Democracy," in *Federalism and Territorial Cleavages*, eds. U.N. Amoretti and N. Bermeo. Baltimore: Johns Hopkins Press.

Tsebelis, G. 1995. "Decision-Making in Political Systems: Veto-Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism," *British Journal of Political Science* 25: 289-325.

— 2002. *Veto Players: How Political Institutions Work*. Princeton: Princeton University Press.

Watts, R.L. 1999. *Comparing Federal Systems*, 2nd ed. Montreal and Kingston: McGill-Queen's University Press.

— 2003. "Bicameralism in Federal Parliamentary Systems," in *Protecting Canadian Democracy*, ed. S. Joyal. Montreal and Kingston: McGill-Queen's University Press.

5

HARPER'S SENATE REFORM: AN EXAMPLE OF OPEN FEDERALISM?

Nadia Verrelli

Cet article compare les efforts fournis par le Premier ministre Harper en ce qui a trait à la réforme du Sénat aux efforts fournis par le Premier ministre Trudeau en 1978. Selon cet article, bien qu'Harper essaie de se distinguer des premiers ministres qui l'ont précédé en prônant l'idée d'un fédéralisme ouvert, ses méthodes, ainsi que celles de Trudeau sont toutefois des exemples de fédéralisme « fermé ». Les deux n'accordent aux provinces aucun rôle à jouer dans la réforme du Sénat. Cet article suggère qu'en plus de prendre en considération l'élément constitutionnel de la proposition d'Harper, il faut également tenir compte de l'aspect fédéraliste, en particulier du rôle des provinces au sein de la fédération.

Upon entering office in 2006, Prime Minster Stephen Harper quickly professed that his new government would engage in a policy of "open federalism" in an attempt to address the apparent democratic deficit in Canadian federal governance. Briefly, open federalism is the idea that the federal government should strive for open negotiations and equal relations with the provinces on key intergovernmental issues. Accordingly, Prime Minister Harper offered Senate reform as a crucial way to achieve this end. The government proposed two changes to the Canadian Senate, asserting that both could be enacted through the federal legislative process: Bill C-19, which seeks to limit the term of senators to eight years; and Bill C-20, under which senators would be appointed after having been elected by the people of each region. The government argued that these reforms would enable the provinces and the electorate to play an ongoing role in the selection process of the senators, thereby rendering the Senate independent, efficient, effective and, most importantly, fully democratic. But is the process through which the government intends to enact these changes really an example of "open federalism"?

Though Prime Minister Harper speaks of practising open and transparent federal governance – thereby attempting to distinguish himself from his predecessors, most notably Jean Chrétien and Pierre Trudeau – his government's proposed amendments to the Canadian Senate are arguably indicative of a more "closed"

view of federal relations in that the provinces are being actively shut out of the process of institutional reform. In fact, despite Harper's intention to achieve a greater openness in the federation by encouraging the active involvement of the provinces, his preferred method of pursuing reform is symptomatic of an arrogant, if not rogue, government that believes it can circumvent and disregard its constitutional obligations in order to realize its desired agenda. So, while the passage of Bill C-19 and Bill C-20 might result in a Senate that is indeed more democratic, independent, efficient and effective, the means through which Harper wishes to achieve this end is far from "open."

In fact, and perhaps ironically, Bills C-19 and C-20 closely resemble Trudeau's own Senate reform proposal of 1978. As with the Trudeau proposal, Harper's plan has the ultimate aim of rendering the Senate more legitimate by opening the door for the provinces and the electorate to play a significant role in deciding its future makeup. In attempting this, both governments – the Liberals under Trudeau and the current Conservative government under Harper – have ignored past practices, constitutional obligations and a consultative role for the provinces in redefining the selection process and the tenure of senators.

Given the incredibly contentious nature of Senate reform and the repeated failure of past governments to achieve it, an analysis of Harper's novel methods of reform is required. Accordingly, this paper deals with the specific legislative procedures through which the Harper government is advancing its proposals and highlights how closely they parallel Trudeau's own failed attempt to change the structure of the Canadian Senate in 1978. The paper does not address the merits of the issue itself, or deal with the broader question of whether or not the Senate, as it currently exists, is even in need of reform. Nor does it discuss whether the current proposals will achieve the ends that Harper claims they would.

The paper begins by briefly reviewing the historical sentiments that have fuelled the desire for Senate reform in order to contextualize the Harper scheme. It then proceeds to connect the idea of reform to Harper's notion of open federalism, which allegedly sets his government apart from its predecessors. In this way, the paper argues that, although Harper attempts to separate himself from previous prime ministers by championing the idea of open federalism, both his and Trudeau's methods are actually examples of a "closed" federalism, both excluding the provinces from having any role in helping to reform the Senate. Furthermore, the necessity of such a role has been consistently recognized by past governments and by the Supreme Court of Canada in *Reference: re Authority of Parliament in Relation to the Upper House*, (Supreme Court, 1980, 54) (in this reference, the Trudeau government referred the constitutionality of its own proposal to the Supreme Court).

WHY SENATE REFORM

The fundamental composition and function of the Senate in the Canadian federation has long been a source of contention amongst western and, to a lesser degree, eastern politicians. First arising during the debates concerning western

settlement, then in the constitutional debates from the 1970s through the 1990s, the issue persists today. In fact, as Roger Gibbins and Loleen Berdhal argue, "support for Senate reform, is a staple of western Canadian political discourse" (2003, 53). The core issue in this protracted debate has been the need to secure equal and effective regional representation in Canada's federal centre, with proponents of Senate reform viewing the need to transform the institution into one that offers regional perspectives on federal policies.

But how much credence should we give to those who argue that the Canadian Senate, as an institution originally intended to represent regional interests and identities, is a failure? According to proponents of reform, the way in which the system operates now – with twenty-four senators per region, plus six assigned to Newfoundland and Labrador and one for each of the Northwest Territories, Yukon and Nunavut, appointed by the prime minister to serve until the age of seventy-five – does not reflect the political reality of contemporary Canadian federal relations. This, coupled with the fact that senators almost always accept the policies produced by the federal government of the day, calls into question the Senate's independence from the House of Commons and, in turn, its function and role of exercising sober second thought. As a result, many question the democratic legitimacy and effectiveness of the Senate. Gibbins and Berdhal (2003, 54-55), amongst others, argue that

> ... the Senate makes a mockery of federal principles. Senators are neither elected by citizens nor appointed by provincial governments; they are appointed at the sole discretion of the prime minister and retain their seats until reaching 75 years of age. The number of Senate seats per province is based on the math of Confederation, which bears little resemblance to today's demographic or federal realities […] From the perspective of federalism or regional representation, the Senate can most charitably be described as wasted institutional space.

Since the late 1980s, the desire for reform has crystallized into a platform that calls for a Triple-E Senate: elected, effective and efficient. This model of the Senate made its way onto the mainstream Canadian federal agenda mainly upon the insistence of political leaders from the West. Indeed, in this time, two constitutional packages aimed at amending the Constitution, the 1987 Meech Lake Accord[1] and the 1992 Charlottetown Accord,[2] included provisions for Senate

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[1] Had Meech Lake been ratified by all ten provinces and the federal government, vacancies in the Senate would have been filled not on the initiative of the federal government alone; rather, "Ottawa would [have had to] choose from a list of names submitted by the government of the provinces in question." This, of course, was to be a temporary solution until a new formula vis-à-vis Senate reform was agreed upon by the political leaders. A similar formula was also proposed for the reform of the Supreme Court of Canada. (McRoberts 1997, 94)

[2] A Triple-E Senate was in fact proposed in the 1992 Accord in which, had it been ratified, the Senate would have been comprised of an equal number of elected senators

reform aimed at appeasing the growing unrest of political players in the West. Both these attempts to amend the Constitution, however, eventually collapsed.[3] Irrespective of these failures or maybe in spite of them, regional discontent embodied in the demands for institutional reform in general and Senate reform in particular, persists, and alleviating it remains a high priority on the political agenda of the Harper government. In light of this, it is not surprising that the federal government is pursuing Senate reform.

In his attempt to deal with the issue of federal accountability, Harper speaks of engaging in a kind of open federalism that "refers to divided sovereignty between regional and general governments" (Young 2006, 7). Robert Young has listed six core elements contained of this principle:

1. Rectitude and order in the process of federal-provincial relations
2. Strong provinces
3. "Strict constructionism"
4. Quebec is special
5. Fix the fiscal imbalance
6. Municipalities are provincial (ibid., 8-9)

For the purposes of this paper, the first element is most pertinent. Open federalism "is about collaboration – with every level of government – and about being clear about who does what and who is responsible for it" (Harper 2006a). In its essence then, as Peter Leslie states, "open federalism is about procedure or practice in the conduct of intergovernmental relations: a commitment to collaborative federalism." (Leslie 2006, 39) Given this, the "closed federalism" supposedly practised in the past could be described as a type of federal relations dominated by Ottawa – in effect discouraging collaboration with the provinces in restructuring key features of the Canadian federation.[4] According to Harper, his "open federalism" should be viewed as a clear break from the past. Indeed, in his own words, open federalism is "the very opposite of the centralist philosophy espoused

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from each province, two from each territory and representatives from the aboriginal community (the number to be determined at a later date). The new Senate would have been effective as its powers to delay or veto a bill would have increased. (McRoberts 210) (For more detail on this proposed Triple-E Senate, see McRoberts, *Misconceiving Canada*, Russell, *A Constitutional Odyssey)*.

[3] For the causes and reasons for the failure of these two Accords see McRoberts, *Misconceiving Canada*, Russell, *A Constitutional Odyssey*.

[4] It should be noted that Harper's contention that past governments practiced closed federalism is debatable. Indeed, Lester B. Pearson as prime minister was accommodating to the demands of Quebec, and, to a lesser extent, the other provinces. Brian Mulroney and other prime ministers, though notorious for practicing executive federalism, did engage in open negotiations with the provinces. Arguably though, John A. Macdonald and Wilfrid Laurier did engage in what can be referred to as closed federalism in their attempts to undermine the provinces.

by successive federal Liberal regimes, from Mr. Trudeau right up to his current successor, Mr. Dion" (Harper 2007). However, considering Harper's preferred approach to Senate reform, we are quickly reminded of a Trudeau-style of governance that dismissed the provinces as equal players in the Canadian federation when he attempted to reform the Senate.

TRUDEAU AND HARPER COMPARED

On 20 June 1978, the federal government under Trudeau tabled *A Time for Action*, which included a proposal to abolish the current Senate. Under this proposal, the existing Senate would be replaced by a new House of the Federation made up of 118 senators – half of whom were to be chosen by the federal government following a federal general election and the other half by the provincial governments following their respective provincial elections. Furthermore, the proposal was to be enacted under Parliament's unilateral constitutional amending authority.

The similarities between the Trudeau and the Harper proposals are evident. Both attempt to restructure the Senate so as to correct its commonly held inadequacy in representing regional interests and identities. According to the Trudeau government, the Canadian federation needed a "second chamber that will function as a politically effective regional forum" (Lalonde 1978, 3). In a similar vein, the Harper government has argued that "Canada needs an upper house that provides sober second thought [… and] gives voice to our diverse regions with democratic legitimacy" (Harper 2006b).

The procedures by means of which both governments intended to push through their proposals also closely resemble one another: Trudeau favouring a unilateral amendment to the Constitution itself, and Harper attempting to push through his amendments via the federal legislative process. According to the Trudeau government in the arguments it submitted to the Supreme Court of Canada in *Reference re: Authority of Parliament in Relation to the Upper House*, s. 91(1) of the *British North America Act, 1867* (now s. 44 of the *Constitution Act, 1982*) authorizes it to make changes unilaterally to the Senate. Section 91(1), enacted in 1949, gave the federal government the power to amend unilaterally the Constitution of Canada where the amendments did not affect federal-provincial relations (amongst other exceptions including the provision that there be one session of Parliament at least once a year). Here, Trudeau held that since the Senate is included in the phrase "the Constitution of Canada" found in s. 91(1), and since s. 91(1) clearly stipulates that the federal power under this section is absolute except for the specified limitations (a list that does not include the Senate), the federal government could affirm that Parliament did have the exclusive jurisdiction under s. 91(1) to modify the Senate. According to the Harper government, because neither Bill C-19 nor Bill C-20 affects the constitutional provisions vis-à-vis the Senate, a constitutional amendment is not required. Rather, the reforms are held to be within the normal legislative powers of the federal Parliament and necessitate no resort to the amending formulas that require the consent of the provinces. Ordinary legislation is sufficient.

It may seem that Trudeau was much bolder in his attempt to reform the Senate by asserting an ability to do so under s. 91(1) of the *British North America Act, 1867*. Yet Harper, by preferring to pursue reform through legislation passed by Parliament, would achieve a very similar end result: the exclusion of the provinces from the reform process and a repudiation of the long-established principles of constitutionalism and federalism in Canada. Indeed, the approaches of both the Trudeau and Harper governments ignore a role for the provinces in the federation by denying them a voice in determining how the federalism principle of *regional representation at the centre* should continue to be realized.

In *Reference re: Authority of Parliament in Relation to the Upper House (1S.C.R. 56 at p. 71)*, the Supreme Court of Canada adopted Lord Sankey's understanding of Canadian federalism and the original federal bargain:

> Inasmuch as the Act embodies a compromise under which the original Provinces agreed to federation, it is important to keep in mind that the Preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected.

The Court understood the federal bargain and Canadian federalism as a consensus among the constituent units in which the Senate, securing and ensuring regional representation at the centre, is a key feature. In fact, in the original negotiations that took place prior to Confederation, the less populated provinces had insisted upon securing regional representation at the centre before agreeing to join the new country. As such, the Court's ruling recognized the fundamental role played by the provinces in the original makeup of the Senate and the process of selecting senators. Furthermore, it acknowledged that there was a role to be played by the provinces if the provisions of the original contract, including the Senate, were to be changed. In this reference, then, the Supreme Court found that the provinces ought to be consulted and their consent obtained if fundamental changes are to be made to the Senate. Moreover, it concluded that the federal government was not authorized to change unilaterally the selection process of senators.

Emerging from the Supreme Court's opinion in *Reference re: Authority of Parliament in Relation to the Upper House* is the idea that the Senate continues to play an important role in the federation because it secures regional representation at the centre. As such, any changes to the makeup of the Senate cannot be effected unilaterally by the federal government; doing so would negate the idea of a distinctly "regional voice" being expressed independently of the central government. In order to change the Senate, then, the federal government must acknowledge that the provinces need to be consulted and their consent obtained. Though Harper's proposal does not directly change the selection process – as senators will continue to be appointed by the Governor General on advice from the Prime Minister – it does so covertly by introducing elections into the selection process. In effect then, Bills C-19 and C-20 do affect the constitutional provisions relating to the Senate: Bill C-19 by limiting the tenure of senators to eight years, and Bill C-20 by ultimately transforming the Senate from an appointed upper house into an essentially elected one.

Four of the ten provinces – Ontario, Quebec, New Brunswick, and Newfoundland and Labrador – have already openly voiced objections to the manner in which Harper is proceeding with Senate reform, arguing that, as with Trudeau's failed proposal, a constitutional amendment endorsed by the provinces is required. Quebec has even gone so far as to state that it is prepared to challenge in court Harper's plans to reform the Senate. It appears that Harper, by ignoring the objections of the provinces as well as the spirit of the Supreme Court opinion rendered in *Reference re: Authority of Parliament in Relation to the Upper House*, is not only circumventing constitutional principles and past constitutional practices, but is also ignoring the proper role the provinces ought to play in the federation.

The ultimate effect of both Trudeau's and Harper's proposed actions are similar: push aside the provinces and ignore the vital position they hold within the federation. Though the Senate is a part of Parliament, its role is not limited to federal matters. This was affirmed by the Supreme Court of Canada in *Reference re: Authority of Parliament in Relation to the Upper House (1 S.C.R. 54 at p.56)* when it pointed out that the Senate was created "to afford protection to the various sectional interests in Canada in relation to the enactment of federal legislation." (Reference, para. 10). If the federal government alone can determine and alter the selection process of the Senate, and if it alone can establish the tenure of senators, then this undermines the role of the provinces in actualizing the notion of regional representation at the centre. It negates a crucial role entrenched by a century of constitutional deliberations between the federal and provincial governments that culminated in the signing of the *Constitution Act, 1867* and the *Constitution Act, 1982*, a role recognized and respected by the government of Brian Mulroney in its own attempt to reform the Senate through the 1987 Meech Lake Accord and the 1992 Charlottetown Accord.

The negotiations that led to the signing of the *Constitution Act, 1867* included the establishment of a Senate, because it was insisted upon by delegates from New Brunswick, Nova Scotia and Lower Canada (Quebec) in order to ensure a healthy respect for their sectional interests and identities at the centre. In 1982, during the negotiations leading up to the patriation of the Constitution, political leaders agreed that the powers and selection of senators, if they were to be altered, required an amendment to the Constitution by way of the general amending formula. In both the Meech Lake Accord and the Charlottetown Accord, the provincial premiers and the prime minister agreed that the proposals to reform the Senate along Triple-E lines could only be put into effect after the unanimous consent of the provinces was obtained (the Charlottetown Accord was first put to the electorate in a national plebiscite). In all these cases, the provinces were actively and equally engaged in the negotiation process, and indeed, in the last thirty years there have only been two instances in which the federal government chose not to consult the provinces or obtain their consent when pushing through their proposals for Senate reform. In these two instances, the governments of Trudeau and Harper chose to ignore the long-established principles of Canadian federal relations by minimizing the role of the provinces in the federation.

When discussing Harper's Senate proposals, then, in addition to considering the constitutional element of the proposal, we must also consider the federalism factor. Harper describes himself as a proponent of open federalism. Yet, despite this, the attempts of the Mulroney government to reform the Senate appear to be more "open" than Harper's as they included a provincial voice through federal-provincial negotiations. Harper's approach contradicts the way Canadian federalism vis-à-vis Senate reform has evolved over the past two decades, and ignores the authoritative understanding of the relationship between the Canadian federation, the Senate, and the federal government rendered by the Supreme Court in 1980. In a similar fashion to Trudeau, then, Harper is attempting to circumvent constitutional practices and obligations. And as with Trudeau, there is little indication that employing a strategy that circumvents the established mechanisms for reform will produce a more open federalism.

REFERENCES

Gibbins, R. and L. Berdhal. 2003. *Western Visions, Western Futures: Perspectives on the West in Canada*. Peterborough: Broadview Press.

Harper, S. 2006a. Conservative Party of Canada. *Prime Minister Harper Outlines his Government's Priorities and Open Federalism Approach*. 20 April. Accessed online at http://www.conservative.ca/EN/1004/42251

— 2006b. Office of the Prime Minister. 7 September. *Senate Reform*. Accessed online 11 July 2008 at http://www.pm.gc.ca/eng/media.asp?id=1306

— 2007. *Prime Minister's remarks to the Rivière-du-Loup Chamber of Commerce*. Office of the Prime Minister. 7 December. Accessed online 11 July 2008 at http://pm.gc.ca/eng/media.asp?id=1938

Lalonde, M. 1978. Honourable Minister of State for Federal-Provincial Relations. *Constitutional Reform: House of the Federation*. Ottawa: Government of Canada.

Leslie, P. 2006. "The Two Faces of Open Federalism." In *Open Federalism: Interpretations, Significance*. Kingston: Institute of Intergovernmental Relations, p. 39-66.

McRoberts, K. 1997. *Misconceiving Canada: The Struggle for National Unity*. Toronto: Oxford University Press.

Russell, P.H. 1993. *Constitutional Odyssey: Can Canadians Become a Sovereign People?* 2nd ed. Toronto: University of Toronto Press.

Reference re: Authority of Parliament in Relation to the Upper House, [1980] (The Senate Reference)1 S.C.R. 54.

Young, R. 2006. "Open Federalism and Canadian Municipalities." In *Open Federalism: Interpretations, Significance*. Kingston: Institute of Intergovernmental Relations, p. 7-24.

CONSTITUTIONALITY OF THE FEDERAL GOVERNMENT'S APPROACH TO CHANGE

6

BILL C-20: FAULTY PROCEDURE AND INADEQUATE SOLUTION

(TESTIMONY BEFORE THE LEGISLATIVE COMMITTEE ON BILL C-20, HOUSE OF COMMONS, 7 MAY 2008)

Ronald L. Watts

Cet article remet en question la validité du projet de loi C-20 sur le plan constitutionnel. L'auteur soulève deux problèmes au sujet de ce projet de loi sous sa forme actuelle : premièrement, la procédure législative, et deuxièmement, l'absence de contexte en ce qui a trait à la relation entre le processus d'élection proposé et la nature, les fonctions et le rôle du Sénat au sein du Parlement. Selon lui, une réforme complète et immédiate du Sénat est nécessaire au bien-être du Canada en tant que fédération, et pour pouvoir réformer le Sénat, il faut modifier la Constitution. Le projet de loi C-20 ne va pas assez loin. De plus, il comporte des risques et des dangers dans le sens qu'il ne tient pas compte de l'effet probable qu'il aura sur le rôle et les pouvoirs du Sénat si l'on modifie seulement le mode de sélection.

I wish to draw attention to two concerns about Bill C-20 in its present form. The first has to do with the *legislative procedure,* and the second with the *lack of context* in terms of the relation of the proposed election process to the character, functions and role of the Senate within Parliament.

The first concern relates to the use of ordinary legislation to effect what is in substance a constitutional amendment. The explicit objective outlined in the Preamble to Bill C-20 appears to be to replace patronage in the appointment of senators by a more democratic electoral element in the process of selection. Bill C-20 appears to have been very carefully crafted to ensure constitutionality by creating a procedure which neither contradicts nor purports legally to alter in any way the governor general's constitutional power of appointment or the prime minister's right of advising the governor general. But it violates the spirit of the *Constitution Act, 1982*, which explicitly states in section 42(1) that "an amendment to the Constitution of Canada in relation to the following matters may be made only in

accordance with section 38(1)," and lists in section 42(1)(b) specifically: "the powers of the Senate and the method of appointing Senators." Section 38(1) requires for this not only a resolution of the Senate and House of Commons, but of resolutions in two thirds of the provinces that have in aggregate at least fifty percent of the population of all provinces for such amendments.

The purpose of the amendment procedure outlined in section 38(1) is to ensure a broad consensus for amendments to the basic features of our constitutional structure. Difficult as this may make amendments, nevertheless this requirement is fundamental to the operation of Canadian federal democracy. The effort to avoid this procedure by reforming the Senate on the sly through the devious use of ordinary legislation constitutes an anti-constitutional process. It purports to seek a democratic objective by resorting to a non-constitutional and hence ultimately anti-democratic process. The Supreme Court in 1978 declared that "To make the Senate a wholly or partially elected body would affect a fundamental feature of that body," and the Supreme Court provided clear and unanimous guidance that Parliament could not unilaterally alter "the fundamental features or essential characteristics of the Senate." No matter how democratic the objectives of Bill C-20 may be, and no matter how attractive an alternative unilateralism is to the difficult process of constitutional amendment, those objectives should be pursued by the appropriate constitutional process rather than in the devious manner proposed by Bill C-20.

A second concern arises from the proposal in Bill C-20 to alter the appointment process for senators without relating these alterations to the broader context of the role, representative basis, functions and powers of the Senate as a part of the parliamentary structure. Any reform of the Senate must take account of three factors that are *interrelated*: (1) the representation of the regions and provinces, (2) the mode of possible election, and (3) the powers of the second chamber.

To consider just one of these aspects without its relation to the others in a piece of discrete legislation is likely to create unintended consequences in the relationship between the Senate and the House of Commons. For instance, if the current powers of the Senate – equal to those of the House of Commons except for the introduction of money bills – remain for a Senate whose members gain the legitimacy of an electoral base, this could produce a serious challenge to the principle of House of Commons primacy and of cabinets responsible to it. It is no accident that in virtually all federations elsewhere that have parliamentary institutions (even in those parliamentary federations with relatively strong second chambers such as Australia and Germany), the constitutional powers of the second chamber have been more limited. It is only in federations with separated executives and legislatures, such as in presidential-congressional systems, that directly electoral, equally powerful second chambers have proved sustainable. Of the seven federations in which all the members of the second chamber are directly elected, only Australia has a parliamentary form of institutions, and there, ultimately, the Senate can be overridden by the much larger House of Representatives in a joint sitting. Of the other eight parliamentary federations, not including Canada, the second chambers consist of members elected by state legislatures, appointed by state

governments, or selected by a variety of processes. In Canada, despite the almost equal formal constitutional powers of the Senate, in practice its lack of electoral legitimacy – in contrast to the democratic legitimacy accruing to the House of Commons – has induced senators to play a secondary role on most occasions. Would a Senate, composed of ambitious politicians with an ultimately electoral base and with their individual importance enhanced by a smaller chamber than the House of Commons, willingly eschew exercising their full constitutional powers? There is a very real risk that senators with an ultimate electoral mandate but without modification of their current formal powers would exercise those powers they have not dared to exercise in defiance of the House of Commons when they were unelected. Here we might note our pre-Confederation history in the United Canadas. In 1856, with John A. Macdonald's support, an elected second chamber was adopted. But after eight years of its assertiveness complicating the operation of responsible cabinet government, Macdonald admitted that the elective system "did not fully succeed in Canada as we expected." Consequently, in 1864 it was he who introduced into the conference at Quebec the resolution for appointment of members of the Senate (MacKay 1963, 31).

Does this mean that I support the status quo and am opposed to reform of the Senate? Not at all. First of all, my own comparative study of some 25 federations throughout the world has convinced me of the importance of an effective federal second chamber to the effectiveness of federations including parliamentary federations. To those in Canada who would argue for abolition of the Senate, I would point out that of 25 federations in the world today, only five do not have federal second chambers: these are the United Arab Emirates, Venezuela, and the three small island federations (each with less than a million in total population) of Comoros, Micronesia, and St. Kitts and Nevis. Virtually all the others, although in varied forms, have found a federal second chamber desirable for at least two functions: legislative review and the inclusion of distinctively regional views in the federal decision-making process. For information on this federal experience elsewhere, I am leaving for the Committee copies of a recent paper of mine entitled "Federal Second Chambers Compared."

As far as the function of independent legislative review and related activities such as investigative reports are concerned, the Canadian Senate has in fact (as pointed out in many of the contributions to the book edited by Serge Joyal, *Protecting Canadian Democracy*) provided a very useful complement to the House of Commons. Indeed, individual senators such as, to name a few, Hugh Segal, Lowell Murray and Michael Kirby, have made a superb contribution to the work of Parliament.

But as to the second major function of second chambers in federations generally, providing a channel for the involvement of distinctly regional viewpoints in policy making within institutions at the federal level, the Canadian Senate's lack of political legitimacy has meant that, by comparison with other federations, it has fallen short in performing these functions of a second chamber in a federation. These are the functions that Canadian political scientists have come to refer to as "intrastate federalism." That these functions are important has been recognized

by the Canadian Supreme Court when it declared in 1978 that "the Senate has a vital role as an institution forming part of the federal system … thus, the body which has been created as a means of protecting sectional and provincial interests was made a participant of the legislative process." Given the current weakness of the Senate in performing this federal role, Senate reform is in fact *important* and *urgent*.[1] Reform is needed to make more effective the federal coherence of Canada. As one of the most decentralized federations in the world, we need not only provincial autonomy, but federal institutions that bring provincial views more inclusively into federal decision making rather than depending solely on the processes of executive federalism. Reform to achieve this may require elections to the Senate by a different electoral process than that used for the House of Commons, *but also* a more rational basis of representing regional and provincial interests, and an adjustment of the Senate's constitutional powers to avoid deadlocks (possibly along the lines proposed in the Charlottetown Agreement). This is not the place to go into prescriptive detail, but reform requires looking not only at the method of selecting senators, but relating this to the role, functions and powers of the Senate within Parliament.

While such full reform is urgent for the welfare of Canada as a federation, it will require constitutional amendment, difficult as that may be, to redefine not only the method of selecting senators but also the basis of representation and powers of the Senate. Piecemeal reform by stealth and unrelated to the broader functions of the Senate, such as proposed by Bill C-20, not only does not go far enough, but is even risky and dangerous in so far as it does not take into account its likely impact upon the relative role and powers of the Senate.

REFERENCES

MacKay, R.A. 1963. *The Unreformed Senate of Canda*. Toronto: McClelland and Stewart.

Joyal, S. ed. 2003. *Protecting Canadian Democracy*. Montreal and Kingston: McGill-Queen's University Press.

[1] Here I would draw attention to the paper by Tom Kent, "Senate Reform as a Risk to Take, Urgently," in the Special Working Paper Series on Senate Reform 2007–8 of the Institute of Intergovernmental relations, Queen's University http://www.queensu.ca/iigr/working/senate/papers.html

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WHITHER 91.1? THE CONSTITUTIONALITY OF BILL C-19: AN ACT TO LIMIT SENATE TENURE

Don Desserud

Les propositions de réforme du Sénat sont mieux régies sous la formule d'amendement général du paragraphe 38(1) de la Loi constitutionnelle de 1982, selon lequel il est nécessaire d'obtenir le consentement du Parlement et d'au moins 7 provinces dont le total des populations doit représenter au moins 50 pourcent du total des populations de l'ensemble des provinces. Pour affirmer ceci, l'auteur s'intéresse à l'article 44 de la Loi constitutionnelle de 1982, à l'obligation du gouvernement fédéral imposée par l'article 42, et aux conséquences de la réforme du Sénat sur le système gouvernemental. La tentative du gouvernement fédéral de réformer le Sénat en se servant de loi ordinaire peut être perçu comme une violation du principe légal que les gouvernements ne doivent pas essayer de faire de manière indirecte ce qu'ils ne peuvent pas faire de manière directe.

> *It's supposed to be hard. If it wasn't hard, everyone would do it. The hard ... is what makes it great.*
>
> Tom Hanks as Jimmy Dugan in the film *A League of Her Own*

INTRODUCTION

Prime Minister Stephen Harper's Conservative government wishes to reform the Senate. However, the government is clearly aware that constitutional change is a tedious process in Canada, particularly when the provinces become involved, and so hopes to accomplish some of its reforms unilaterally. Bill C-19, "An Act to amend the *Constitution Act, 1867* (Senate tenure)" would abolish a senator's mandatory retirement at age 75 and limit tenure to an eight-year, non-renewable term. The Government maintains that section 44 of the *Constitution Act, 1982*, which gives Parliament the exclusive power to "make laws amending the

Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons," provides sufficient amendment authority for these reforms.

However, were C-19 enacted, the changes to the Senate could be broad, far-reaching and have the potential to affect provincial interests. As such, these reforms are more properly conducted under the amending formula found in section 42, under which an amendment to the constitution in relation to "the powers of the Senate and the method of selecting Senators" must be "made only in accordance with subsection 38(1)." Amendments made under section 38.1 require, in addition to the approval of Parliament, the consent of at least seven provinces (or two thirds), with an aggregate population of 50 percent or more of the provincial total. That the government has chosen not to take this admittedly more cumbersome route for the proposed reforms will deprive the country of an opportunity to fully assess their merits, and prevent the provinces from having a say in changes to an institution in which they have an important stake. Indeed, the government's attempt to avoid the restrictions imposed by section 42 can be seen as a violation of the constitutional principle that governments must not attempt to accomplish indirectly what they are constitutionally forbidden to do directly.[1] At least, such will be my argument.

LEGISLATIVE BACKGROUND

The government began this latest round of Senate reform with Bill S-4, also titled "An Act to amend the *Constitution Act, 1867* (Senate tenure)," and which received first reading in the Senate on 30 May 2006. Like C-19, S-4 would abolish mandatory retirement at age 75, and senators would serve an eight-year term. However, under S-4, this term would be renewable. On 28 June 2006, S-4 was referred to a hastily assembled Special Committee on Senate Reform for a "pre-study" of the "subject matter" of the Bill. The Special Committee was also to consider Senate reform in a wider context, including whether representation from western Canada should be increased. After conducting hearings in September 2006, the Special Committee delivered its report in which it agreed with the government that the proposed limitations on senator tenure were within the powers assigned to Parliament under section 44.

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[1] This principle is known as "colourability." See Albert S. Abel, "The Neglected Logic of 91 and 92," *The University of Toronto Law Journal* 19, no. 4. (1969): 487-521 (494, n.18), and Bora Laskin, *Canadian Constitutional Law: Cases, Text and Notes on Distribution of Legislative Power*, 3rd ed. (Toronto: Carswell, 1969), 189-191. See also Peter Hogg, *Constitutional Law of Canada: 2001 Student Edition* (Toronto: Carswell, 2001), 369; and Dale Gibson, "Founding Fathers-in-Law: Judicial Amendment of the Canadian Constitution," *Law and Contemporary Problems* 55(1) (1992): 261-284 (269).

After receiving second reading 20 February 2007, S-4 was then referred to the Senate's Standing Committee on Legal and Constitutional Affairs. After concluding its hearings, the Standing Committee reported that the constitutional implications for S-4 were unclear and undetermined. So, when the Standing Committee tabled its report on 12 June 2007, it made the sensible recommendation "[t]hat the bill, as amended, not be proceeded with at third reading until such time as the Supreme Court of Canada has ruled with respect to its constitutionality" (Spano 2007, 10). Otherwise, the Standing Committee accepted limited terms in principle but recommended they be increased from 8 years to 15 and made non-renewable. They also wished to reinstate the mandatory retirement age of 75 years.

The government, however, declined to consult the Supreme Court on the constitutionality of the legislation, and instead on 13 November 2007 introduced a modified version of S-4 in the House of Commons. This was Bill C-19. The probable strategy in reintroducing what is almost the same bill in the House of Commons rather than the Senate is that it will likely receive strong support in the lower house, making it then difficult for the Senate to reject the bill. In any case, the new bill does incorporate the Senate's recommendation that senatorial terms be non-renewable, thereby answering one of the concerns raised by the Standing Committee that the Senate's independence would be compromised were serving senators to become preoccupied with their term renewal. However, except for sitting senators, the bill did not retain mandatory retirement nor did it accept the recommendation that terms be set at 15 rather than eight years. Under C-19, then, current senators would continue to serve until they reached age 75, while senators appointed after the act came into effect would serve until they completed eight years of service regardless of their age. Finally, subsection 29.2 of the proposed amendment would provide for interrupted terms. This would allow a senator to leave the Senate to serve as an MP, but then complete the remaining years of his or her Senate term at a later date.

Supplementing C-19 is Bill C-20, "An Act to provide for consultations with electors on their preferences for appointments to the Senate," introduced in the House of Commons the same day. Under C-20, Elections Canada would be authorized to run elections or, more accurately, plebiscites, in provinces with Senate vacancies. These plebiscites would run concurrently with a general election, and the victorious government would then be expected to nominate the successful senatorial aspirants to fill the vacancies.[2] The two bills are, as Prime Minister Harper told the Special Senate Committee on Senate Reform, "yet another step in fulfilling our commitment to make the Senate more effective and more democratic" (Harper 2006).

Constitutionally, however, C-20 is a very different bill than C-19. While both are designed to provide, ultimately, for an elected senate, Bill C-20 neither commits nor forces the government or the governor general (nor could it) to choose

[2] C-20 is the same bill as C-43, introduced in the first session of the 39th Parliament.

the winner as a senator. The bill merely provides for a "consultation." In spirit and intent, this bill certainly violates section 42, under which changes in the method of selecting senators require the use of section 38. However, since it does not attempt to force the governor general to accept the results of these plebiscites, C-20 – technically anyway – is not a violation of section 42. Bill C-19, however, does not allow for such a technicality. Were C-19 merely to encourage senators to serve for only eight years, perhaps by providing for a significant compensation if a senator were to then retire, it would not change then the character of the Senate or its appointments. Senators could ignore the incentive, just as under C-20 the government and the governor general could ignore the preference of a province's electors for a Senate appointment.[3]

GOVERNMENT'S ARGUMENT

The government maintains that limiting Senate tenure falls within its exclusive powers to amend the Constitution provided by section 44 of the *Constitution Act, 1982*. It justifies this claim with three arguments.

The first is that all amendments to the Senate must fall under sections 41, 42 or 44 of the *Constitution Act, 1982*. Section 44 states: "Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons." Sections 41 and 42, then, are exceptions to, or restrictions on, section 44. The government maintains that the amending powers found under section 44 are general and residuary. As the term "Senate tenure" is not to be found under either section 41 or 42, it must by default be found under section 44.

The government's second point is found in the preamble to C-19 (fourth clause), which reminds us that Parliament has previously limited Senate tenure when it passed the *Constitution Act, 1965* changing the tenure of senators from life to age 75. This was done with neither provincial consent nor involvement, and was accomplished under the authority given to Parliament under section 91.1, which

[3] It is possible, however, that C-20 is in fact a stalking horse. Critics of C-19's predecessor, S-4, noted that changing Senate tenure might well affect, as Professor John McEvoy has put it, "the office of Governor General by altering the nature of the office to which she can summon qualified persons. If so, Bill S-4 is subject to the unanimity formula of section 41." (*Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, Issue 23 - Evidence, 22 March 2007). The argument here is that the constitutional powers held by the governor general to summon someone to the Senate are linked to the character of that chamber, and so changes to the character affect not only the powers of the Senate, but also the office of the governor general itself. It may be that by proposing C-20, the government hopes to deflect such a claim being levelled against C-19. Since C-20 is clearly designed to affect the summoning of senators, then C-19 must be about something else. Let C-20 fail; but in doing so, similar criticism of C-19 will be mitigated.

was an amendment to the *BNA, 1867* through the *BNA, 1949 (2)*. However, the *Constitution Act, 1982* repealed the *BNA, 1949 (2)*, and the government argues that with this repeal section 91.1 was (mostly) replaced by section 44.[4] Specifically, the powers that accrued to section 44 certainly included the power to limit Senate tenure, as was used to impose retirement at age 75 with the *Constitution Act, 1965*. The government acknowledges that section 44 does not expand the powers provided under 91.1. But, as the 1965 Act showed, section 44 doesn't need to because 91.1 provided sufficient power to limit Senate tenure.

Finally, the government argues that changing the term of a senator affects neither the powers nor the method of selecting senators, as described under section 42. Senators will still be "summoned" by the governor general on the recommendation of the prime minister. The length of their tenure does not legally affect this summons, or any associated processes. As well, whether a senator serves for eight years or until retirement does not affect the constitutional position of the Senate, or, more specifically, its legal powers. The Senate's approval would still be needed before legislation could become law, and so forth. Besides, under the current system, senators are often appointed just shy of their seventy-fifth birthdays, and so often serve for much shorter terms than eight years. This is not thought to affect the powers of Senate. Hence, the length of a senator's term cannot be a characteristic of the constitutional identity or character of the Senate.

RESPONSE

In this section of this paper, I attempt to counter these arguments. In the first section, I will maintain that justifying Parliament's right to make unilateral amendments to the Senate, based on what was in fact a temporary authority provided under *BNA,1949 (2)*, misunderstands the circumstances under which 91.1 came into being. Furthermore, such an argument ignores the subsequent negotiations to rectify what many, including (and especially) the provinces, believed was an unwarranted power grab by the federal government. The *Constitution Act, 1982* succeeded, finally, in restoring a federal-provincial balance to the amending power, and so whatever amending powers it gave Parliament, they are fewer than the powers Parliament had held under section 91.1.

My second argument looks at the intentions of the framers in writing the amending formulas as revealed by the structure and layout of the formulas themselves as well as the context in which they were drafted. The several amending formulas strike a balance between parliamentary power, flexibility and provincial

[4] The government is not alone in this interpretation; in fact, it is rather widely held. See, among others, Hogg, *Constitutional Law of Canada*, 96, and Luc Tremblay, *Rule of Law, Justice, and Interpretation* (Montreal: McGill-Queen's University Press, 1997), 263. Of course, agreeing that section 44 received all the powers granted to Parliament under 91.1 still leaves open the question of just what powers were so granted.

involvement. But in striking such a balance, the framers demoted Parliament's unilateral power to amend the constitution from its former status as residuary and general. The general formula is now found instead under section 38, where amending powers are shared with the provinces.

In the final section of the paper, I will argue that the Senate's place in the Canadian Constitution is complicated and varied, and so even what appear to be minor changes to the Senate have the potential to affect a wide range of constitutional matters. As well, the effects of the length of a senatorial term are themselves fundamentally ambiguous, and lend themselves too easily to slippery-slope arguments. For both these reasons, changes to Senate tenure are better left under the general formula, a place designed for just such constitutional ambiguities.

CONSTITUTIONAL HISTORY

Much of the history of Canada's quest for a patriated[5] Constitution has been a struggle between the federal and provincial governments over who should be able to amend what and how.[6] The federal government, speaking on behalf of Parliament, tried to guard or enhance what it believed was its unilateral and residuary right to amend much of the Constitution, including institutions such as the Senate. However, the provinces, albeit usually more concerned with cultural or economic issues, nevertheless worried that a disempowered Senate would lose whatever powers it had to protect provincial interests. In the end (that is, by 1982), the provinces secured this important victory: they wrestled the general amending power away from Parliament, and narrowed the scope of Parliament's unilateral amending power. Parliament retained its veto: its approval, save for amendments to a province's own constitution, is still required for any amendment. Nevertheless, Parliament's amending powers as now contained in the *Constitution Act, 1982* are the most restricted of all the various proposals over the years. As Stephen

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[5] "Patriated" is not as anachronistic a term as it might seem. In 1963, Laskin used the term to describe the "sporadic attempts to eliminate the need for formal resort to the United Kingdom Parliament" that had taken place "for over three decades." Bora Laskin, "Amendment of the Constitution," *The University of Toronto Law Journal* 15, no. 1. (1963), 190-4 (191).

[6] For the early history of Canada's attempts to agree on an amending formula, see Paul Gérin-Lajoie, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 1950); E.R. Alexander, "A Constitutional Strait Jacket for Canada," *The Canadian Bar Review* 43, no. 2 (1965), 262-313; Bayard William Reesor, *The Canadian Constitution in Historical Perspective: with a Clause-by-Clause Analysis of the Constitution Acts and the Canada Act* (Scarborough, Ont.: Prentice-Hall, 1992), 126-46; James Ross Hurley, *Amending Canada's Constitution: History, Processes, Problems and Prospects* (Ottawa: Canada Communication Group, 1996), and J.R. Mallory, *The Structure of Government in Canada*,(Toronto: MacMillan of Canada, 1971), 370-408.

Scott wrote in 1982, "[t]he language of section 44 creating the unilateral federal procedure is framed in terms distinctly narrower than those of its predecessor, section 91.1 of the amended 1867 Act" (Scott 1982, 277, n. 94). I would go so far as to say that the amending formulas should be seen not just as the repeal of the powers granted to Parliament under the *BNA,1949 (2)*, but their refutation. Any argument that suggests that under the 1982 formulas Parliament retained the amending powers formerly found under 91.1 must acknowledge that the provinces never accepted that 91.1 was a legitimate power under a federal system, and would not have agreed (and did not agree) that such power should stand.

In 1949, the British Parliament amended the *BNA, 1867* with an Act titled the *British North America Act (2) 1949*, which supplemented the powers granted to the federal government under section 91. Under this subsection, named 91.1, Parliament was granted power over "the amendment from time to time of the Constitution of Canada," except over those areas under the exclusive jurisdiction of the provinces (so section 92 of the *BNA, 1867*), the use of French and English, and the extension of Parliament beyond five years.[7] When the *BNA, 1949 (2)* was enacted, constitutional scholars at the time assumed that under this amendment Canada now had most of the power it needed to amend its own constitution, with Great Britain retaining, in F.R. Scott's words, only a "ghostly presence" in Canadian constitutional affairs (Scott 1950, 204). Most regarded the *BNA, 1949 (2)* as the penultimate step in patriating the Canadian Constitution; clearly Canada was moving steadfastly towards "a normal responsibility of nationhood" (Brady 1963, 493-94).[8] Furthermore, the *BNA, 1949, (2)* was seen as complementing the

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[7] The text of 91.1 reads: "The amendment from time to time of the Constitution of Canada, except as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces, or as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a province, or to any class of persons with respect to schools or as regards the use of the English or the French language or as regards the requirements that there shall be a session of the Parliament of Canada at least one each year, and that no House of Commons shall continue for more than five years from the day of the return of the Writs for choosing the House; provided, however, that a House of Commons may in time of real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such continuation is not opposed by the votes of more than one-third of the members of such House." The use of French and English is now covered under the *Constitution Act, 1987*, section 133, and *Constitution Act, 1982*, section 16 through 20, while the provision allowing Parliament to extend its term in times of emergency is covered by *Constitution Act, 1982*, section 4.1.

[8] Brady quotes Prime Minister Louis St. Laurent: "The United Kingdom authorities, I will not say resent, but do not like the position in which they are placed of having to rubber-stamp decisions for Canadians, made by the representatives of Canadians, and having to do it because no other procedure has yet been devised in Canada for implement-

Canadian Citizenship Act, 1947, the new Letters Patent outlining the power of the governor general – now issued under the Great Seal of Canada (1947)[9] – as well as the 1947 JCPC decision that would give birth to the *Supreme Court Act, 1949*.[10] Also worth mentioning is the *BNA, 1949 (1)*, which brought the colony of Newfoundland into Confederation, completing Canada's dominion over the northern half of North America. All that remained was a comprehensive amending formula and the last piece of the constitutional puzzle would be put into place.

While for many a welcome step towards full independence,[11] the sweeping powers that 91.1 gave Parliament nevertheless alarmed both the provinces and constitutional scholars (Favreau 1965, 25). Rowat (1952, 11) claimed "that the federal Parliament has for the time being assumed a power of unilateral amendment which does not accord with the principle of federalism." F.R. Scott's criticisms were stronger. He worried over the vagueness of the phrase "the Constitution of Canada," a phrase he referred to as "novel" and unknown under "Canadian constitutional law." The phrase could conceivably encompass every aspect of the Canadian political and legal system, and as such might provide Parliament with near-limitless amending powers. In any case, wrote Scott, the provinces were left out and clearly the "compact theory of Confederation" was now dead (Scott 1950, 202-3, 207).

The provinces were indeed left out. Prime Minister Louis St. Laurent had not consulted them before moving the joint address requesting the British Parliament amend the *BNA, 1867* (apparently, he saw no point, as he was sure that Quebec premier Maurice Duplessis would never agree) (Cairns 1992, 140). This lack of provincial consultation did not go unnoticed, even in Great Britain. But St. Laurent assured all concerned that the new powers afforded Parliament by *the BNA, 1949 (2)* were not meant to be permanent. All that was needed were "general over-all

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ing these decisions. I believe we must recognize that either Canada is a sovereign state or she is not. If the former is true, then Canada must act as an adult nation and assume her own responsibilities." *Debates of the House of Commons, 2nd* Session, *1949,* I, *832*, quoted in Alexander Brady, "Constitutional Amendment and the Federation," *The Canadian Journal of Economics and Political Science* 29, no. 3 (1963): 486-94 (493-4). See also Alain Cairns, *Charter versus Federalism: The Dilemmas of Constitutional Reform* (Montreal: McGill-Queen's University Press, 1992), 21.

[9] W.P.M.K., "The Office of Governor-General in Canada," *The University of Toronto Law Journal* 7, no. 1 (1947): 474-83 (474).

[10] Frederick Vaughan, *Canadian Federalist Experiment: From Defiant Monarchy to Reluctant Republic* (Montreal: McGill-Queen's University Press, 2003), 118. See also W.R. Lederman, "Notes on Recent Canadian Constitutional Developments," *Journal of Comparative Legislation and International Law* (3rd Ser.) 32, no. 3/4 (1950): 74-7.

[11] Although not welcome to those who saw Canada's move towards independence from Great Britain as a loss of a valuable British identity. See Philip Buckner, *Canada and the End of Empire,* (Vancouver: UBC Press, 2004), 50.

amending procedures." Were the federal and provincial governments able to agree on such procedures, "the federal power granted by the 1949 amendment would be *ipso facto* subject to re-definition and could be limited to its *true intent* by more precise terms" (emphasis added).[12] So in 1950, St. Laurent convened a dominion-provincial conference on the Constitution to do just that.

The context for the discussions concerning the new amending formula was to be a proposal offered by "a sub-committee of experts" back in 1936.[13] The 1936 proposal had been a somewhat tentative response to the Statute of Westminster (1931), under which the British Parliament renounced any further legal power over its former colonies, "the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland." The intention of the Westminster statute was that these colonies, now equal members of the Commonwealth, would attend to their own constitutional affairs by adopting or using exclusively[14] their own amending formulas. However, the Canadian provinces protested that in the absence of an agreed-upon amending formula, the statute would provide Parliament with far-reaching and comprehensive amending powers (Mallory 1982, 58). So, the British Parliament agreed, for the time being, to act as "a legislative trustee" for Canada (Laskin 1963, 190).[15]

The 1936 proposal did not succeed. While some provinces embraced it, others did not. Nor did the federal government. And then the Depression, followed by the Second World War, intruded on the constitutional reform process. However, the 1936 proposal contained several remarkable features which would inform the 1950 negotiations, particularly (for our purposes) the negotiations pertaining to the Senate. Under the 1936 proposal, Parliament would have the unilateral right to make changes to, among other subjects, the qualifications of senators (with an exception made for Quebec), the "Summons of Senators," resignation and disqualification of senators, the choice of Senate Speaker, quorum and voting in Senate and the rule prohibiting senators also holding a seat in the Commons (Gérin-Lajoie 1950, 306). However, the proposal contained another formula under which amendments would require the consent of Parliament and the legislative assemblies of two-thirds of the provinces whose aggregate population was 55 percent of the total. Subject to this amending formula would be changes to the number of senators, provincial representation in Senate, the addition of senators and reduction to normal number, the maximum number of senators and the "Tenure

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[12] Lederman, "Notes on Recent Canadian Constitutional Developments," 76. See also Gérin-Lajoie, *Constitutional Amendment in Canada*, xxv.

[13] Gérin-Lajoie, *Constitutional Amendment in Canada*, xxxvi, 248, 301. See also Alexander, "A Constitutional Strait Jacket for Canada," 271, and Mallory, *The Structure of Canadian Government*, 378-9.

[14] Australia, for example, already had an amending formula for its constitution.

[15] Laskin is quoting Ivan Cleveland Rand.

of place in Senate" (ibid., 310). Also included was a provision for a joint session to override Senate intransigence, revealing that those who drafted the proposal anticipated that reforms made under it would affect, but might not be accepted by, that chamber.

Even with the 1936 proposal available as a draft, the 1950 conference failed to find agreement on a new formula, the provinces themselves disagreeing on how flexible the amending formula should be (Alexander 1965, 274).[16] It would not be until 1960 before another patriation formula would emerge. This was the Fulton formula, named after Prime Minister John Diefenbaker's minister of justice, E. Davie Fulton, and it was clearly a reaction to the fear that section 91.1 gave Parliament far too much power. But the Fulton formula swung the pendulum too far towards provincial power by insisting all amendments require, in addition to Parliament, the support of all ten provinces. So Fulton's successor, Guy Favreau, was given the task of finding a compromise. The result was the Fulton-Favreau formula, which emerged in 1964. This formula maintained the general and residuary amending power of Parliament, but limited the "scope of Parliament's exclusive authority." As well, the proposal established the principle that the provinces had a stake in any constitutional reforms that were either "linked to or identified with the federal nature of Canada (e.g., the Senate)"(Meekison 1982, 115-16). This expanded the previous principle that only those matters directly affecting the provinces should require provincial approval. As well, under the Fulton-Favreau formula a qualifying phrase was added to the unilateral amending powers of Parliament. Now, Parliament's powers to amend "the Constitution of Canada" were clarified to mean "in relation to the executive Government of Canada, and the Senate and House of Commons." Finally, the restrictions on this exclusive power were expanded to include several provisions affecting the Senate.[17] Amendments to such matters would now require the consent of "two-thirds of the provinces representing at least fifty per cent of the population of Canada according to the latest general census."

The Fulton-Favreau formula came very close to being ratified, but in the end was not. The next attempt at an agreement over patriation would not come until June 1971, when the federal and provincial governments agreed to a constitutional amendment package named the Victoria Charter. Just like the negotiations which eventually brought forth the Fulton-Favreau formula, the discussions prior to the writing of the Victoria Charter focused on "limiting the scope of Parliament's exclusive authority to amend parts"(Meekison 1982, 116). Under the Victoria Charter's article 53, Parliament retained its right to "exclusively make laws from time to time amending the Constitution of Canada," but the Fulton-Favreau's restriction remained as well, that is, such power was again clarified to

[16] See also Laskin 1963.

[17] The text of the Fulton-Favreau formula and proposed amendments is widely available. See Favreau, *The Amendment of the Constitution of Canada*.

mean specifically "in relation to the executive Government of Canada and the Senate and the House of Commons." As well, the previous article, no. 52, allowed the provinces to initiate amendments, something they had not been permitted previously (save for amending their own constitutions). Parliament's veto remained; however, with this new provincial power to initiate amendments, Parliament would no longer be able to simply ignore provincial calls for constitutional reform. To borrow a classic phrase in parliamentary history, the provinces had seized (some of) the constitutional initiative.

The Victoria Charter also allowed for considerable flexibility: no provisions, not even the offices of the Queen or Governor General, required unanimous provincial consent. Instead, amendments would be made under an amending formula that provided for a balance of provinces and population. Article 55 specified what areas would fall under the general formula, three of which were Senate related: "(4) the powers of the Senate; (5) the number of members by which a Province is entitled to be represented in the Senate, and the residence qualifications of Senators; [and] (6) the right of a Province to a number of members in the House of Commons not less than the number of Senators representing the Province" (Hurley 1996, Appendix 4). Also significant, the Senate's power over constitutional amendment was reduced to a ninety-day suspensory veto.

The Victoria Charter, however, also failed to be ratified. In 1978, undoubtedly frustrated by such continual failures, Prime Minister Pierre Trudeau put forth a bold constitutional amendment package known as Bill C-60.[18] The 1978 initiative was one of, if not *the*, most ambitious and far-reaching constitutional proposal in Canadian history, indeed much more ambitious than what finally took place in 1982. In addition to adding a Charter of Rights and amending formulas, C-60 would have entrenched the Supreme Court, defined and limited the powers of the prime minister and Cabinet and provided for House of the Federation in place of the Senate whose members would be "elected" jointly by the House of Commons and the appropriate provincial legislatures. Just as they did after the Statute of Westminster and the *BNA, 1949 (2)*, the provinces reacted with alarm and they pressed upon the federal government to first request a ruling from the Supreme Court on the constitutionality of the proposed reforms, specifically those affecting the Senate. This time the federal government agreed, and the result was "Reference re: Authority of Parliament in Relation to the Upper House (1979)," commonly known as the Upper House Reference.[19]

Bill C-60 never did get implemented; it died on the order paper as a federal election was held in 1979, one in which the PCs under Joe Clark gained a minority government. However, the Court's decision was delivered before the election

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[18] See Gregory Brandt, "The Constitutional Amendment Act (Bill C-60)," *University of Western Ontario Law Review* 17 (1978-1979): 267-94.

[19] See David E. Smith, "Empire, Crown and Canadian Federalism," *Canadian Journal of Political Science*, 24, no. 3 (1991): 451-73.

and remains the subject of some discussion today. In its decision, the Court ruled that while not all limits on Senate tenure were necessarily *ultra vires* Parliament, neither did Parliament have the unilateral right to impose such limitations. "At some point," said the Court, "a reduction of the term of office might impair the functioning of the Senate in providing what Sir John A. Macdonald described as 'the sober second thought in legislation'" (Reference re: Authority of Parliament, 76). Furthermore, Parliament's unilateral power to reform the Senate was restricted to "mere housekeeping" changes.[20] The Court ruled that the provinces had a stake in the integrity of the Senate and its ability to function, and so any changes that touched on the Senate's constitutional role required some level of provincial consent (Smith 1991, 468). Furthermore, the Court excluded from section 91.1 those matters that could affect "the federal-provincial relationships in the sense of changing federal and provincial legislative powers," as well as "certain sectional and provincial interests such as the Senate" (Tremblay 1997, 263).

At this point, it would be useful to recap. Over many years of constitutional negotiations, the provinces achieved several victories. While these victories were not constitutionally entrenched (a patriation agreement having yet to be achieved), they nevertheless provided the basis for what would be accomplished in 1982. These victories were (1) the scope of Parliament's unilateral amending power was clarified and restricted so that it applied only to its own institutions; (2) the Senate was now acknowledged as a special case, that is, a federal institution in which the provinces had a stake. Therefore some level of provincial consent was needed before amendments affecting the Senate could be made, save for "mere housekeeping" matters. And, finally, (3) the principle that some combination of provinces representing the regions of the country as well as the population should form the basis for a comprehensive amending formula. In the next chapter of constitutional negotiations, beginning in 1978 and culminating in the patriation of the Constitution in 1982, this last principle would become entrenched as the new general amending formula.

PATRIATION OF THE CONSTITUTION – INTENTIONS OF THE FRAMERS

If, in the wake of the 1978 initiative, the provinces needed any more evidence that the Trudeau government was quite prepared to patriate the Constitution unilaterally, they certainly found it in 1980, when the Liberals returned to power and

[20] Changing the number needed for quorum is commonly cited as an example of a "housekeeping matter." In any case, the Court's decision in the Upper House Reference was criticized by several legal scholars, including Hogg ["Comment," *Canadian Bar Review*, 58, no. 3 (1980): 631-45], who maintained that the Parliament of Canada did indeed have the right to make radical changes to the Senate under 91.1, including its abolishment.

Trudeau to the prime minister's office. Trudeau had followed his advisors' recommendations that he leave constitutional issues out of the 1980 campaign, and the ploy seemed to work: the Liberals won a substantial majority. However, during the campaign preceding Quebec's referendum on separation (20 May 1980), he was not so circumspect, and boldly promised a renegotiated constitution if Quebec voters rejected the sovereignty-association vote. That ploy worked too, the "no" votes totalling just under 60 percent. So Trudeau promptly threatened to unilaterally request that the British Parliament amend the British North America Acts to allow for an entrenched charter of rights and a Canadian amending formula. The provinces were, once again, alarmed (Russell 1993, ch. 8).

The conflicts and controversies, not to mention drama, surrounding the constitutional negotiations which followed have been well told by others,[21] and won't be repeated here. My interest at this point in the paper is in discussing the consequences of the federal-provincial negotiations over the various amending formulas for Senate reform.

Of course, much of what ended up in the *Constitution Act, 1982* was the result of compromise. What, then, did the provinces get in 1982 and what did they give up, concerning Senate reform? For that matter, what did the Senate itself get? Here the compromise is interesting. Stephen Scott explains that in the earlier drafts of what became the *Constitution Act, 1982*, written at a time when the federal government stood very much alone in its decision to patriate the Constitution unilaterally, the Senate's role in future constitutional amendments was significant: "In the revised proposal of April 24, 1981, the Senate had full coordinate power in *all* cases. A beleaguered federal government was in no position to press forward to Westminster, not only against the opposition of eight provinces, but without the concurrence of the upper house in the traditional joint address to the Queen. Coordinate power for the Senate was in effect to be the price of the Senate's cooperation" (Scott 1982, 265).

However, this changed when the federal and provincial governments (without Quebec) agreed on a new constitution in November 1981. No longer needing the Senate's support (at least not so much), the federal government then inserted provisions for overriding Senate intransigence, in particular over its own reform. The compromise for the provinces was section 42. By involving the provinces through the general formula, section 42 could now "provide the Senate with a substantial degree of entrenchment" (ibid.). On the one hand, then, the Senate actually lost power with the *Constitution Act, 1982*. It had been an equal partner in constitutional amendments, but now it could be overruled. On the other hand, the provinces gained power over amendments affecting the Senate, providing a measure of constitutional protection for that body. Therefore, one consequence of *Constitution*

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[21] For example, Keith Banting and Richard Simeon, eds, *And No One Cheered: Federalism, Democracy, and the Constitution Act* (Toronto: Methuen, 1983), and Russell, *Constitutional Odyssey*.

Act, 1982 was a shift of power over Senate reform away from Parliament to the provinces, thereby buttressing the provinces' claim that they had a constitutional stake in the function and position of the Senate.

The second compromise benefiting the provinces was the promotion of the formula now found in section 38. In all previous proposals, the listing of the amending powers began with a general statement under which Parliament was acknowledged as having the power to amend the Constitution. Parliament's power in this regard was accepted and assumed to be general and residuary. Over the history of these constitutional negotiations and the proposals associated with them, the scope of the general power was narrowed as more restrictions were imposed (although sometimes removed again). Soon, however, a principle emerged: the provinces had a general stake in much of the constitution, including certain federal institutions, such as the Supreme Court and, more specifically for our purposes, the Senate. Amendments affecting such institutions, then, should involve the provinces at some level. Rather than add a long and growing list of restrictions to Parliament's general power, a new general power was created. This became entrenched with the *Constitution Act, 1982* as the general authority for amendment under section 38, the formula which requires, in addition to Parliament, the consent of two thirds of the provinces with 50 percent aggregate population (note that this is 50 percent of the total provincial population, and not the country as a whole). It is no accident that Part V, the amending formulas of the *Constitution Act, 1982*, begins with section 38, nor is it a coincidence that section 38, and it alone, is referred to as the "general formula" by the gloss.

But what of the general language still contained in section 44? Here we can turn again to the context in which this section was written. The intention of section 44 was clearly explained to the 1981 Special Joint Committee on the Constitution by then-minister of justice, Jean Chrétien. Clark's former minister for Indian and Northern Affairs, the Honourable Jake Epp, was a member of the 1981 Special Joint Committee, which examined earlier drafts of what would become the *Constitution Act, 1982*. Epp expressed concerns about the powers to amend the Senate that were provided to Parliament under (what would become) section 44. Therefore, Epp introduced an amendment to remove the words "the Senate" from the clause "in relation to the executive government of Canada or the Senate and House of Commons." In doing so, Epp maintained that "[t]his amendment would assure that the role and scope of the Senate could not be changed simply through the House or a federal initiative." However, Epp was satisfied with the assurances provided by Chrétien, who suggested that the amendments to the Senate foreseen by the framers of this section were well in keeping with the "housekeeping" measures insisted upon by the Court in the Upper House Reference, such as, in Chrétien's own example, changing quorum (Canada 1980–1981).[22]

[22] I am indebted to Professor John McEvoy, whose testimony before the Senate Standing Committee on Legal and Constitutional Affairs, pointed me to this reference (22 March 2007).

AN ENTANGLED SENATE

We come now to the section of the paper in which I argue that the Senate's constitutional position, as befitting a federal body, is a complicated one and cannot easily be altered without affecting many other parts of the Constitution, not all of which are immediately apparent. Furthermore, the specific effects of changing Senate tenure from its present form to eight years are difficult to determine. This is why such changes should be conducted under section 42. Consider, for example, the *Senate and House of Commons Act*, which governs "the privileges, immunities, and powers of the Senate and House of Commons and their members," and which includes provisions for resignations. As it was enacted under the authority found in section 18 of the *BNA, 1867*, some constitutional experts wonder whether the *Senate and House of Commons Act* is therefore a part of the Constitution of Canada. Given that the authority under which it was enacted was a constitutional head of power, I would argue that it is. But as such, any changes to those privileges, etc., are constitutional changes that can only be amended "in accordance with the procedures prescribed in section 38(1)" (Scott 1982, 257). A change in tenure, surely, is a change in a senator's privileges.

Or consider the amending formulas themselves. Amendments to the amending formula can only be made under the unanimity formula found in section 41. But with the exception of section 45 and the exceptions provided by the override procedures in section 47, all amendments to the Constitution require the approval of the Senate. Indeed, the Senate can initiate amendments. What, then, is the Senate as it is defined under the Constitution, specifically in relation to amendments? More specifically, would changing the Senate constitute a change to some of the amending formula? If so, such a change could require the unanimous consent of the provinces.

However, this cannot be right. If it were, then no amendments affecting the Senate could be made except with the unanimous approval of Parliament and the provinces; the other amending formula would be redundant and impossible to use. Yet surely this is precisely why section 42 is there. It anticipates that changes to the Senate may affect other parts of the Constitution. It recognizes that those effects are not always clear or apparent. Under this clause the provinces have an opportunity to consider whether their interests are affected, as does the public at large. Rather than impose an impossibly rigid formula, though, section 42 provides a compromise.[23]

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[23] It's worth noting that unlike section 38, section 42 does not allow for a province to opt out, nor does it require section 38.2: "Majority of members; An amendment made under subsection (1) that derogates from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province shall require a resolution supported by a majority of the members of each of the Senate, the House of Commons and the legislative assemblies required under subsection (1)."

I am arguing here that section 42 is specifically designed to deal with such amendments, the effects of which are fundamentally difficult to determine. The question of the impact of an eight-year, fixed Senate tenure compared to (say) a one-year tenure or a 15-year tenure, provides a good example to make my point. Consider one of the criticisms levelled against the eight-year term: that such a length corresponds too well to the normal parliamentary cycle of four years. With eight-year senatorial terms, a government would only have to win two successive majorities in order to have the opportunity to recommend the appointment of every single senator, probably from its own party. Of course, after winning two successive elections, a party in power might well lose the third. But then the new government would find itself facing a Senate in which they had no members, an equally unpalatable option.

This poses an interesting partisan question that the Constitution does not address, and from which constitutional law shies away. From a constitutional standpoint, a senator is an independent decision maker and legislator, just like an MP. The constitution provides no check on one party dominating or even winning every seat in the House of Commons, as happens at the provincial level, my own province of New Brunswick being an example. I doubt a constitutional challenge would be successful were it argued that the single-member, simple-plurality electoral system currently practised in Canada is unconstitutional because it allows for one party to win every seat, thereby undermining the adversarial nature of opposition politics and therefore responsible government (though the suggestion intrigues!).

Nevertheless, what if the reduction in term were to one year, as several critics of the proposal have suggested, and that the Supreme Court itself pondered in the Upper House Reference? Surely a one-year term, for reasons different than those outlined above, would place serious constraints on the Senate's ability to do its job. A one-year term would certainly not provide sufficient opportunity for the Senate to fulfill its duty to be a chamber of sober second thought. It must be true, then, that limitations on terms can affect the Senate's ability to perform its duties as expected by the Constitution. The question becomes one of degree. If not one year, what about two? What about three? And so on. This is not a frivolous point. Drawing an absolute line between when a term limit is too short and acceptably short is impossible. Therefore, constitutions find other means for dealing with such questions. One is to avoid answering the question and instead substitute a process for the answer. No, we don't know how long an optimal term for a senator is, so instead we will force any changes to such terms through a complex process. Then, by the time the process is over, we can at least be assured that most, and maybe all, of the contingencies will have been discussed and incorporated in whatever decision emerges.[24]

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[24] On vagueness in law, see Dorothy Edgington, "The Philosophical Problem of Vagueness," *Legal Theory,* 7, no. 4 (2001): 371-8, and Timothy Endicott, "Law is Necessarily Vague," *Legal Theory,* 7, no. 4 (2001): 379-85.

We do not know what effect an eight-year term will have. The debate so far seems to be caught up in trying to decide whether the effect of an eight-year term would be deleterious. It is quite possible that eight-year terms are salubrious. But this is not the point. The point is that limiting the term to eight years constitutes a change warranting careful consideration, and is of such a nature as to possibly involve provincial interests. Furthermore, Senate reform is a complex affair, so that changes to tenure affect many other aspects of it, including the powers of the Senate itself. The effects are unpredictable. However, this is precisely why any attempts at Senate reform should be governed by the general formula. That is, I repeat, one of the reasons why the general formula is there: to give all interested parties a chance to consider hitherto unforeseen effects of proposals for constitutional change.

CONCLUSION

Constitutional change in Canada is a complicated, tedious and, at times, impossible affair. However, the rules governing amendments are there precisely to ensure that changes made to the Constitution are pursued with the appropriate level of public consultation. The amending formulas found under Part V of the *Constitution Act, 1982*, are not perfect. Some are probably too strict; perhaps others are too lenient. But they provide a balance between the expedience of unilateral powers of amendment and the rigidity of unanimity. Section 38 provides that compromise, and section 42 enhances it.

I do not claim that the case I have made here against unilaterally imposing eight-year terms on the Senate is airtight. I doubt such a case could be concocted. And were the government restricted to choosing between unilateral amendment and unanimity, then I might sympathize with the unilateral argument. However, the *Constitution Act, 1982* provides a third option. It is there to provide a sensible compromise between those two extremes. To circumvent these sections is to undermine the federal integrity of the Constitution.

REFERENCES

Abel, A.S. 1969. "The Neglected Logic of 91 and 92," *The University of Toronto Law Journal* 19(4): 487-521.

Alexander, E.R. 1965. "A Constitutional Strait Jacket for Canada," *The Canadian Bar Review* 43(2): 262-313.

Brady, A. 1963. "Constitutional Amendment and the Federation," *The Canadian Journal of Economics and Political Science* 29(3): 486-94.

Cairns, A.1992. *Charter versus Federalism: The Dilemmas of Constitutional Reform* Montreal and Kingston: McGill-Queen's University Press.

Canada 1981–1982. Parliament. House of Commons. Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada. *Minutes of Proceedings and Evidence, 6 Nov. 1980 - 13 Feb. 1981*, 53:50.

Favreau, G. 1965. *The Amendment of the Constitution of Canada*. Ottawa: Queen's Printer.

Gérin-Lajoie, P. 1950. *Constitutional Amendment in Canada*. xxxvi, 248, 301. Toronto: University of Toronto Press.

Gibson, D. 1992. "Founding Fathers-in-Law: Judicial Amendment of the Canadian Constitution," *Law and Contemporary Problems* 55(1): 261-284.

Harper, S. Office of the Prime Minister. 2006. 7 September. *Senate Reform*. Accessed online at http://www.pm.gc.ca/eng/media.asp?id=1306

Hogg, P. 2001. *Constitutional Law of Canada: 2001 Student Edition*. Toronto: Carswell.

Hurley, J.R. 1996. *Amending Canada's Constitution: History, Processes, Problems and Prospects*. Ottawa: Canada Communication Group.

Laskin, B. 1963. "Amendment of the Constitution," *The University of Toronto Law Journal* 15(1):190-94.

— 1969. *Canadian Constitutional Law: Cases, Text and Notes on Distribution of Legislative Power*, 3rd ed. Toronto: Carswell.

Mallory, J.R. 1982. "The Politics of Constitutional Change," *Law and Contemporary Problems* 45(4): 53-69.

Meekison, J.P. 1982–83. "The Amending Formula," *Queen's Law Journal* 8: 99-122.

Reference re: Authority of Parliament in Relation to the Upper House (1979), [1980] 1 S.C.R. 54, 76.

Rowat, D.C. 1952. "Recent Developments in Canadian Federalism," *The Canadian Journal of Economics and Political Science* 18(1): 1-16.

Scott, F.R. 1950. "The British North America (No. 2) Act, 1949," *The University of Toronto Law Journal* 8(2): 201-7.

Scott, S. 1982. "The Canadian Constitutional Amendment Process," *Law and Contemporary Problems* 45(4): 249-81.

Smith, D.E. 1991. "Empire, Crown and Canadian Federalism," *Canadian Journal of Political Science* 24(3): 451-73.

Spano, S. 2007. 21 November. *Legislative Summary: Bill C-19*. LS-580E. Parliamentary Information and Research Service. Ottawa: Library of Parliament.

Russell, P. 1993. *Constitutional Odyssey: Can Canadians Become a Sovereign People?* 2nd ed. Toronto: University of Toronto Press.

Tremblay, L. 1997. *Rule of Law, Justice, and Interpretation*. Montreal and Kingston: McGill-Queen's University Press.

8

CONSTITUTIONAL DOUBTS ABOUT BILL C-20 AND SENATORIAL ELECTIONS

Andrew Heard

Cet article examine les aspects les plus importants des rôles et de la composition du Sénat dans le système politique canadien. L'article se penche sur le rôle du Sénat qui consiste à fournir « une réflexion sereine » et se demande si des mandats de courte durée (comparé à la durée moyenne actuelle des mandats) auraient une influence négative sur ce rôle. Cet article entreprend une analyse empirique du comportement sénatorial. Finalement, l'article examine en détail les conséquences possibles du projet de loi C-19 dans trois contextes : le remplacement de l'âge de retraite obligatoire par des mandats de durée limitée pour les nouveaux sénateurs; les conséquences possibles des pratiques relatives à l'ancienneté au Sénat; et la question de savoir si les sénateurs dont la durée du mandat est limitée ont tendance à agir de manière plus indépendante que ceux en place pour une période de temps plus longue.

Bill C-20 represents a novel attempt at Senate reform that deserves substantial attention. Unfortunately, serious questions arise about whether C-20 is within the legislative powers of Parliament.

Proponents of C-20 argue that it does not disturb the relevant provisions of the *Constitution Act, 1867* and therefore does not require a constitutional amendment. Furthermore, they argue that the Supreme Court of Canada's opinion in the *Upper House Reference* (1979) was rendered moot by the *Constitution Act, 1982*. Therefore, in this case, we need not consider the relevance of the Court's finding that Parliament cannot legislate direct elections to the Senate. Bill C-20's critics, on the other hand, contend that it is indeed unconstitutional. They assert that the *Upper House Reference* still stands and that the election of Senate nominees amounts to an invalid scheme to create an elected Senate. In short, the government is attempting to do indirectly what it cannot do directly.[1] These different

[1] The principle has been developed since *A.G. Ontario v. Reciprocal Insurers*, [1924] A.C. 328.

sides of the debate need to be weighed against each other, to determine whether C-20 is in fact within the powers of Parliament. In undertaking this analysis, it is important to bear in mind that the constitutionality of any particular process for Senate reform is very much independent of the merits of the reform.

All participants in the debate have generally agreed that there are only minor conflicts between the provisions of Bill C-20 and the wording of the relevant sections of the Constitution. C-20 does directly conflict with the *Constitution Act, 1867* in specific details relating to the qualification of senators; these conflicts relate to citizenship, residency, and financial assets.[2] Curiously, C-20 does not ensure that those who stand as candidates in the senatorial nominee elections are in fact qualified to sit as senators.[3] Individuals could run in the elections without satisfying all of the criteria in the *Constitution Act, 1867*. In particular, they do not need to be residents in the province for which they would hold a seat. In

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[2] The qualifications to be a senator are found in s. 23 of the *Constitution Act, 1867*:

(1) He shall be of the full age of Thirty Years;

(2) He shall be either a natural-born Subject of the Queen, or a Subject of the Queen naturalized by an Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of One of the Provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, before the Union, or of the Parliament of Canada, after the Union;

(3) He shall be legally or equitably seised as of Freehold for his own Use and Benefit of Lands or Tenements held in Free and Common Socage, or seised or possessed for his own Use and Benefit of Lands or Tenements held in Franc-alleu or in Roture, within the Province for which he is appointed, of the Value of Four thousand Dollars, over and above all the Rents, Dues, Debts, Charges, Mortgages, and Incumbrances due or payable out of or charged on or affecting the same;

(4) His Real and Personal Property shall be together worth Four thousand Dollars over and above his Debts and Liabilities;

(5) He shall be resident in the Province for which he is appointed;

(6) In the case of Quebec he shall have his Real Property Qualification in the Electoral Division for which he is appointed, or shall be resident in that Division.

[3] The qualifications for candidates in the consultative elections are found in s. 18 of Bill C-20:

Any citizen of Canada who has attained the age of 30 years may be a nominee in a consultation being held in a province, except (a) the Chief Electoral Officer and the Assistant Chief Electoral Officer;

(b) a consultation officer or an election officer;

(c) a nominee in a consultation being held in another province; and

(d) a person who was a nominee in a previous consultation and for whom a return, report, document or declaration has not been provided under subsection 451(1) of the Canada Elections Act, as applied by section 96 of this Act, if the time for providing it and any extension have expired.

theory it is even possible for someone to run in an election in one province but be later appointed to a Senate seat for another province where they do meet the residency requirements. Neither are there requirements that candidates possess real property in the province for which they are appointed, are solvent and have a net financial worth of over $4,000.[4] Bill C-20 also appears to run afoul of the Charter's right to equality; only Canadian citizens may run as candidates, although any "natural-born subject of the Queen" or naturalized citizen of the UK or Canada may take a seat in the Senate. While these conflicts are substantive, they could be easily eliminated without disturbing the overall thrust of the Bill. On the broader details of the election of nominees, there are no substantial conflicts with the wording of relevant constitutional provisions. More importantly, Bill C-20 does not conflict with any of the constitutional provisions relating to the actual appointment of senators.

However, the constitutional validity of legislation hinges on much more than an absence of manifest conflicts between the wording of an act and that of the Constitution. Fatal conflicts can also involve a clash with judicial decisions that add crucial content to the bare bones of the specific wording of constitutional documents. For example, the *Constitution Act, 1867* does not explicitly state that only federally appointed superior courts may possess the powers of those courts, nor does the Act provide any list of what those powers may be. And yet, the Supreme Court has blocked several provincial attempts to empower provincially appointed courts and tribunals with powers the Court has ascribed to s. 96 courts. The courts have created a list over the years of the powers of so-called "s. 96 courts," even though the powers of those courts varied from one province to another at the time of Confederation. So, the most relevant area of inquiry is whether C-20 conflicts with past judicial decisions about the Senate. Much uncertainty and controversy hinge on this question.

Potential problems for Bill C-20 arise principally from the Supreme Court of Canada's opinion in the *Upper House Reference*. In December 1979, the Court responded to a series of questions put to it by the federal government about Parliament's legislative authority to alter or abolish the Senate. While the Court refused to answer some of the questions in the absence of specific legislative proposals, it did answer others, and in the process of doing so articulated clear positions on them. The Court held unanimously that Parliament could not unilaterally alter any of the "essential characteristics" of the Senate, and neither could Parliament legislate direct elections for the Senate. Therefore, fundamental questions that

[4] In reality, many individuals appointed to the Senate only meet the property requirements after they have been chosen by the government for recommendation to the governor general. This is particularly true of senators from Quebec who must hold property in one of the 24 divisions in that province; many have had no connection with their official division until that time. Thus, C-20's failure to require candidates to meet the property and residence qualifications is not a substantial concern.

need to be resolved are whether the *Upper House Reference* still applies and, if so, whether C-20 conflicts with it.

In order to answer these questions, this paper will explore several related issues in turn. First, the paper will review the existing constitutional provisions that govern the appointment of senators, as well as the different constitutional amendment processes for altering those provisions. Second, the Supreme Court's decision in the *Upper House Reference* will be discussed in order to reveal the potential challenges it poses to Bill C-20. Next, the debate over the continued applicability of this decision will be analyzed, with specific attention to whether the subsequent enactment of s. 44 of the *Constitution Act, 1982* has rendered it moot. Particular consideration at this stage needs to be given to whether the exceptions to Parliament's unilateral powers of amendment are exhaustively covered by sections 41 and 42. If these sections are not the sole limitations on those powers then the principles of the *Upper House Reference* may well apply to Bill C-20. With this backdrop in mind, the ultimate question can be examined: whether the "consultative" nature of the elections under Bill C-20 is enough to save the Bill or whether they do indeed constitute real elections that would doom the Bill.

CONSTITUTIONAL PROVISIONS RELATING TO THE SENATE

The constitutional provisions relating to the qualifications, tenure, and method of appointment of senators are found in the *Constitution Act, 1867* and the current processes for amending these provisions lie in the *Constitution Act, 1982*. Section 23 of the *Constitution Act, 1867* contains the qualifications needed to take a Senate appointment. Potential senators must be 30 years of age, reside in the province for which they are appointed, meet stipulations for holding real property, and have a personal wealth of over $4000.[5] Senators used to serve for life, mirroring the British House of Lords, but a mandatory retirement age of 75 years came into effect on 1 June 1965 for senators appointed after that date (Canada 1965, c. 4). The actual appointing power is set out in section 24: "The Governor General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon qualified Persons to the Senate; and, subject to the Provisions of this Act, every Person so summoned shall become and be a Member of the Senate and a Senator." Section 32 also stipulates: "When a vacancy happens in the Senate by Resignation, Death or otherwise, the Governor General shall by Summons to a fit and qualified Person fill the Vacancy." The actual choice of senator is made by the prime minister, although his power is purely a matter of constitutional convention and is not mentioned anywhere in the Constitution.

[5] Appointees must hold real estate with a net worth of $4,000 and have a personal net worth of at least $4,000; Quebec senators must also hold property within the specific region to which they have been appointed.

The various constitutional amending formulas now in place are found in Part V of the *Constitution Act, 1982*. Only three provisions specifically mention the process to be followed for making amendments relating to the Senate:[6]

> 41. An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assemblies of each province:
>
> (b) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force;
>
> 42. (1) An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with subsection 38(1):
>
> (*b*) the powers of the Senate and the method of selecting Senators;
>
> (*c*) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators…
>
> 44. Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to executive government of Canada or the Senate and House of Commons.

The debate about the validity of Bill C-20 revolves around whether it falls within Parliament's normal legislative powers or whether it should be enacted through the "7 & 50" process under s. 42(*b*).

THE UPPER HOUSE REFERENCE

The constitutional doubts about C-20 centre on the continued applicability of the *Upper House Reference*. In December 1979, the Supreme Court of Canada delivered its opinion on a series of questions put to it by the federal government concerning the authority of Parliament to pass legislation to alter or abolish the Senate. This reference followed the publication of Bill C-60, *The Constitutional Amendment Bill*, introduced into the House of Commons in June 1978. This bill contained proposals to replace the Senate with a new House of the Federation; one half of the 118 members would be selected by the House of Commons and the other half by the legislatures of the provinces following each provincial election.[7] Faced with a wide degree of concern about the constitutionality of Bill C-60, the Trudeau government put the following questions to the Supreme Court:

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[6] While Section 41(*b*) protects the "senatorial floor" for provincial representation in the Senate, an amendment affecting this measure relates more in essence to the House of Commons, than to the Senate.

[7] See sections 62 and 63 of Bill C-60.

1. Is it within the legislative authority of the Parliament of Canada to repeal sections 21 to 36 of the *British North America Act, 1867*, as amended, and to amend other sections thereof so as to delete any reference to an Upper House or the Senate? If not, in what particular or particulars and to what extent?

2. Is it within the legislative authority of the Parliament of Canada to enact legislation altering, or providing a replacement for, the Upper House of Parliament, so as to effect any or all of the following:

(a) to change the name of the Upper House;

(b) to change the numbers and proportions of members by whom provinces and territories are represented in that House;

(c) to change the qualifications of members of that House;

(d) to change the tenure of members of that House;

(e) to change the method by which members of that House are chosen by

(i) conferring authority on provincial legislative assemblies to select, on the nomination of the respective Lieutenant Governors in Council, some members of the Upper House, and, if a legislative assembly has not selected such members within the time permitted, authority on the House of Commons to select those members on the nomination of the Governor General in Council, and

(ii) conferring authority on the House of Commons to select, on the nomination of the Governor General in Council, some members of the Upper House from each province, and, if the House of Commons has not selected such members from a province within the time permitted, authority on the legislative assembly of the province to select those members on the nomination of the Lieutenant Governor in Council,

(iii) conferring authority on the Lieutenant Governors in Council of the provinces or on some other body or bodies to select some or all of the members of the Upper House, or

(iv) providing for the direct election of all or some of the members of the Upper House by the public; or

(f) to provide that Bills approved by the House of Commons could be given assent and the force of law after the passage of a certain period of time notwithstanding that the Upper House has not approved them? If not, in what particular or particulars and to what extent?

The main issue common to all these questions was the extent of Parliament's ability to amend the then *British North America Act, 1867* using the powers gained in 1949 and embodied in s. 91(1):

The amendment from time to time of the Constitution of Canada, except as regards matters coming within the classes of subjects by this Act assigned exclusively to the

> Legislatures of the provinces, or as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a province, or to any class of persons with respect to schools or as regards the use of the English or the French language or as regards the requirements that there shall be a session of the Parliament of Canada at least once each year, and that no House of Commons shall continue for more than five years from the day of the return of the Writs for choosing the House: provided, however, that a House of Commons may in time of real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such continuation is not opposed by the votes of more than one-third of the members of such House.

The Court noted that Parliament's powers under s. 91(1) allowed it to amend the "Constitution of Canada," which it held to mean matters relating to "the constitution of the federal government in matters of interest only to that government" (*Reference* [1980], 71). In answering question 1, essentially relating to the abolition of the Senate or its replacement with another body, the Court held that s. 91(1) described a power held by a Parliament constituted of three elements: "There shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons" (*Constitution Act, 1867*, s.17)." Thus, Parliament's legislative powers did not extend to replacing any of its constituent elements (*Upper House Reference*, 74-5). The result of the Court's position is that the Senate could have only been abolished by legislation passed by the British Parliament. In reaching this position, the court also stressed the unique federal character of the Senate: "A primary purpose of the creation of the Senate, as a part of the federal legislative process, was, therefore, to afford protection to the various sectional interests in Canada in relation to the enactment of federal legislation" (ibid., 67).

The Court chose to answer only a sub-set of specific issues posed in question 2, but several answers are relevant to Parliament's power to pass Bill C-20.[8] The Court's partial or complete responses to some of the issues in question 2 reveal a central theme of protecting the essential characteristics or features of the Senate. The Court held that regional representation was such an essential feature: "Without it, the fundamental character of the Senate as part of the Canadian federal scheme would be eliminated" (*Upper House Reference*, 76). Similarly, the Court's answers to question 2(*e*) disapproved of legislation that would permit any direct provincial appointing power or direct election by the public. The Court cast doubt

[8] Of interest, but not directly relevant to Bill C-20, is the Court's answer to 2(*f*) was that the Senate could not be excluded from the legislative process; thus Parliament could not have enacted legislation providing the Senate with only a suspensive veto. Since 1982, however, a suspensive veto could only be achieved through an amendment under the 7 & 50 process, as required by s. 42(*b*) of the *Constitution Act, 1982*.

on whether provincial legislatures or lieutenant governors could select senators, because this "would involve an indirect participation by the provinces in the enactment of federal legislation" (ibid., 77). Although the court refused to provide a definitive answer about amending the qualifications of senators in the absence of a specific proposal to change qualifications, it did say:

> Some of the qualifications for senators prescribed in s. 23, such as the property qualifications, may not today have the importance which they did when the Act was enacted. On the other hand, the requirement that a senator should be resident in the province for which he is appointed has relevance in relation to the sectional characteristic of the make-up of the Senate.

Thus, Parliament may have been able to abolish the property qualifications, but not the residency requirements, because provincial residence is more central to the character of the Senate. After the enactment of the *Constitution Act, 1982*, only the residency requirement and not the financial requisite would now have to be amended through the 7 & 50 process of s. 38. Financial qualifications, however, may still possibly fall within Parliament's purview under s. 44. Further relevant details emerge from the Court's general conclusion to the issues in question 2:

> Dealing generally with Question 2, it is our opinion that while s. 91(1) would permit some changes to be made by Parliament in respect of the Senate as now constituted, it is not open to Parliament to make alterations which would affect the fundamental features, or essential characteristics, given to the Senate as a means of ensuring regional and provincial representation in the federal legislative process. The character of the Senate was determined by the British Parliament in response to the proposals submitted by the three provinces in order to meet the requirement of the proposed federal system. It was that Senate, created by the Act, to which a legislative role was given by s. 91. In our opinion, its fundamental character cannot be altered by unilateral action by the Parliament of Canada and s. 91(1) does not give that power.

For the purposes of Bill C-20, the most germane issue raised in the *Upper House Reference* was whether ordinary federal legislation could provide for direct elections. The Court ruled this out because of the change it would bring to one of the Senate's "fundamental features":

> The substitution of a system of election for a system of appointment would involve a radical change in the nature of one of the component parts of Parliament. As already noted, the preamble to the Act referred to "a constitution similar in principle to that of the United Kingdom," where the Upper House is not elected. In 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. This was accomplished by providing for the appointment of members of the Senate with tenure for life. To make the Senate a wholly or partially elected body would affect a fundamental feature of that body.

The Court ascribed central importance to the existence of an appointed Senate with members serving terms long enough to preserve a character similar to that of the House of Lords. Thus, there are indeed serious questions about Parliament's ability to pass Bill C-20, if the *Upper House Reference* continues as a determining precedent. Bill C-20 may be *ultra vires* Parliament if it alters the fundamental or essential characteristics of the Senate. The Court's denunciation of legislation to implement direct elections also requires an examination of whether the "consultations" provided for by C-20 are tantamount to proscribed elections.

However, it is crucial to understand that the *Upper House Reference* dealt with Parliament's powers under the former s. 91(1) of the *Constitution Act, 1867*, which was repealed and replaced by the new s. 44 of the *Constitution Act, 1982*:

> Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons.

There is some debate about how substantially changed is Parliament's power under s. 44 of 1982, compared to the old s. 91(1). Undoubtedly, the s.44 provision is substantively different from the former s. 91(1), and the crux of the matter is how s.44 relates to the other amending procedures. As Justice Department lawyer Warren Newman told the Special Senate Committee on Senate Reform:

> There has been much written in the scholarly community about the extent to which the amending procedures are exclusive, because when you read section 44, for example, it says "subject to sections 41 and 42." It does not say "subject to section 38." It reads that Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and the House of Commons.

From one perspective then, Parliament alone is empowered to make any amendment relating to the Senate that is not reserved under s. 42 for the 7 & 50 formula. This would cover any amendments except those dealing with "the powers of the Senate and the method of selecting Senators" and "the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators."[9] Furthermore, it would not be valid to pass other amendments relating to the Senate through the s. 38 process, under which the Senate has only a six-month suspensive veto. The 1984 Molgat-Cosgrove committee believed that a limited term could be achieved by Parliament acting alone.[10] This interpretation appears to be a sound one based on a literal reading of s. 44.

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[9] The only aspect of the Senate that requires unanimous consent is the "senatorial floor" which entitles provinces to have at least as many representatives in the House of Commons as it had in the Senate; only in a very few scenarios would such an amendment relate to the Senate rather than to the House of Commons.

[10] Parliament of Canada, *Report of the Special Joint Committee on Senate Reform*, 1984, p. 36.

From another perspective, however, s. 44 may be read as permissive. Parliament *may* pass amendments relating to the Senate not reserved by section 41 and 42, but any amendment directly relating to the Senate could also be passed through s. 38 or 41, as the case may be (Canada 1984, 36). The exclusivity referred to in Section 44 may be intended to protect Parliament's legislative jurisdiction from incursions by provincial legislation, not from other amendment processes. It is also quite conceivable for the Supreme Court of Canada to draw from the *Upper House Reference* and place some limits on Parliament's power under s. 44. Such restrictions would arise from the previous acknowledgement that the creation of the Senate was an essential part of the Confederation agreements; the Senate should not, therefore, be unilaterally altered in any significant manner by Parliament acting alone. In this reading of s. 44, the *Upper House Reference* would still be relevant in its prohibition against Parliament acting alone to alter essential characteristics of the Senate or of Parliament as a whole.[11]

The controversy over the continued application of the *Upper House Reference* essentially turns on whether it has been rendered moot by the *Constitution Act, 1982*. When the Supreme Court examined the issues in the *Upper House Reference*, the relevant powers of Parliament were then found in s. 91(1) of the *Constitution Act, 1867*. This section declared that Parliament could amend the Constitution of Canada with five exceptions: the powers of the provincial legislatures, the "rights and privileges" of the lieutenant governors and provincial governments, the use of the French and English languages, the requirement that there be an annual session of Parliament, and that no Parliament can normally last more than five years. Read literally, s. 91(1) would appear to have granted Parliament the power to alter or abolish the Senate, because it is not mentioned in the five exceptions to Parliament's unilateral powers of amendment. Nevertheless, the court ruled that the essential characteristics of the Senate were beyond the powers of Parliament.

Several legal authorities have argued that the repeal of s. 91(1) and its replacement by s. 44 have rendered the *Upper House Reference* inapplicable. For example, Peter Hogg believes that s. 44 should be read as codifying those "essential elements" of the Senate that cannot be amended unilaterally:

> I do not think a court will say that subtracted from the power under section 44 are not only the four matters listed in section 42, but also fundamental or essential changes. That would be an odd way of reading the provisions, I think. What I am saying is that since 1982, the matters listed in section 42 are the fundamental or essential features that cannot be changed unilaterally. (Canada 2006, 37)

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[11] David Docherty, for example, asserts that the institution of fixed terms for senators would require the use of s. 38; David C. Docherty, "The Canadian Senate: Chamber of Sober Reflection or Loony Cousin Best Not Talked About," (2002) *Journal of Legislative Studies*, 8(3) Autumn, 27-48, p. 45.

This is a strong argument based on a principle of statutory interpretation which holds that the repeal and replacement of a provision normally indicates that the legislative drafters intended the new provision to displace the jurisprudence predicated on the repealed provision. However, further scrutiny of the connection between the old s. 91(1) and the new s. 44 may not sustain that assumption.

If the new amendment processes entrenched in 1982 completely replaces s. 91(1), then one should find a satisfactory accommodation of the matters found in the old provision. However, only two of s. 91(1)'s exceptions to Parliament's unilateral powers are explicitly accounted for in the new amending formulas. Language rights and the office of the lieutenant governor are both explicitly listed among the subjects that now require unanimous consent for any future amendment. None of the other s. 91(1) exceptions are explicitly referred to in the 1982 amending formulas. The legislative powers of provincial legislatures, the "rights and privileges" of provincial legislatures and governments, educational rights, the requirement for an annual meeting of Parliament and the five-year limit on the life of a Parliament are not explicitly listed in sections 41 or 42 as matters requiring either unanimity or the general "7 & 50" process.[12] Instead those amendments could fall within any of the other three processes (s. 43, s. 44, or s. 45), depending upon the content of the amendment. If one focuses simply on the subjects most relevant to s. 44, some troubling problems arise. The provisions ensuring an annual meeting of Parliament and setting a five-year maximum term for Parliament are now found in sections 4 and 5 of the Charter of Rights. But there is no explicit reference in the amending formulas that indicates which process should be used for amendments to the Charter.

If one accepts the argument that the only limitations on Parliament's powers under s. 44 are those exceptions found in sections 41 and 42, then Parliament must be able to legislate unilaterally any other amendments "in relation to the executive government of Canada or the Senate and House of Commons." Parliament should then, logically, be able to repeal its requirements for an annual meeting and a five-year lifespan. Furthermore, Parliament would have the power to alter or repeal the right found in s. 3 of the Charter for citizens to vote and stand for office in elections to the House of Commons. Indeed, Parliament should even be able to amend s. 32(1) of the Charter to say that it no longer applies to the executive government of Canada or the Senate and House of Commons. In short, the Charter would only apply at the federal level to legislation passed by Parliament.

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[12] S. 38(2) does mention that *if* an amendment relating to the rights and privileges of the provincial legislatures or governments is undertaken through s. 38(1), then resolutions must be authorized by a majority of the membership of the relevant legislatures; resolutions to approve amendments dealing with other subjects only need a majority of those voting. But, that stipulation does not in itself require that amendments relating to the rights and privileges of provincial legislatures and governments can only be approved through s, 38(1).

Such a conclusion about the unilateral powers of Parliament, however, is plainly absurd. No court would support the argument that sections 3, 4, 5 and 32 of the Charter are subject to unilateral legislative amendment when those sections are not even subject to the temporary suspensive effects of the notwithstanding clause.

The exceptions to the s. 44 powers of Parliament must, therefore, be more than just those found in sections 41 and 42. This conclusion is actually consistent with the exact wording of s. 44. Peter Hogg and others who favour the complete and exhaustive displacement of s. 91(1) by s. 44 would require section 44 to be read in practice as "subject only to sections 41 and 42." However, there is no definitive reason why the actual wording, "subject to sections 41 and 42," precludes other possible exceptions. The wording of s. 44 literally may only ensure that sections 41 and 42 are necessary, not unique, exceptions.

The limitations on Parliament's power to legislate on the Senate were read into s. 91(1) by the Court when no such restrictions relating to the Senate were present in that section; they were read into it or drawn from the preamble to the *Constitution Act, 1867*. Those characteristics have not been changed by the enactment of the *Constitution Act, 1982*. Since the Supreme Court did not hesitate to add new exceptions to the apparently definitive list in s. 91(1), there is a clear precedent for adding exceptions to s.44 as well.

Another determinative aspect of the *Upper House Reference* is likely to persist into judicial considerations of s. 44, regardless of its technical applicability. As part of the analysis of the powers of Parliament under s. 91(1), the Court had to decide what the objects of that legislative power were. In the end, it gave quite a narrow definition to the range of matters Parliament could legislate upon. In particular, the Court said: "In our opinion, the power of amendment given by s. 91(1) relates to the constitution of the federal government in matters of interest only to that government." The Supreme Court may well conclude that the powers of Parliament under s. 44 are similarly focused on matters of interest only to the national government. The stipulation that amendments relating to the method of appointing senators can only be achieved through s. 38 clearly demonstrates that this is a matter that concerns both levels of government. The provinces would apparently have as much interest as the federal government in whether senators are directly elected or appointed following a nomination election, especially since the effect of both processes may be the same: the effective transformation of the Senate into an elected chamber.

INVALID ELECTION OR VALID CONSULTATION?

As interesting an issue as the continued application of the *Upper House Reference* is, the ultimate question that must be resolved is whether the indirect nature of the "consultation" process saves C-20. Clearly, legislation to institute direct elections would run afoul of both the *Upper House Reference* and s. 42(1)(*b*) of the *Constitution Act, 1982*. Whether elections for Senate nominees are permissible hinges on how literal an approach one takes to constitutional jurisprudence. Some argue that Bill C-20 is constitutional because of the absence of a direct

conflict with the legal powers and discretion of the governor general in sections 24 and 32 of the *Constitution Act, 1867*. However, there is considerable evidence that Supreme Court of Canada would not take such a literal, black-letter approach.

The history of Bill C-20 and its predecessor C-43 clearly shows that the pith and substance of the bill is to achieve an elected Senate. When trying to establish the true nature of legislation, the courts have often asked what deficiency the legislature was trying to remedy. In the case of Bill C-20, numerous government statements plainly declare that the problem they wish to address is the unelected nature of the Senate. Prime Minister Harper has made it clear that he wishes to avoid any more appointed senators. By mid-2008, he had allowed 14 vacancies to accumulate among Senate ranks. His commitment to waiting for elections is underscored by the serious imbalance between the Liberals and Conservatives in the Senate; new Conservative senators are sorely needed.[13] The ability of voters to indicate their choice of new senators would convey democratic legitimacy to those new senators and to the Senate as an institution. In essence, the remedy provided in C-20 could hardly be any different if direct elections were instituted.

Bill C-20 does provide legal discretion on two key matters that supporters of the measure claim are crucial to its constitutionality: there is no legal obligation for a government to hold an election for Senate nominees, and there is no legal obligation to appoint any nominee once they have been declared winners. One can point to the history of senatorial elections in Alberta for evidence that governments might decide not to recommend that the governor general select elected nominees for the Senate: Jean Chrétien and Paul Martin ignored the winners of Alberta's senatorial elections for eight Senate appointments from Alberta between 1996 and 2005.

However, prime ministers may well not be able to ignore C-20 once enacted. First of all, it makes a tremendous difference that this election process would be enacted by the Parliament of Canada and not by a provincial legislature venturing out of its usual legislative domain. Secondly, a question arises as to how the courts would react to a suit brought by a nominee, elected under the C-20 process, who was overlooked for a Senate appointment. Clearly, the courts would not issue a writ of mandamus requiring the governor general appoint the nominee; there simply is no legal obligation under Bill C-20 to enforce the electoral outcome. However, there is every likelihood that the courts would not leave the matter there. In the *Quebec Secession Reference*[14] the Supreme Court could have simply stated that Quebec does not have a right to secession under either Canadian or international law. Instead, the court went on to declare that the Government of Canada would have a moral obligation to negotiate separation if a clear majority of Quebec

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[13] As of 23 June 2008, the party standings in the Senate were as follows: Liberals 60, Conservatives 22, others 9, vacancies 14. Parliament of Canada, "Standings in the Senate," available at: http://www.parl.gc.ca/common/senmemb/senate/ps-e.htm, (Accessed June 23, 2008).

[14] *Reference re: Secession of Quebec*, [1998] 2 S.C.R. 217.

voters had agreed to secession in a clearly worded referendum question. Also, in the *Patriation Reference*,[15] the Supreme Court could have simply said that the federal government can in law unilaterally request changes to the Constitution that affected provincial powers. Yet, it went on to declare that substantial provincial consent was required by convention. Thus, it is highly probable that the Supreme Court of Canada would also comment on the government's political obligations to respect the peoples' wishes under the C-20 regime.

The Supreme Court is highly unlikely to endorse the view that a prime minister is free to ignore the results of even "consultative" elections and recommend some other individuals to the governor general. In the *Quebec Secession Reference*, the Court was faced with arguments about the implications of a referendum vote in favour of separation. Legally, the results of such a referendum are just as "consultative" and non-binding as the results of a consultative election held under C-20. However, the Court underlined the importance of the democratic principle of Canada's constitution and declared that the government of Canada would have a moral obligation to negotiate the terms of separation if a clear majority voted in favour of a clear question on Quebec's separation. In this light, it is highly probable that the Court would again point to the democratic principle and say that the government is under a moral obligation to respect the outcome of an election for Senate hopefuls.

Given this, it would indeed be all but impossible for a government to ignore the clear wishes of the people in a nominee-election process conducted with all the seriousness and substance of a regular election for members of the House of Commons. If Bill C-20 were enacted, it would not take long for a constitutional convention to be established that prime ministers should only recommend elected nominees for selection to the Senate. The democratic principle would impose a moral and political obligation from the outset. In the end, then, the theoretical discretion left to the prime minister and governor general in C-20 may quickly prove to be a mirage.

The "consultation" process in C-20 is in every sense of the word an election. It would be held under conditions as stringent as those for elections to the House of Commons. These elections would be waged by candidates and political parties at the same time as elections for members of the House of Commons or provincial legislatures. From the voters' perspective, there is nothing to distinguish their involvement in the Senate elections from their involvement in electing other legislators.[16] In all instances, they will have listened to the campaign promises of a field of individual candidates and their parties before making a trip to the polling station to cast a ballot for their preferred candidates. Once the ballots are counted, the winning senatorial candidates will be officially "selected as nominees," rather than declared "elected," but the end of both types of elections comes with the

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[15] *Reference re: Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753.

[16] There will, of course, be a different ballot for the senatorial elections, since the STV system will be used in place of the usual single member plurality system.

chief electoral officer officially publishing the results in the *Canada Gazette*. In the case of the senatorial elections, the chief electoral officer also directly informs the prime minister of the results. In the case of elections for the House of Commons, the chief electoral officer sends certificates of election to the clerk of the House with the names of the candidates declared elected for each seat. Surprisingly perhaps, the winning candidates do not automatically take their seats in the House of Commons. They can only do so after taking the oath of office, and they may be barred from the House and the seat declared vacant if they refuse the oath (Marleau and Montpetit 2000, 180-81). Thus, there still remains an element of personal discretion to be exercised, even in the normal election process, between the declaration of a candidate's victory and their taking a seat in the legislature. In theory at least, two extra levels of personal discretion are added in the case of senatorial elections: the discretion of the prime minister to recommend the selected nominees to the governor general and the discretion of the governor general to make those appointments. As noted above, however, the reality of these elections means that the prime minister would in fact be obliged to recommend the winning nominees, just as the governor general would be obliged to appoint them to the Senate. In the end, there will be little in substance or form to distinguish the "direct" election process for choosing MPs from the process for choosing senators. In short, the "consultations" of Bill C-20 really do constitute direct elections.

The long-term effects of elections under Bill C-20 must also be considered. Based on current retirement dates, as early as 2013, a majority of senators will have taken their seats after having won nomination elections. There can be no doubt that they will think of themselves as elected members who possess an electoral mandate to achieve their policy objectives. Such an empowerment has great potential for disturbing the current balance of power between the Senate and the House of Commons. The election of senators would result in fundamental changes to the institution's character and behaviour. As an appointed chamber, the Senate currently exercises considerable restraint relative to the legal powers it possesses under the Constitution. Since 1994, the Senate has amended only nine per cent of the bills passed by the House of Commons and explicitly rejected only two out of 465 (Heard 2008, 5). A Senate with a majority of elected members will undoubtedly flex its powers much more often, leading to potentially serious deadlock between the two houses of Parliament. In past discussions of Senate reform, academics and politicians alike have accepted that any substantive change to the selection process requires a concomitant revision of the powers of the Senate or provision of a clear process for resolving deadlock between the two houses.

CONCLUSION

For all intents and purposes, Bill C-20 creates an electoral process to transform the Senate from an appointed body into an elected chamber. Bill C-20 represents an attempt to alter radically the essential characteristics of the Senate as it was created and has operated since 1867. The chosen method for this drastic

reformulation is also intended to exclude the provincial governments whose consent would be required if this reform were proposed through a formal amendment.

Bill C-20 attempts unilaterally to privilege the Parliament of Canada in a decision that provincial legislatures were supposed to have a constitutional right to participate in and to veto. Constitutional amendment processes are meant to protect more than just the black letter of the law. The courts have proven many times that they intend to protect the substance of the institutions and principles that are given life by the Constitution. There is a reason why the powers of the Senate and the method of selecting senators are mentioned in the same line in s. 42 (1)(*b*) of the *Constitution Act, 1982*: the two go hand in hand. A successful transformation of the Senate into an elected body would radically transform the workings of Parliament and disturb the balance of powers between the House of Commons and the Senate. The government's recent attempt to extend a test of confidence into the currently structured Senate's consideration of a bill is only a precursor of the institutional battles that would lie ahead (CTV News 2008). Provincial governments would also demand a review of the distribution of seats within the Senate if it were to exercise more effective powers. The Senate was a foundational institution in Confederation over which considerable debate was expended in order to create this country. In 1982, the first ministers agreed that amendments to the powers and methods of selecting senators should only be done through the general amending formula. As such, the Senate is not something for the national Parliament to radically reform without the consent of the provinces.

REFERENCES

Canada. 1965. *Constitution Act, 1965*, Statutes of Canada, 1965, c. 4.

— 1984. Parliament of Canada. *Report of the Special Joint Committee on Senate Reform*. Ottawa: Queen's Printer.

— 2006. Parliament of Canada. Special Senate Committee on Senate Reform. "Proceedings," Issue No. 4, 20 September 20. Ottawa: Queen's Printer.

— 2008. Parliament of Canada, "Standings in the Senate," Accessed online 23 June 2008 at: http://www.parl.gc.ca/common/senmemb/senate/ps-e.htm

CTV News. 2008. "Tories Threaten to Force Election Over Anti-Crime Bill." 7 February. Accessed online 23 June 2008 at http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20080207/tories_liberals_080207/20080207/

Docherty, D.C. 2002. "The Canadian Senate: Chamber of Sober Reflection or Loony Cousin Best Not Talked About," *Journal of Legislative Studies*, 8(3) Autumn: 27-48.

Heard, A. 2008. "Assessing Senate Reform Through Bill C-19: The Effects of Limited Terms for Senators." Working Paper 2008-12. Kingston: Institute of Intergovernmental Relations, Queen's University.

Marleau, R. and Montpetit, C. 2000. *House of Commons Procedure and Practice*. Montreal: Chenelière/McGraw-Hill.

Reference re: Authority of Parliament in Relation to the Upper House, [1980] 1 S.C.R. 54; 1979.

Reference re: Secession of Quebec, [1998] 2 S.C.R. 217.

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SENATE REFORM: WHAT DOES THE CONSTITUTION SAY?

John D. Whyte

Le Premier ministre Harper a décidé que les barrières formelles faisant obstacle aux changements constitutionnels en ce qui concerne la réforme du Sénat ne devaient pas empêcher de très importantes réformes qui, selon lui, allaient avoir un effet bénéfique sur le Parlement canadien et la démocratie canadienne. Il n'a pas adopté la tactique de l'homme politique fort et utilisé ses pouvoirs politiques pour déroger à la constitution, mais il a soigneusement préparé des réformes qui lui permettent d'éviter certaines restrictions liées à l'autorité fédérale unilatérale pour amender la Constitution. Cette stratégie se base sur de petites distinctions textuelles, lesquelles, cependant, l'emporteront sur des motifs constitutionnels de base. Cet article examine la loi constitutionnelle relative à ce débat et suggère que le Premier ministre n'a pas bien évalué les règles constitutionnelles qui s'appliquent aux propositions de réforme du Sénat en matière d'élections et de durée des mandats au Sénat.

Beyond question, the present composition of the Parliament of Canada is anomalous. It is a bicameral legislature, the members of one of its chambers – the Senate – being appointed by the government and holding office until the end of the normal working life (age 75). The absence of both popular selection and periodic accountability to electors for a group of national legislators represents a failure of timely Canadian constitutional reform – a nagging sign of the country's weak capacity for self-determination.

In the context of Canada's founding and the emerging state of democratic practices in that period, it is not altogether surprising that the members of one of the chambers in a bicameral legislature would not be elected but, rather, selected by a specially empowered institution of the state – its executive government – on the basis of one form or another of social and political privilege. Nor is it surprising that the representative role of this class of legislators would be directed to interests that are narrower than those of the general electorate. After all, democratic majorities were, it was believed, likely to make decisions ruinous to interests vital

to the state's political and economic stability. It is in the nature of all constitutional design to hedge against any particular political principle, especially principles like democracy that reflect emerging values, gaining unchecked ascendancy and thereby producing an unwelcome revolution in the state.

However, states come to accept new political paradigms. They learn the many ways that emerge in the political culture to ameliorate dominance by a single idea. The ideas about which there have been constitutional anxiety – rights, federalism, provincialism, legalism, democracy – cease to threaten state functioning and become basic principles within the context of competing political needs and values. As this happens we tolerate less and less the constitutional mechanisms designed to control them – the trumping instruments of declaration and veto.[1] In this way, the early Canadian arrangement of placing legislative power in two chambers, one with elected members and one with appointed members, and the consent of both chambers being required to enact laws, became anomalous. We have moved past the time when fear over the risk to state well-being of majorities prevailed over notions of democratic legitimacy. One might think that any nation with a normal and healthy capacity to modernize its constitution would have found by now a way to tie comprehensively the democratic principle to the national legislative process.

Possibly, however, this instance of failed self-determination is sensible for Canada. After all, few political realities are better understood than the virtual impossibility of constitutional reform, including reform that might be considered nothing more than constitutional modernization. Perhaps, also, the failure of Senate reform has been tolerated because the Senate generally exercises power in a way that reflects its lack of a democratic license to exercise independent legislative authority. In fact, the lack of legitimacy may have become a positive factor of Canadian legislative efficiency. In the potentially difficult relationship between bicameralism and responsible government, one of the mediating conditions seems to be that the Senate, acting under the condition of a weak political warrant, acts cautiously with respect to frustrating the government's legislative agenda.

However, an insipid legislative role for the Senate, while responsive to both democracy and structural concerns, is not responsive to other bases for the existence of a second legislative chamber. There are sound reasons of constitutional design for having a bicameral legislature that will permit legislative considerations beyond those that engage members of the Commons.[2] None of the

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[1] For a discussion of constitutional "safety valves" and how they grow superfluous, see John D. Whyte, "Sometimes Constitutions Are Made in the Street: the Future of the Charter's Notwithstanding Clause" (2007), 16 Constitutional Forum 79, 80-81.

[2] While concerns for class, identity, provincial interests or deeper legislative reflection could justify bicameralism, in truth, as David Smith has pointed out, Canada has no developed theory of bicameralism. See David E. Smith, *The Canadian Senate in Bicameral Perspective* (Toronto: U of T Press, 2003) 3-21.

representation needs that could be met by a second chamber – enhanced representation for minority communities, coordinated representation for the sub-national political communities of the federation, a legislative voice for various economic estates, protection of distinct religious, ethnic and language estates minorities, simply a second review of legislative initiatives, or others – is well served through executive appointment of members. None of them offers a compelling case for anything but establishing legislative membership through elections.

Prime Minister Stephen Harper believes that a non-elected Senate is an affront to democracy. He also seems to believe that the national legislature should be structured to allow its work to be more driven by ideas of, if not provincial interests, at least provincial identities. He is determined to remedy the constitutional obsolescence of an appointed Senate through instituting Senate elections and, it seems, channelling Senate legislative participation along the lines of provincial concerns – not just general provincial concerns but, through province-wide elections, each province's specific perspectives and interests.

Notwithstanding the coherence of these goals, the first of his three initiatives in Senate reform revealed only unclear purposes.[3] This proposal was to establish an eight-year term limit on Senate appointments. He did not make clear whether appointments would be renewable.[4] As a result, it is difficult to know the exact ideas of political efficacy and legitimacy that were sought by this reform. He could have had in mind the advantage of hastening the process of legislator renewal which one would think would exacerbate Senate obstinacy flowing from the conditions of no prospect of re-appointment and no reason to nurture long term political capital. Or, if appointments were renewable, he could have had in mind the doubtful advantage of creating a structure of senator accountability to the appointing government. But given the constant uncertainty about who will be governing some years hence, this would work for only a part of the Senate at any given time. The Harper proposal is, in fact, so resistant to purposive analysis that one is tempted to see it as an instance of "jump ball" reform – putting up a proposal to see what happens to it politically and, if it produces confusion, hope that this will somehow lead to reform with more significant and more intelligible purposes. The Special Senate Committee on Senate Reform in October 2006, however,

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[3] Prime Minister Harper did believe, however, that term limits on senators would in itself enhance the legitimacy of the Senate. He characterized it as "a modest but positive reform." Senate of Canada, *Report on the Subject-matter of Bill S-4, an Act to amend the Constitution Act, 1867 (Senate tenure)*, (October, 2006), 11.

[4] At the 7 September 2006 session of the Senate Committee on Senate Reform, senators several times asked the prime minister his intentions with respect to the renewal of term appointments. He stated that "[t]he government can live with it either way." He also said, "I will be frank in saying that I tend to think of the future Senate in terms of being an elected body. For that reason I tend to [think] that renewability is desirable." See Special Senate Committee on Senate Reform, *Evidence*, 1st Sess., 39th Parl., 7 September 2006.

saw a purpose to the term limit reform. It endorsed the idea on the basis that this would "re-invigorate the Senate with a constant flux of new ideas" (Canada 2006b, 29). Implicit in this purpose, it seems, is the notion that there would be a steady flow of new senators and, hence, might prefer that appointments be non-renewable. In fact, the report seems to endorse renewable terms (ibid., 30-31).[5]

It seems that the general discomfort with the current Senate, the apparent political barriers to open, broadly considered constitutional reform, the strong appeal to democratic values and the general (although, I believe, mistaken) sense that the Senate is not significant to the national legislative process, have all worked to license constitutional reform that may seem valuable, or appealing, but is unintelligible. Equally important, its constitutionality is highly doubtful and the government seems adamant in its refusal to seek authoritative resolution of the constitutional doubts. This aspect of the term limit initiative ought to concern us a great deal, both as a matter of honouring the rule of law and as a matter of leaving us with a clearly valid legislative structure.

The proposal to create term limits on Senate appointments through simple Parliamentary enactments is of doubtful validity for these reasons. Part V of the *Constitution Act, 1982*, sets out the procedures for amending the Constitution. Section 44 in that part gives the Parliament of Canada unilateral power to amend the Constitution in relation to the executive government of Canada and the Senate and House of Commons. Provinces have a similar unilateral amending power. These provisions relate to the internal basic organization and operation of both orders of government. When section 44 says that the Constitution may be amended with respect to the Senate it is not the case that all elements of Senate reform can be achieved through ordinary legislation. First, the section 44 amending power is subject to section 42 of Part V. That section identifies four elements of Senate reform – powers of the Senate, the method of selecting senators, the number of senators from each province and the residence qualification for senators. These matters can be amended only through the general amending formula which requires the consent of the House of Commons, the Senate and legislatures of two-thirds of the provinces so long as they represent 50 percent of the population of all provinces. (This general amending rule is popularly known as the 7/50 formula.)

When Prime Minister Harper spoke to the Special Committee on Senate Reform on 7 September 2006, he claimed that the constitutional amending formula "says that the Constitution of Canada in respect of the Senate can be amended by the Houses of Parliament with four exceptions, and [the current proposal] is not one of them" (Canada 2006a). The Department of Justice lawyer who appeared before the Special Committee immediately following the Prime Minister appears to have reiterated this position. It is noteworthy, however, that in his testimony he

[5] The Report, however, is far from clear and conflicts over this issue within the Special Senate Committee were, it seems, not fully resolved.

was careful not to claim explicitly that the implication of the identification in section 42 of specific exceptions to Parliament's section 44 entitlement to make amendments is that the section 44 power is otherwise comprehensive. He noted that the amending power is labelled as an *exclusive* power but that this characterization of Parliament's power does not tell us anything about its scope, only that, whatever its scope, it will displace other amending procedures. The lawyer made no claims with respect to section 44's actual reach (ibid.).[6] Arguably, the "exclusive" power designation used in section 44 (and also commonly present in the 1867 constitutional allocation of legislative jurisdictions) conduces to a narrower reading of the scope of the authority since placing matters within the scope displaces what the framers wanted as the general amending process. This careful strategy is has been evident in the interpretation of "exclusive" federal and provincial legislative powers listed in the *Constitution Act, 1867*.

There are two basic questions. The first is whether the term limit proposal for Senate appointments falls within the matters in section 42 that require use of the general amending formula (the 7/50 formula). The second is, if the proposal does not fall within section 42, does it then, as Prime Minister Harper claimed, fall within Parliament's unilateral amending power under section 44. As to the first question of whether altering the term of a Senate appointment falls within the categories of amendment listed in section 42, it might seem that none of the section 42 amendments are engaged by imposing a term limit. However, it is not unreasonable to entertain the possibility that "method of selection" includes the length of time of an appointment on the basis that the purpose for making an appointment (to create a life appointment or to create a term appointment) bears on the method of appointing. Both the purpose and effect of an appointment are significantly altered by changing the term from "until age 75" to a term of eight years. Selection practices will change to reflect this. Different considerations will be in play and it seems likely that different considerations will require different methods. For one thing, if term limits for senators strengthens the importance of provincial interest representation, as it might do, the method of appointing will change to better reflect provincial sensibilities.

One might buttress this argument through reading purposively the requirement for provincial consent for "method of selection" amendments. Amendments that alter the federal-provincial relationship, or alter the institutions that mediate that relationship (even slightly), should fall within the categories of constitutional change that require provincial consent – the changes that are caught in sections 38 and 42 of Part V (and elsewhere). A change that affects provincial interests

[6] This witness did say that enacting very short terms for senators would not fall within Parliament's power under s. 44 because this change would undermine the effectiveness of the Senate. Establishing term limits would, of course, alter the political dynamics of the Senate, but he felt that that degree of change did not require resort to the general mending formula.

properly belongs in the category of amendments requiring consent from both orders of government and, therefore, should, if linguistically possible, fall within the language of section 42.

However, if it is assumed that length of tenure does *not* fall within "method of selecting" under section 42, the claim of the Harper government is that Parliament can unilaterally make this change in the term of Senate appointments. This claim arises from a general presumption of statutory interpretation that by specifically naming particular members or topics within a general class, legislators mean to exclude from the general class all other particularities. But this is only a presumption, and will be displaced when to do so makes better interpretive sense. There are a number of reasons for believing that the naming in section 42 of some categories of Senate amendments (and thereby subjecting them to the general amending procedure) does not mean that every other type of Senate amendment falls to the unilateral federal amending power under section 44. The first reason is that sometimes particularities within a class are named not to exclude implicitly all other instances but simply to ensure that named instances are brought within the class. This reasoning is particularly applicable in constitutional drafting and interpretation. Drafters must frequently capture the very specific trade-offs or resolutions of competing interests that have come up in the constitutional negotiation process. Parties insist that these specific concessions and agreements be reflected expressly in the text. This inclusion cannot sensibly lead to distorted readings of general provisions or underlying constitutional structures.

Second, one can see that listing in section 42 matters that require use of the general amending formula under section 38 has an important effect on federal-provincial relations with respect to proposed amendments. Matters listed in section 42(2) are rendered immune from provincial opt-outs from a constitutional amendment while the general class of amendments under section 38 is amenable to provincial opt-outs. One of the explicit effects of the section 42 list, therefore, is to avoid the particular opt-out mechanism for some specific amendments. Of course, it could be argued that many instances of provincial opting out from Senate amendments (beyond those listed in section 42) could be undesirable (or irrelevant) and, consequently, this is a weak argument. But insofar as some amendments relating to the Senate can trigger a provincial claim to opt out, it is intelligible to claim that the purpose of the section 42 list was to forestall opting out with respect to some amendments. The basic point is that there are textual readings that make it unlikely that section 42's real purpose was to place every other sort of Senate amendment within the unilateral power of Parliament.

Third, if one considers the many sections of the *Constitution Act, 1867* that relate to the Senate, it defies sense to say that any change to them, save the four changes named in section 42, can be implemented unilaterally by the federal level. To make this claim would mean that Parliament, without provincial consent, could amend the 1867 Constitution with respect to the distribution of Quebec senators

according to the twenty-four electoral divisions, the age qualification of senators, their citizenship qualification, the property and wealth qualifications, the power to add supernumerary senators, the requirement to reduce Senate representation when supernumerary senators are appointed, the total number of senators allowed, the conditions for the removal of senators and the replacement of senators. These are important elements of the national legislative condition and most, if not all of them, impact on how provincial and regional representation will occur in the Parliament of Canada. It is not sensible, from the perspectives of sustaining the federal relationship and constitutional integrity, to conclude that the framers of the 1982 constitution believed that these vital features of Canada's Senate could all be altered by unilateral parliamentary enactment.

Furthermore, there is no sound argument that all Senate reforms (other than those under section 42) must fall within section 44 in order for that section to have purpose or meaning. There are other constitutional provisions relating to how the Senate does its business – and how it relates to the work of the Commons – that that are clearly part of Parliament's internal constitution and, hence, can be amended under section 44.

Finally, The Supreme Court of Canada in the *Reference re: Authority of Parliament in relation to the Upper House* (1980, 54) limited Parliament's authority to amend the Senate to changes that neither impaired the second sober thought in legislation nor changed the essential character of the Senate. Two issues arise from this. Do the standards established by the Supreme Court prior to the constitutionalization of a formal amending procedure in 1982 have any bearing on how the terms of that new procedure are to be interpreted and, second, if they do, does changing a Senate appointment to an eight year term alter the essential character of the Senate. If the Court were to accept the proposition that section 44 allows full unilateral amending capacity, apart from the four section 42 exceptions, its earlier decision would be irrelevant. If it decided that the section 44 power required a limited reading in order to preserve interests of the federal structure, the *Senate Reference* would be highly relevant. Of course, in making this decision – in deciding whether section 44 is exhaustive of Senate amendment authority – the Court is likely to be influenced by the conception of federalism interests that it adopted in *Reference re: Authority of Parliament in relation to the Upper House* in describing limits to unilateral federal authority. And of course, these fundamental federalist conditions were underscored by the Supreme Court's in its decision in *Reference re: the Secession of Quebec* (1998, 217). It seems very unlikely that the Supreme Court in adjudicating a dispute over as foundational an issue as the meaning of the amending formula would not draw on its decisions that touch on the basic conceptions of Canadian statecraft. It is likely that the Court would be at pains to ensure that those judicially endorsed conceptions were reflected in its interpretations.

As for the second question, if the *Upper House* decision were to be considered relevant, the Court is bound to see the change in the term of a Senate appointment as altering the functioning and essential character of the Senate – not necessarily

for the worse, but, nevertheless, a significant alteration in the character of the Senate.[7] As we know from many state design contexts, the term of office inevitably shapes the character of the office and that idea is clearly expressed in the Constitution.

There is one further prudential argument of, perhaps, weaker legal significance. If the current proposal to limit senatorial terms to eight years can be implemented under section 44, it must take the form of a parliamentary enactment, which means that it will require the consent of the Senate. But if such an amendment required provincial consent because it fell under section 38 (the general amending formula), lack of Senate could not block the reform beyond 180 days from the date of a House of Commons resolution to amend he Constitution. As a matter of rational constitutional design, it is likely that the amending procedures would contain the restriction on the Senate veto with respect to reforms to the Senate, especially when such reforms are very likely to weaken the political role or legitimacy of sitting senators. It is, however, not clear whether this sort of prudential analysis bears on judicial disposition, at least not unless there is legislative history that suggests that the framers of the provisions had made this very calculation. The very complicated provenance of the *Constitution Act, 1982* makes any discernment of the intentions of the framers virtually impossible.

The second reform proposal of Prime Minister Harper is to hold Senate elections. In the course of Special Committee hearings on the Term Limit Bill, the prospect of senatorial elections was raised. In particular, it was asked that if the government felt that it could only proceed with reforms to the Senate that can be implemented by Parliament under section 44, why had it announced an intention to initiate an election process for choosing senators. At the conclusion of the Senate committee hearing on 7 September 2006, an official from the Privy Council Office suggested that the government would avoid this constitutional difficulty through a parliamentary enactment that would establish an "… elections type consultative type bill that would provide other guidance to the Prime Minister in that appointment process" (Canada 2006a). A Department of Justice lawyer then assured senators that it is always possible to "temper" the effect of constitutional restrictions through "… various legislative and other techniques" (ibid.). When some senators suggested that governments and legislatures should not attempt to do indirectly what they cannot do directly, the Justice lawyer explained his position by saying that that principle is honoured in the breach rather than in the observance. He buttressed his somewhat cynical claim by pointing to the constitutional prohibition against legislative delegation between orders of government which was sidestepped, he said, by the delegation of administrative authority

[7] The Court in this case observed that the unilateral predecessor parliamentary power to amend the Constitution as it was stated prior to 1982 and s. 44, was limited to "housekeeping matters" and did not extend to altering the structure of the federal Parliament. (Ibid., 66). Placing term limits on Senate appointments is not "housekeeping."

between jurisdictions (ibid.). This comparison was misleading. The difference between legislative delegation and administrative delegation is significant. The barrier to the former is grounded in the idea of preserving the integrity of the allocation of legislative authority, a central feature of Canada's constitutional structure. Placing amendment of this structure beyond unilateral provincial legislative authority was an essential element of having governments rule according to law and the constitution. Administrative delegation does not alter the constitutional arrangement, but produces co-ordination efficiencies as regulatory programs begin to overlap. In any event, it is wrong to suggest that governments were able to find a way to persist in their unconstitutional plan with respect to legislative delegation. The legislative inter-delegation prohibition has restrained governments and, to this day, they are prevented from engaging in this back-door form of constitutional amendment to the division of powers. In short, it is simply not credible that the clever manipulation of words and concepts that the Justice lawyer seemed to recommend will lead to judicial authorization for an alteration to a constitution's cornerstone – the process by which constitutional terms come into being.

Fourteen months after this exchange the government did, in fact, introduce in the House of Commons a bill which would provide for "the consultation with electors on their preferences for the appointments of Senators." Apart from the preamble, the entire Bill is a reproduction of the *Canada Elections Act* (2000 chap. 9) with the same officers, the same structures, the same restrictions, the same offences and the same processes (other than the Bill contemplates the possibility of the election taking place in the context of a provincial election, as well as in the context of a federal election – an alternative, one assumes, that will prove to be an administrative nightmare, electorally confusing and not likely used).

As an initial observation, one doubts that calling elections consultative or advisory will persuade courts to overlook the lack of provincial consent for substantive constitutional reform relating to Senate appointments. Only if a court were to believe that the new voting process did not materially change the government's actual appointment practices and that, even after a vote, there would be no loss of the government's discretionary room with respect to appointments, would it conclude that there had been no alteration of the constitution. In fact, it is not to be believed that a government would initiate a non-binding electoral scheme for the Senate. This would fly directly in the face of the accountability and legitimacy principles that justify Senate appointment reform in the first place and it would create a corrosive level of electoral cynicism. It is not unreasonable to assume that the Court would share this incredulity over the claim that Senate elections would not constrain completely the discretionary power of governments with respect to appointments. The Supreme Court of Canada seeks to apply constitutional norms to real contexts and to actual practices, and elections for Senate appointments implemented under section 44 would, therefore, be in constitutional jeopardy. It cannot be the case that those seeking to justify an initiative to democratize the Senate can find constitutional justification for their reform through promising never to be bound by the democratic process that they so badly want and that they claim to be so uniquely legitimate.

There are four reasons why the plan to seek electoral advice on who to appoint to the Senate is a change in the method of selecting senators which, if implemented through ordinary legislation, would result in constitutional breach. First, section 42(*b*) refers to the method of *selecting* persons for appointment, not the means of appointment. The method of selection will now be that governments will consider – and under the normal imperatives of electoral success – only those who win elections to determine who should be selected for Senate appointment. The electoral process is nothing other than a new and crucial component of the method of senator *selection*.

Second, by section 32 of the *Constitution Act, 1867*, the discretion to determine who is a fit and qualified person to be appointed to the Senate is assigned to the federal Cabinet. The new Bill has constructed an electoral mechanism to advise the government as to who should be appointed. A clear constitutional responsibility specifically assigned to a particular agency of government will be eroded or constrained by another element of public government – the electors. In administrative law we say of this situation that the statutory decision-maker has declined its jurisdiction, or has submitted to dictation or has fettered its discretion. The constitutionally recognized decision maker has altered the constitutional plan for making appointments. These actions are *ultra vires*. Of course, it may be claimed that the consultation process and its results will not curtail Cabinet discretion and that the consultation is not designed to limit the list of those considered for appointment but only to add names to a larger list – one that contains names not resulting from election. If one reads the Bill it is simply not believable that consultation will not determine for the Cabinet who is to be selected. The size of the electoral process, the context of a general election, the visibility of the election, the political energy and the higher public attention paid to province-wide votes all preclude any possibility of cabinets disregarding these electoral results. The saving clause of the Bill – this process is to ascertain the preferences of electors on appointments to the Senate "within the existing process of *summoning* senators" (italics added) – cannot save the Bill's constitutionality. This attempt to appear to be preserving the constitutional *status quo* is disingenuous. The precise process of *summoning* is, of course, not altered. It is the method of selecting senators that the reform bill alters and that is exactly what section 42(*b*) states must be accomplished only through the general constitutional amending process.

Third, the electoral process in the Bill does not satisfy the specific requirements relating to appointing senators from Quebec. The Quebec situation is unique in that the twenty-four Quebec senators must be appointed – one from each of the twenty-four electoral divisions. One doubts that this has the same salience that it had in 1867, but the rule persists. The election bill does not accommodate this peculiarity. Arguably, the Cabinet could overlay the electoral process with the constitutional restraint that all Quebec appointments will match the electoral districts but, in province-wide elections this is unlikely to be possible unless the decision is made to ignore the election results. This, however, could not occur. Quebec would not tolerate a voting system of relative insignificance, one that was uniquely irrelevant and one that would produce Quebec senators who did not

reflect the popular preferences and who, as a result, operated with less electoral legitimacy than other senators.

Finally, courts do not treat the Constitution as if it were a tax code. They require fidelity to the Constitution's structures, its relationships, its design and its principles. The proponents of the amendment have admitted that they are unable to institute an election process since they have taken what is clearly an election process, kept all of its attributes but labelled it a "consultation." The process they call consultation is, in fact, an election in everything but name. It would bring Parliament into disrepute, and it will do grave damage to the Constitution and the rule of law if Parliament attempts by such an obvious and self-confessed sleight of hand to amend the Constitution in contravention of amending provisions. A telling experiment to decide if "consultation" is simply a semantic alternative to Senate elections is to replace the word "consult" with the word "elect" wherever it occurs – if the words are interchangeable without affecting the process, this is a strong indication that there is no difference. Section 2(2) of the Bill states: "Words and expressions in this Act have the same meaning as the *Canada Elections Act* unless a contrary intention appears." No contrary intention appears.[8]

The Harper government has sought to justify its Senate election proposal by pointing to the decision of the Judicial Committee of the Privy Council's 1919 decision in *Reference re: The Initiative and Referendum Act* in which a Manitoba plan to have amendments to the provincial constitution put into effect on a majority vote of all electors was ruled unconstitutional. The Judicial Committee saw this plan as abrogating the legislative role of the lieutenant governor. (Of course, it also abrogated the legislative role of the provincial legislature, but the Judicial Committee focused on the constitutional role of giving royal assent.) The defenders of the Senate election bill point out that in that case the Manitoba Act expressly stripped away a legislative role, whereas the current reform leaves intact the Cabinet's role (described, of course, in the 1867 Act as the governor general) to make appointments once the election has been held. Again, defenders of reform take a

[8] When Senator Bert Brown appeared before the Legislative Committee on Bill C-20 on 18 June 2008, he spoke in defence of Senate elections. Brian Murphy MP (Liberal) asked him why he chose to speak of the prime minister's commitment to Senate elections when the Bill before the Committee seemed to deal with a consultative process. He reminded Senator Brown of Professor Peter Hogg's testimony about the importance of the distinction – that only if the selection prerogatives of the Cabinet in Senate selection were left unaltered in any way could Bill C-20 be constitutional. Senator Brown replied: "To go back to your question about whether the Prime Minister is committed to the idea of the election of Senators, I would have to answer with an unequivocal yes because he has told me that himself, but with a time-limited offer to provinces. If they hold Senate elections, he will recognize the outcome of those elections." (Legislative Committee on Bill C-20, *Evidence*, No. 10, 2nd Sess., 39th Parl. (June 18, 2008), 1550. Of course, the prime minister's clear political purposes and the electoral scheme of Bill C-20 are not necessarily the same.

constitutional prohibition and infer from it a constitutional licence for everything else. This is simplistic interpretation. It is true that the Judicial Committee was not dealing just with a *de facto* alteration of constitutional power but also with formal alteration. However, its decision that what Manitoba was attempting was unconstitutional does not carry any implication that when in a substantive – and substantial – change of constitutional power the formal process is left intact there is no constitutional violation. The case is no authority in situations like the present in which there is a significant alteration to constitutional powers and processes. The test the Judicial Committee actually applied to the Manitoba proposals was that the Manitoba plan "intended seriously to *affect* the position of [the constitutional power-holder]" (italics added). That particular test of unconstitutionality is, of course, met in the current proposal relating to Senate elections.

Prime Minister Harper's final "reform" initiative has been implicit and is a further instance of "jump ball" reform. It consists of the simple decision not to fill Senate vacancies (apart from bringing a defeated candidate for a Commons seat into his first Cabinet and appointing a person elected under Alberta's experiment with holding elections for filling Senate vacancies from that province) (*Globe and Mail* 2008, A4). One purpose of this is to produce the sense that something urgently needs to be done to reform the Senate.[9] The failure to appoint is also a type of reform in that its effect is to erode the legitimacy of the Senate in two ways. First it expresses disdain for the practice of appointment and, hence, disdain for the Senate generally and the role it performs in the national legislative process. Second, through not filling vacancies the constitutional scheme of representation (as badly skewed as it already was) has been destroyed. Currently, for instance, New Brunswick has three times as many senators as British Columbia and approximately one-sixth the population producing an eighteen-fold overrepresentation. Certainly the allocation of seats provided by the Constitution produces discrepancies, but not at this scale. This conduct of the Prime Minister is clearly unconstitutional. Appointing senators is not a prime ministerial prerogative but a constitutional requirement placed on him and his Cabinet in section 32 of the *Constitution Act, 1867*, which identifies a duty to "summon qualified Persons to the Senate." Whatever discretionary room may exist in this power, it does not extend to an exercise of it that destroys the element of governmental structure the preservation and functioning of which is the purpose behind the granting of the power. Constitutions do not assign authorities with the idea that they will be used to defeat the Constitution. Certainly, no Canadian government would be allowed to attack and erode the judicial branch through a decision not to fill judicial vacancies. This situation is no different.

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[9] Senator Bert Brown, a promoter of the prime minister's plan for "elections" has identified the prime minister's decision not to make Senate appointments as designed to push the provinces "to come on side" with Senate elections. See, "Saskatchewan plans to elect senators" The Globe & Mail (Toronto) 19 May 2008 at A1. Senator Brown spoke of the prime minister's plan only in terms of Senate *elections*.

Prime Minister Harper has decided that political barriers to constitutional reform should not stand in the way of reforms that his government sees as having high national value. He has not adopted the political strongman's tactic of improving the Constitution through amendment by decree, or by the less oppressive, but equally improper, device of legislative decree. Instead, he is proposing changes to the Senate that he believes do not violate any of the Constitution's terms and that he is proceeding in accordance with the constitutional order. I believe that he has miscalculated the constitutional constraints that apply to his Senate reform proposals.

It needs to be acknowledged that intergovernmental constitutional reform of the sort required by sections 38 and 42 is very likely to be held up by traditional demands. From Quebec will come proposals for amendment that could lead to Quebec's acceptance of the 1982 Constitution that will have to be dealt with prior to any other reforms. Aboriginal organizations will demand for the right to participate in constitutional discussions and the right to special inclusion in any reformed governmental institutions. Both sets of claims reflect compelling ideas of national justice. Neither claim should be ignored if we are seeking to create a peaceable state. These political conditions will hold up parliamentary reform and this gives rise to the belief that there must be some route for legislated Senate reform under section 44. But there isn't. We need to be nation enough to conduct the inconvenient and difficult intergovernmental discussions that Part V of the *Constitution Act, 1982* has identified as being essential to our sustained nationhood. We might benefit from them.

REFERENCES

Canada. 2006a. Special Senate Committee on Senate Reform. *Evidence*, 1st Sess., 39th Parl. 7 September.

— 2006b. Senate of Canada. *Report on the Subject-matter of Bill S-4, an Act to amend the Constitution Act, 1867 (Senate tenure)*. October.

— 2008. Legislative Committee on Bill C-20. *Evidence*, No. 10, 2nd Sess., 39th Parl. 18 June.

Curry, B. and B. Laghi. 2008. "Saskatchewan plans to elect senators," *The Globe and Mail*, 19 May, A1.

Reference re: Authority of Parliament in relation to the Upper House, [1980] 1 S.C.R. 54.

Reference re: Secession of Quebec, [1998] 2 S.C.R. 217.

Reference re: The Initiative and Referendum Act, [1910] Appeal Cases 935 (Judicial Committee of the Privy Council).

Smith, D.E. 2003. *The Canadian Senate in Bicameral Perspective*. Toronto: University of Toronto Press.

The Globe & Mail. 2008. "Empty seats: Saving taxpayer dollars one vacant Senate seat at a time," 19 May, A4.

Whyte, J.D. 2007. "Sometimes Constitutions Are Made in the Street: The Future of the Charter's Notwithstanding Clause," *Constitutional Forum* 16(2): 79-88.

CONTENT OF THE FEDERAL GOVERNMENT'S PROPOSED CHANGES

10

ANTICIPATING THE CONSEQUENCES OF BILL C-20

Stephen Michael MacLean

Le projet de loi C-20 – Loi sur les consultations concernant la nomination des sénateurs – et le projet de loi C-19, sont désavantageux pour le Sénat. S'intéressant surtout au projet de loi C-20, l'auteur énumère les désavantages de ce projet de loi, entre autres le fait que si le Sénat était « élu », il serait une copie de la Chambre des communes, et non son complément (tel que c'est le cas maintenant); ce projet est, selon lui, un affront aux intentions des Pères de la Fédération, et il trouve le processus de consultation ambigu. Il conclut en affirmant que le Sénat actuel joue le rôle qui lui a été donné.

> We wished at the period of the [Glorious] Revolution, and do now wish, to derive all we possess as *an inheritance from our forefathers*. Upon that body and stock of inheritance we have taken care not to inoculate any cyon alien to the nature of the original plant. All the reformations we have hitherto made, have proceeded upon the principle of reference to antiquity; and I hope, nay I am persuaded, that all those which possibly may be made hereafter, will be carefully formed upon analogical precedent, authority, and example.
>
> Edmund Burke, *Reflections on the Revolution in France*

While the Conservative Party of Canada has often been accused of trying to ape the Republican Party of the United States, there is a marked contrast between them with respect to their attitudes toward constitutional practices. Republicans eschew innovation by an appeal to the "intent of the Framers" and to a strict constructionist ("originalist") interpretation, whereas Canada's Conservatives advocate a radical re-interpretation and adaptation of the *British North America Act, 1867* (in contemporary usage, the *Constitution Act, 1867*).

Nowhere is this "new" Conservative bent and ideological fixation upon "the principles of modern democracy" (C-20, Preamble) more in evidence than in Senate reform. The government has introduced two bills in this area: C-19 (Senate ten-

ure), which introduces a non-renewable eight-year term for senators, and C-20 (Senate Appointment Consultations Act), which encourages public recommendations of senatorial appointments.

While few would deny the salutary benefits of Senate reform – e.g., increased representation from other political parties, more *independent* senators without political party affiliation, a greater diversity of professions and employments ("walks of life") represented, and a more equitable representation of regions the better to reflect Canada's growing population – it is here asserted that this particular reform of Senate Appointment Consultations (SAC) is detrimental to the Senate.

Bill C-20 (as indeed C-19) threatens the organic nature of the Parliament of Canada as it has evolved: an elected House of Commons and an appointed Senate; the former principally of legislative function, the latter deliberative in nature or, in the clichéd phrase, a chamber of "sober second thought." Convention reflected this tension between accountability and legitimacy: the Commons is privileged (*de facto* if not *de jure)* as the pre-eminent *confidence* chamber, the Senate a *complementary* chamber of scrutiny and amendment.

Traditional Conservatives would not undertake constitutional reform were there no obvious breakdown in the system of government that threatened paralysis and chaos. They would instead rely upon a Burkean reverence for prejudice, the belief that "individuals would do better to avail themselves of the general bank and capital of nations, and of ages" (Burke 1790, 183). It is such prejudice, based on the fundamentals of the *Constitution Act, 1867* and the legacy of the Fathers of Confederation, upon which this critique is formed.

I will briefly address the reform of the Senate contemplated in C-20.

DUPLICATION

Upper houses historically have stood apart from their lower house counterparts; ideally, their function is not to oppose, but to complement; not to duplicate, but to augment. Upper houses justify their existence by the promise to provide a political service not fulfilled by lower houses and to provide a fresh perspective and insight on public policy issues – a uniqueness manifest in the fact that their members are selected differently than lower-house members. Canada's appointed Senate is fairly true to this upper house model. A reformed, elected Senate is not, since it merely duplicates the function of the Commons. What's the point of imitation?

SLIPPERY SLOPE

If the idea of senators appointed by an elected prime minister – to a chamber that by convention assumes a complementary role to the Commons – is such an affront to democratic sensibilities, requiring the remedy that C-20 proposes, what is the effect on the credibility of the judiciary and other appointed public offices?

INTENTIONS OF THE FATHERS

By introducing a consultative process, C-20 contravenes the intentions of the Fathers of Confederation. With the British and American examples before them, they devised an upper house to act primarily as a deliberative, secondary body. Only an irresponsible government would set out upon the path of Senate reform with so little regard for what the Fathers of Confederation achieved, and with so little apprehension of what lies ahead, unmindful of "precedent, authority, and example."

CONSULTATION PROCESS

How efficiently will the actual process of consultation work? How will candidates/nominees come forward? What assurances are proffered that "qualified Persons" (*Constitution Act, 1867,* s. 24), different from those elected to the House of Commons, will be nominated to provide sober second thought? And what is the legal and political status of public consultations if constitutional responsibility ultimately remains with the prime minister?

RAISED EXPECTATIONS

Must the prime minister always defer to the recommendations of the voters? Though C-20 leaves him free to exercise his own judgment, the pressure for him to enact the public's choice will be great. What will be the public's response, and its perception of probity and accountability, if the prime minister rejects the nominee(s) provided and, at his own discretion, appoints someone else?

SENATORIAL CONSTITUENCIES

Will the consultative process lead to "senatorial constituencies" in much the way that MPs represent ridings? While senators currently sit for regional districts (with greater geographic specificity in Quebec), they serve no constituents *directly* as MPs do, and can thus focus on national issues and not on the individual needs of their constituents. This distinctiveness is conducive to the independence and objectivity of the upper house and acts as a foil to parochial interests.

PROVINCIAL SPOKESMEN

Though some provincial premiers advocate elected senators in theory (as consultation implies), they might well change their minds when confronted with the establishment of such political rivals. Elected senators, representing provincial interests at the national level, will inevitably supplant the premiers' prestige and their depiction as statesmen to their constituents, a characterization of which they are naturally jealous. Quebec premiers, by virtue of the *deux nations* theory of

Confederation and as the self-appointed representatives of French-speaking rights in the country, are adamantly protective of their special stature. Will premiers relinquish to senators their power and authority to take on Ottawa – as the sole official speakers for provincial interests – without a fight?

HYBRID CHAMBER

If C-20 becomes law, then the short-term prospect includes both appointed and "elected" senators who will sit in the red chamber. If C-19 also receives royal assent, there will be the added ingredient of senators who will sit until the present mandatory retirement age of 75 and those with fixed, non-renewable eight-year terms. With such a mélange of mandates, will senatorial colleagues truly respect each other as peers?

CLASH OF COMPETING CHAMBERS

Were C-20 to be enacted and found to be constitutional, how would the inevitable clash between competing "elected" chambers be resolved? Since the Senate is *co-equal* with the Commons save for money bills, how will a "red veto" be overturned?

REVERSAL OF FORTUNES

The ultimate poetic justice of C-20 would be the reversal of the pre-eminence of the two chambers in Parliament. With "elected" senators-at-large enjoying both a larger constituency yet fewer provincial peers-*cum*-rivals vying for public attention (in contrast to most MPs); with longer terms to build up public confidence and trust; with traditional politicians polling low numbers for public respect; and with the *Constitution Act,1867* investing the Senate with virtually equal powers to the House of Commons (excepting revenue legislation), may not all these factors tilt public esteem in the Senate's favour?

As the foregoing comments indicate, in my view the Senate reform bills are fraught with more disadvantages than the sought-for remedy or the hopeful folly of benefits-to-be-received. "It is what we prevent, rather than what we do," William Lyon Mackenzie King once observed, "that counts the most in government" (quoted by Reynolds 2007, B2). More aptly, to borrow a British expression, the present Senate of Canada is still "fit for purpose."

REFERENCES

Burke, E. 1790. *Reflections on the Revolution in France*, C.C. O'Brien, ed. Harmondsworth: Penguin Books, 1986.

Reynolds, N. 2007. "Bring back the mighty ship Labrador," *The Globe and Mail*, 14 February, B2.

11

ASSESSING SENATE REFORM THROUGH BILL C-19: THE EFFECTS OF LIMITED TERMS FOR SENATORS

Andrew Heard

Cet article revoit les clauses constitutionnelles au sujet des nominations au Sénat et les différents processus pour les modifier. L'article examine également la décision de la Cour suprême du Canada dans l'Upper House Reference pour voir si elle pose problème au projet de loi C-20. Puis, le débat se poursuit afin de déterminer si cette décision est toujours valable ou si l'amendement ultérieur, l'article 44 de la Loi constitutionnelle de 1982, lui a fait perdre sa raison d'être. L'article conclut en se demandant si la nature consultative des élections dans le cadre du projet de loi C-20 suffira à le sauver, ou s'il s'agit effectivement de vraies élections et que le projet de loi est voué à l'échec.

After some years in the hinterland, Senate reform has again edged its way to the fore of the national political agenda. Many proposals for significant reform were made in the last decades of the twentieth century, culminating in the Charlottetown Accord signed by all first ministers in 1992. This agreement would have replaced the current appointed Senate with one composed of an equal number of elected members from each province; the Accord, however, suffered fatal wounds at the hands of the voters in the referenda organized by the Quebec and Canadian governments in October 1992.

Little appetite remained after that for national constitutional debates; even the narrow results of the 1995 Quebec referendum failed to inspire Canadian politicians to engage in broad federal-provincial negotiations for constitutional renewal. Instead, the federal government reacted with non-constitutional, legislative measures: the regional veto formula embodied in the *Constitutional Amendments Act, 1996* and the *Clarity Act* passed in 2000.

This lower-key approach to unilateral legislative innovation has continued with the minority Conservative government elected in January 2006. Their first concrete government action on Senate reform came only a few months into the first session of Parliament, with the introduction of Bill S-4 into the Senate on 30 May

2006. Instead of dealing with Senate elections, this bill would have ensured that any new senators would serve no more that eight years in office; this term of office dovetailed with proposals introduced that same day in the House of Commons to limit the life of a parliament to a maximum of four years (Canada 2007). Bill S-4 was substantially amended in June 2007 by the Senate after two rounds of committee hearings. At report stage, the Senate adopted committee recommendations that the eight-year tenure of new senators be increased to fifteen years, that a senator could not be reappointed to another term, and that mandatory retirement at 75 be restored. In addition, the Senate effectively killed the bill by agreeing that it would proceed no further until the Supreme Court had ruled on its constitutionality.

Parliament was prorogued not long afterwards, in September 2007, and the government chose to reintroduce the measure into the House of Commons in November 2007 as Bill C-19. Embodying most of the original provisions of S-4, Bill C-19 left out the one provision which had generated the most concerns about the constitutionality of S-4: the ability of the prime minister to reappoint senators to subsequent eight-year terms. As the Senate deliberations on S-4 revealed, this power of reappointment could have undermined the Senate's fundamental independence by inducing some senators to curry favour with the government in the hopes of securing a second term in office.

Although Bill C-19 lacks the major constitutional weakness of S-4, it is still important to consider the effects of introducing an eight-year limit to the tenure of new senators. During the Senate's consideration of Bill S-4, a number of senators and committee witnesses raised concerns that unilateral federal legislation to set eight-year term limits may run afoul of a 1979 reference decision of the Supreme Court of Canada which indicated that federal legislation could not alter the "essential characteristics" of the Senate.[1] While it is beyond the scope of this paper to analyze the legal debate over whether the *Upper House Reference* continues to apply in light of the new amending formulas in the *Constitution Act, 1982*, the main issue of impact on the essential characteristics of the Senate remains a useful perspective for analyzing Bill C-19.

This paper will briefly identify the most important aspects of the Senate's composition and roles in the Canadian political system. Particular attention will be paid to the Senate's role of providing "sober second thought" and whether short-term senators might be less effective in this regard. Rather than relying purely upon abstract considerations, this paper will include empirical analysis of senatorial behaviour. The potential effects of Bill C-19 will be examined in detail in three contexts: the replacement of the mandatory retirement age for new senators with the fixed eight-year term, the possible effects that the seniority practices of the Senate may have on new short-term senators working among many other longer-term senators, and whether short-term senators act less independently than others

[1] *Reference re: Authority of Parliament in Relation to the Upper House*, [1980] 1 S.C.R. 54 (hereinafter referred to as the *Upper House Reference*).

with longer terms. A much richer perspective on Bill C-19 can be gained from the combined insights of these three perspectives, and firmer conclusions on its likely effects on the work of the Senate can be drawn.

BILL C-19: CONTENTS AND EFFECTS

The terms of Bill C-19 are very succinct and would change the term of newly appointed senators to a limit of eight years. It would also abolish mandatory retirement for newly appointed senators while preserving it for current senators. The main clause of the Bill would replace section 29[2] of the *Constitution Act, 1867*, with the following:

> 29. (1) Subject to sections 30 and 31, a person summoned to the Senate shall hold a place in that House for one term of eight years.
>
> (2) If that term is interrupted, that person may be summoned again for the remaining portion of the term.
>
> (3) Notwithstanding subsection (1) but subject to sections 30 and 31, a person holding a place in the Senate on the coming into force of the Constitution Act, 2007 (Senate tenure) continues to hold a place in that House until attaining the age of seventy-five years.[3]

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[2] The original text of s. 29 is as follows:

> 29. (1) Subject to subsection (2), a Senator shall, subject to the provisions of this Act, hold his place in the Senate for life.
>
> (2) A Senator who is summoned to the Senate after the coming into force of this subsection shall, subject to this Act, hold his place in the Senate until he attains the age of seventy-five years.

[3] The preamble to Bill C-19 is rather lengthy but provides good insights into the motivation for its enactment:

> WHEREAS it is important that Canada's representative institutions, including the Senate, continue to evolve in accordance with the principles of modern democracy and the expectations of Canadians;
>
> WHEREAS the Government of Canada has undertaken to explore means to enable the Senate better to reflect the democratic values of Canadians and respond to the needs of Canada's regions;
>
> WHEREAS the tenure of senators should be consistent with the principles of modern democracy;
>
> WHEREAS the Parliament of Canada enacted the *Constitution Act, 1965*, reducing the tenure of senators from life to the attainment of seventy-five years of age;
>
> WHEREAS, by virtue of section 44 of the *Constitution Act, 1982*, Parliament may make laws to amend the Constitution of Canada in relation to the Senate;
>
> AND WHEREAS Parliament wishes to maintain the essential characteristics of the Senate within Canada's parliamentary democracy as a chamber of independent, sober second thought…

Short-term Senate appointments are not new, indeed short-term appointments are more common than the extra-long appointments that fuel animosity towards the Senate. Since 1867, only 60 (6.9 percent) of 873 Senate terms have been for more than 30 years, while 246 (28.0 percent) senators served for less than 8 years; another 6 current senators will have to retire within eight years or less of their appointment.[4] It is important to note that most of those short-term Senate careers ended prematurely because of death; 146 senators died having served less than eight years. Table 1 shows that, since the 75 year age limit came into force on 1 June 1965, 46 of 276 (16.7 percent) appointments have been given to individuals who had less than eight years to serve.

TABLE 1: Appointment of Short-Term Senators since Mandatory Retirement in effect in 1965

Prime Minister	*Total Appointments*	*Appointments of Less than 8 Years*	*Short-term as % of Appointments*
Harper	2	1	50.0
Martin	17	2	11.8
Chrétien	75	28	37.5
Mulroney	57	5	8.8
Turner	3	1	33.3
Clark	11	1	9.1
Trudeau	81	5	6.2
Pearson	30	3	10.0
Total	276	46	16.7

Source: Library of Parliament

While short-term senators are not a new phenomenon in Canada, Bill C-19 would mark a fundamental change because all appointments would be for a maximum of eight years. A small minority of short-term senators sitting at any one time is quite different from the ultimate goal of ensuring that the entire membership is appointed to an eight-year term.

Limited terms have also been recommended in other proposals for Senate reform. The Beaudoin-Dobbie Report suggested that senators should have renewable terms "of no more than six years in length," and that they be elected (Canada 1982, 44-49). The Molgat-Cosgrove Report favoured electing senators to non-renewable terms of nine years; the committee believed that without adopting

[4] There have actually been 876 appointments to the Senate, but three individuals named to it in the 1867 Royal Proclamation declined their appointments. These data were calculated from the individual biographies of senators, as of 9 September 2006, available from: "Senators – 1867 to date – by name," Acessed 28 February 2008 at http://www2.parl.gc.ca/parlinfo/lists/senators.aspx?Parliament=&Name=&Party=&Province=&Gender=&Current=False&PrimeMinister=&TermEnd=&Ministry=&Picture=False

elections, the Senate would benefit from the nine-year term for appointed senators (Canada 1984, 26-27). The Charlottetown Accord provided for elected senators who would face elections at the same time as MPs.[5]

With this backdrop in place, an assessment of the impact of Bill C-19 can be undertaken. The next two sections of this paper explore the work of the Senate and the independence of its members in an effort to identify the salient characteristics that may need protection. Then the paper will analyze 1) the replacement of the mandatory retirement age for new senators with the fixed eight-year term; 2) the possible effects that the seniority practices of the Senate may have on new short-term senators working among many other longer-term senators; and 3) whether short-term senators may act less independently than others with longer terms.

THE WORK OF THE SENATE

The Senate is an insufficiently studied institution in Canadian politics. Scholarly works usually refer to the Senate as having been designed with two functions in mind. The role as a forum for regional representation is stressed by those who point to the lengthy debates over the relative representation of the different provinces during the Confederation negotiations. As a counter-balance to the general principle of representation by population in the House of Commons, the Senate was designed to provide equal representation of "regions"; originally this allowed the Maritime provinces to collectively have representation equal to that which Ontario and Quebec each had. As has been widely noted, however, the Senate has not actually operated as a chamber in which distinctive regional interests are championed. Virtually from the start, the main forum for effective regional representation has been the Cabinet, bolstered by the in-camera debates in the governing caucus and the House of Commons in public session.[6] In recent decades, the provincial premiers and other officials have taken a central place in representing provincial and regional interests. It has become *de rigueur* for many modern advocates of Senate reform to assert that the Senate must be remade to perform this initial function effectively, and this motivation underlies the Triple-E ideas spawned in western Canada in the 1980s.

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[5] With the exception of any senators that would have been selected by provincial legislatures.

[6] Paul G. Thomas is one author who believes that the view that the Senate has failed in regional representation is "not altogether persuasive." See his comments in "Comparing the Lawmaking Roles of the Senate and House of Commons," in Serge Joyal (ed.), *Protecting Canadian Democracy: The Senate You Never Knew*, Montreal-Kingston: McGill-Queen's University Press, 2003, 206-9. For an opposite view see Paul G. Weiler, "Confederation Discontents and Constitutional Reform: The Case of the Second Chamber," (1979) *University of Toronto Law Journal* 29(3): 253-283.

The Senate's role to provide "sober second thought" to precipitous actions in the Commons is the other original function that the founders of Canada felt necessary. Modelled on the British House of Lords, the Senate was envisioned as a bastion to represent propertied interests distinct from the interests of the masses that might be championed by MPs in search of re-election. The qualifications for appointment to the Senate contained in the real property and financial net-worth requirements were substantial at the time of Confederation.[7] Some have argued that the Senate has been too successful in this role of defender or promoter of the interests of capital (Campbell 1978). The Senate's purpose in acting as a counterweight to the Commons, however, is certainly much broader than this. From the beginning, the Senate assumed the roles of scrutinizer of legislative proposals coming from the Commons and of initiators of legislation dealing with more technical and less partisan issues. The Senate provides detailed revision of clauses that are glossed over in the hurly burly of the Commons, and it takes some of the burden off the Commons by giving careful consideration to bills initiated in the Senate on non-controversial matters. In a larger sense, the Senate was meant to act as one of the checks and balances in Canada's parliamentary form of government and as one of the limits on government power essential to liberal democracy (Ajzenstat 2006, 5; Ajzenstat 2003, chap. 1).

In the decades since Confederation, the Senate has demonstrated a varied record in revising legislation from the House of Commons. While the percentage of Commons legislation amended by the Senate dropped over the course of the twentieth century, it still remains at meaningful levels.[8] Indeed, as table 2 shows, the proportion of Commons bills amended by the Senate has actually grown from the early 1960s. It is also important to note that the Senate has an absolute veto over legislation coming from the Commons. Although I have argued elsewhere that a constitutional convention had appeared to have developed by the late 1980s that the Senate should not exercise its outright veto, Senate activity since then has shown an increase in the number of bills rejected by the Senate; little outcry from the general public accompanied any of the defeats of Commons bills since the late 1990s (Heard 1991, 89-98).

The Senate is also able to prevent Commons legislation from being passed in more subtle ways than, for example, an outright defeat on second or third reading. A bill may be processed at treacle-like speeds or be delayed by lengthy and sporadic

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[7] Those appointed to the Senate must hold real estate worth a minimum of $4000 above any loans or liens, and the appointee's net financial worth must also be at least $4000; these requirements are found in s. 23 of the *Constitution Act, 1867*.

[8] For excellent, recent discussions of the Senate's legislative roles, see C.E.S. Franks, "The Canadian Senate in Modern Times," in Serge Joyal (ed.), *Protecting Canadian Democracy: The Senate You Never Knew*, Montreal-Kingston: McGill-Queen's University Press, 2003; David Smith, *The Senate in Bicameral Perspective*, Toronto: University of Toronto Press, ch. 6; and Thomas 2003.

TABLE 2: Senate Treatment of Commons Bills, 1958–2007

Parliament	*Commons Bills Introduced in the Senate*	*Commons Bills Amended in the Senate*	*% of Commons Bills Amended*	*Commons Bills Rejected by the Senate*	*Senate Prestudy of Commons Bills*	*No Royal Assent of Commons Bills in the Senate*	*Bills Amended by Senate and Agreed to by Commons*	*Bills Amended by Senate and Not Agreed by Commons*	*Senate Amendments Insisted on by Senate*	*Further Commons' Amendments Agreed by Senate*
2006–2008	88	9	10.2	-	-	20	2[a]	3[a]	-	1
2004–2005	50	3	6.0	-	-	-	3	-	-	-
2001–2004	131	14	10.7	1[b]	1	26	9	2	1	1
1997–2000	122	10	8.2	1	-	6	10	-	-	-
1994–1997	169	14	8.3	1	-	6	10	3	-	1
1988–1993	229	8	3.5	2	9	3	4	3	1	-
1984–1988	248	18	7.3	-	75	7	11	5	2	1
1980–1984	202	1	0.5	-	37	1	1	-	-	-
1979–1979	7	0	0.0	-	3	1	-	-	-	-
1974–1979	221	9	4.1	-	23	4	8	-	-	-
1973–1974	64	1	1.6	-	4	-	-	1	-	1
1968–1972	178	12	6.7	-	1	-	10	2	-	2
1966–1968	113	5	4.4	-	-	-	3	-	-	-
1963–1965	92	3	3.3	-	-	1	2	1	-	1
1962–1963	18	0	0.0	-	-	-	-	-	-	-
1958–1962	211	15	7.1	2	3	3	1	1		
TOTALS	2,143	122	5.7	7	153	78	76	21	5	8

Notes: [a]With Bill C-2 and Bill C-31, the House of Commons agreed with some Senate amendments to the bills but objected to or amended others; [b]Bill C-10 was split into 2 bills, C-10A and C-10B; C-10 is counted as a rejection by the Library of Parliament. However, it can be argued that this was really an amendment rather than a defeat.

Source: Library of Parliament

consideration at committee stage. As a result, many bills simply fail to emerge from the Senate by the time a session is prorogued or Parliament dissolved. Granted, some bills are passed on to the Senate from the Commons too late for any effective deliberations in the Senate. However, the fact that decisions are indeed made to not proceed with the passage of certain bills is highlighted by the expeditious treatment of other bills in the dying days of a session. Numerous bills are introduced and passed in perfunctory fashion within a few days of the close of a session, while many other bills introduced weeks or months earlier are simply left to expire. Occasionally these "indirect vetoes,"[9] are made publicly and loudly, such as when the liberal-dominated Senate decided in 1988 that it would not proceed with the original Free Trade Agreement legislation until after a general election had provided a mandate for the policies enshrined in the FTA. Thus, the impact the Senate has on the legislative process is felt beyond the most visible exercises of amending or formally rejecting Commons bills. Table 2 shows a growth through the 1980s and 1990s in the number of Commons bills that fail to make it through the Senate and receive royal assent.[10]

The independence of the Senate is not just revealed in its treatment of legislation passed by the House of Commons, because it can and does reject government bills initiated in the Senate. In doing so, the Senate is directly opposing the Cabinet of the day. The Senate's treatment of Bill S-4, in the 2006–7 Session, is a prime example. The Senate not only fundamentally altered the bill, but effectively killed it by accepting the committee recommendation that the bill not be proceeded with until the Supreme Court of Canada has ruled on its constitutionality.

Almost invisible, but substantive, contributions are also made when Senate committees study the content of bills while they are still formally before the House of Commons. In this process of "pre-study," senators examine the bills in detail and offer suggestions for amendment that are then considered and often adopted by the House of Commons before the legislation ever formally is introduced into

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[9] This phrase is taken from Smith 2003, 115-6.

[10] Note that the column headed "No Royal Assent of Commons Bills in the Senate" includes bills also listed in the column headed "Commons Bills Rejected by the Senate," as well as Commons bills amended by the Senate without a final agreement with the House of Commons over those amendments before the end of the session. The data in Table 2 are complied from various tables prepared by the Library of Parliament: "Bills introduced in the House of Commons and amended in the Senate," accessed 28 February 2008 at http://www2.parl.gc.ca/Parlinfo/Compilations/HouseOfCommons/Legislation/HOCBillsAmandedBySenate.aspx?Language=E; "Pre-study of House of Commons bills by the Senate, 1971 to date, accessed 28 February 2008 at http://www2.parl.gc.ca/Parlinfo/compilations/HouseOfCommons/Legislation/PreStudyBySenate.aspx?Language=E; "House of Commons bills sent to the Senate that did not receive Royal Assent, 1867 to date," accessed 28 February 2008 at http://www2.parl.gc.ca/Parlinfo/compilations/HouseOfCommons/legislation/billsbyresults.aspx?Language=E&Parliament=&BillResult=03d93c58-f843-49b3-9653-84275c23f3fb

the Senate.[11] In these instances, the official record shows that the bills have passed through the Senate unaltered, when in actuality the Senate's suggested amendments may have already been incorporated. Senate leaders have decided in recent years to engage in pre-study on much fewer occasions. A decision to stop pre-study was reached in the late 1980s because the Liberal leaders in the Senate believed they had been simply helping the Conservative dominated House of Commons to improve its legislation; the reluctance to use pre-study continued even after the Liberals gained control of both houses in the late 1990s, because Senate leaders believed that the Senate was not getting public credit for the work it was doing.[12] With the decline in pre-study in the late 1990s and 2000s, there has also been a corresponding increase in the number of Commons bills amended and not receiving royal assent.

Thus, the information in table 2 should be read together with these caveats in order to understand the actions of the Senate in reviewing legislation passed by the House of Commons. As Ned Franks has written, the ineffective and largely idle "Imaginary Senate" caricatured in the media and much political discussion is quite different from the "Actual Senate" (Franks 2003, 182-85).

In reviewing Commons legislation, the Senate's role has also changed somewhat since Confederation. Rather than being a champion of business interests, Franks notes that much of the Senate's activities have arisen out of the Senate's efforts to defend broad consumer or citizen interests (ibid., 183). In a previous statistical analysis of the Senate's legislative activity between 1958 and 1988, the only robust variable to show strong correlations to the level of Senate amendments to Commons legislation was the size of the governing party's majority in the House of Commons; the Senate is more likely to amend Commons bills when the government has a large majority and can expedite measures through the House of Commons with dispatch (Heard 1991, 91). Some confrontations between the two houses definitely are ignited by pure partisan interests when different parties control the two houses; opposing camps clashed memorably during the GST debacle in 1990 and the battle over the Pearson airport contracts in the mid-1990s. However, the Senate's active treatment of Commons legislation in the late 1990s and early 2000s, for example, came at a time when Liberals controlled both houses.[13]

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[11] The pre-study of bills is sometimes referred to as the Hayden Formula, after Senator Salter Hayden who began the practise in 1971 while chair of the Senate Committee on Banking, Trade and Commerce; Thomas 2003, 203-4.

[12] Once the Conservatives wrested control of the Senate with the appointment of eight extra s. 26 senators, they revived pre-study between 1991 and 1993, reviewing nine bills mainly dealing with banking and other financial industries. The only instance of pre-study since that time occurred with the *Anti-Terrorism Act* in 2001–2. (Library of Parliament, "Pre-study of House of Commons bills by the Senate, 1971 to date," accessed 28 February 2008 http://www2.parl.gc.ca/Parlinfo/compilations/HouseOfCommons/Legislation/PreStudyBySenate.aspx?Language=E

[13] The rivalry between the Chrétien and Martin camps may explain some Senate activity prior to Chrétien's resignation as Liberal leader.

Perhaps the most widely respected work of the Senate occurs in its committees, both when reviewing legislation in detail and when conducting investigations in specific issues of public policy. Proceedings in Senate committees are usually significantly less partisan than their Commons counterparts. The Senate also benefits greatly from the wide range of professional, business and political experience of its members. Of the 870 individuals who have served in the Senate since 1867, 3 former prime ministers and 22 former premiers have been appointed to the Senate, 305 have served as MPs, and 416 senators had been elected to municipal office.[14] The actual percentage of sitting senators who have previously held public office varies from time to time; for example, between 1970 and 2000 this percentage varied from 75 percent to 48 percent (Nagle 2003, 327-29). The Senate also has had significant numbers of individuals with previous careers in business, the professions, academe, and the arts. This rich range of pre-Senate experience is then further built upon by the often lengthy periods that senators serve. The result is an accumulation of institutional memory, collegiality and expertise.

Harnessing this experience in investigative studies by Senate committees has led to a number of impressive policy reports.[15] These policy investigations are one of the most widely credited aspects of the Senate's work (Franks 2003; Thomas 2003). Significant studies in recent decades have included reports on the banking and financial industries, the fisheries, national security, and health care. The so-called Kirby Report on Health Care, produced by the Standing Committee on Social Affairs, Science and Technology in 2003 is perhaps the most recent report

[14] While 875 appointments have been made to the Senate, 3 individuals refused to accept their appointments, and 2 individuals resigned and were reappointed for a total of 5 terms between them. Data compiled from the Library of Parliament: "Senators – 1867 to Date – By Name," http://www2.parl.gc.ca/parlinfo/lists/senators.aspx?Parliament=&Name=&Party=&Province=&Gender=&Current=False&PrimeMinister=&TermEnd=&Ministry=&Picture=False; "Senators – Prime Ministerial of Premiership Experience – 1867 to Date," http://www2.parl.gc.ca/Parlinfo/Lists/PrimeExperience.aspx?Language=E&Menu=SEN-Politic&Section=Senators&ChamberType=; "Senators – 1867 to Date – Previously Members of the House of Commons," http://www2.parl.gc.ca/Parlinfo/compilations/Senate/PreviouslyMembers.aspx; "Senators – Municipal Experience – 1867 to Date," http://www2.parl.gc.ca/Parlinfo/Lists/MunicipalExperience.aspx?Language=E&Section=b571082f-7b2d-4d6a-b30a-b6025a9cbb98&Chamber=b571082f-7b2d-4d6a-b30a-b6025a9cbb98&Parliament=0d5d5236-70f0-4a7e-8c96-68f985128af9&Name=&Party=&Province=&Gender=&MunicipalProvince=&Function= (All accessed 28 February 2008).

[15] The Library of Parliament has compiled a selective list of the more influential reports: "Major Legislative and Special Study Reports by Senate Committees, 1961–2003," available at http://www.parl.gc.ca/37/2/parlbus/commbus/Senate/com-E/pub-E/directorate-e.htm (Accessed 28 February 2008).

with a high public profile (Canada 2003). David Smith notes that this report was produced by a panel that contained experienced health care professionals, while the Romanow Commission on Health Care had to hire experts (Smith 2003a, 178). This influential Senate report was produced for a total cost of about $500,000 while the royal commission headed by Roy Romanow had a budget of $15 million (Canada 2006a). Senate committees have been actively engaged in studying policy matters, producing 91 separate policy reports since 2000; the House of Commons, with almost three times the membership of the Senate, issued 165 in the same time period.[16]

Another noted characteristic of the Senate is its role in representing non-territorial groups in Canadian society. Because prime ministers make deliberate choices for the individuals to be appointed to the Senate, they can ensure that certain population groups do get representation. By contrast, the social groups represented in the House of Commons are subject to the vagaries of constituency-level battles and the electoral system. As a result, women and aboriginal members form a higher proportion of the members in the Senate than in the House of Commons. Currently, women constitute 34 percent of the upper house and 21.1 percent in the lower house; First Nations members are 7.7 percent of the upper house and 1.3 percent of the lower.[17]

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[16] These figures cover reports tabled by 6 June 2006 of committee investigations on substantive public policy issues, excluding consideration of bills, estimates, public accounts, auditor general's reports or matters of internal organization and processes of either House; multi-volume reports issued on the same day are counted as one report, but multi-volume reports issued on different dates are counted as separate reports. The data are calculated from: Library of Parliament, "Substantive Reports of Committees – House of Commons," http://www2.parl.gc.ca/Parlinfo/Compilations/parliament/SubstantiveReports.aspx?Menu=SEN-Procedure&Language=E&Parliament=&Chamber=de833414-75db-4dc9-8855-73b0faf3e5db&CommitteeType=&TextSearch=; Library of Parliament, "Substantive Reports of Committees – Senate," http://www2.parl.gc.ca/Parlinfo/Compilations/parliament/SubstantiveReports.aspx?Menu=SEN-Procedure&Language=E&Parliament=&Chamber=de833414-75db-4dc9-8855-73b0faf3e5db&CommitteeType=&TextSearch= (Accessed 28 February 2006).

[17] Data calculated from Parliament of Canada: "Women - Party Standings in the House of Commons," http://www2.parl.gc.ca/Parlinfo/lists/PartyStandings.aspx?Language=E&Section=03d93c58-f843-49b3-9653-84275c23f3fb&Gender=F; "Women – Party Standings in the Senate," http://www2.parl.gc.ca/Parlinfo/lists/PartyStandings.aspx?Language=E&Menu=SEN-Politic&Section=b571082f-7b2d-4d6a-b30a-b6025a9cbb98&Gender=F ; "Members of the House of Commons, Current List, Inuit, Metis or First Nations Origin," http://www2.parl.gc.ca/Parlinfo/Compilations/Parliament/Aboriginal.aspx?Language=E&Menu=HOC-Bio&Role=MP&Current=True&NativeOrigin=; "Senators – Current List – Innuit, Metis or First Nations Origin," http://www.parl.gc.ca/information/about/people/key/Aboriginal.asp?Language=E&Hist=N&leg=S: (All accessed 28 February 2008).

INDEPENDENCE AND PARTISANSHIP IN THE SENATE

Two key, and interrelated, characteristics of the Senate emerge throughout its work on considering legislative proposals or conducting policy investigations. The first is the collection of experienced members who usually conduct their business with much less partisanship than is seen in the House of Commons. The second is a degree of relative independence from both Cabinet and the House of Commons. While the Senate is a partisan chamber and operates through organized party caucuses, there is a much higher degree of collegiality and much more of a tradition of independent voting among its members than among MPs. The independence of the Senate, collectively, is ultimately founded upon the individual independence of its members to vote as they think best, whether following the whip or not.

There is very little detailed research on senatorial voting patterns, so an analysis of each senator's voting record in the 37th and 38th Parliaments was undertaken. This analysis reveals a degree of independence from the caucus whip that would be the envy of most MPs. In the period covered by the lives of the two parliaments, 2001–5, senators voted in a total of 125 formal divisions and many showed a strong inclination to either record a formal abstention or even vote against the position of their caucus leaders.[18]

The record of these divisions is interesting from a number of perspectives, especially since they reveal a much higher average turnout than the caricatured "Imaginary Senate." The average turnout in recorded divisions over the life of the two Parliaments was 62 senators – about two-thirds of the membership, given vacancies and illnesses at any given moment. Of particular interest to this study are the 7732 votes cast by 122 members of the two main caucuses, as the test for independence used here is the degree to which members of organized caucuses are willing to cast their votes independently of their caucus.[19] It must be noted

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[18] A formal abstention is counted in this study as voting independently of a caucus position, as it is a clear expression of a senator's desire not to directly support the party line. An abstention, of course, may be motivated either by a senator's belief that the matter is too controversial to be reduced to either a yea or nay vote; it may also indicate that senators wished to vote against their caucus position but did not want to directly confront it. In either case a senator would dissent, in the sense of thinking differently, from their caucus leaders.

[19] The creation of the new Conservative Party of Canada created a situation unique to the Senate. While the bulk of the members of the Progressive Conservative Party formally listed themselves as members of the new Conservative Party in time for the start of the 3rd Session of the 37th Parliament, a few members did not; three continued to sit as PC senators while a fourth sat as an independent. Two other senators appointed after the creation of the new Conservative Party chose to sit as PC senators; one switched later to sit as a Conservative in 2006. Another senator crossed the floor from the Liberal to Conservative

that these recorded divisions provide just a partial view of Senate activities, since formally recorded votes, the standing votes, are a minority of all the votes held in the Senate; many more votes are settled informally by a voice vote. But they are important in providing the only solid evidence of senators' individual voting record. Any dissent in formal divisions is all the more noteworthy since the fact a senator did not show solidarity with his or her caucus mates is recorded for posterity.

Perhaps the most remarkable statistic to emerge is that the majority of the formal divisions, 62.4 percent, involved one or more senators either voting against their caucus leader's position or registering an official abstention. The collective record of caucus members' voting also revealed a strong degree of independence, with 65.6 percent registering one or more formal abstentions or votes against their caucus position; conversely, only 34.4 percent always voted with their caucus leaders. These statistics only reflect the 2000–2005 period, and lifetime rates of dissent would likely show even fewer senators always voting faithfully with their caucus. In the 37th and 38th Parliaments, 156 formal abstentions were recorded for 55 (45.1 percent) senators, and 69 (56.5 percent) voted directly against their caucus position 291 times; 42 (33.6 percent) senators had done both. Almost a third had dissented by either means in over 5 percent of their recorded division votes, and, remarkably, 18 (14.8 percent) senators had recorded dissents in 15 percent or more of their votes; the most frequent dissenter did so in 37 percent of their recorded votes. Figure 1 provides an insight into the large numbers of senators who voted against their party position during the life of the 37th and 38th Parliaments, and the distribution of senators into groups according to their rate of dissention.

Clearly, party discipline is not as strong in the Senate as it is in the House of Commons.[20] The relatively greater independence of senators may be explained by several factors, including the fact that no Senate votes involve a test of confidence, senators do not need to seek re-election or re-appointment, and institutional cultural beliefs shared by senators support a degree of independence. In order to

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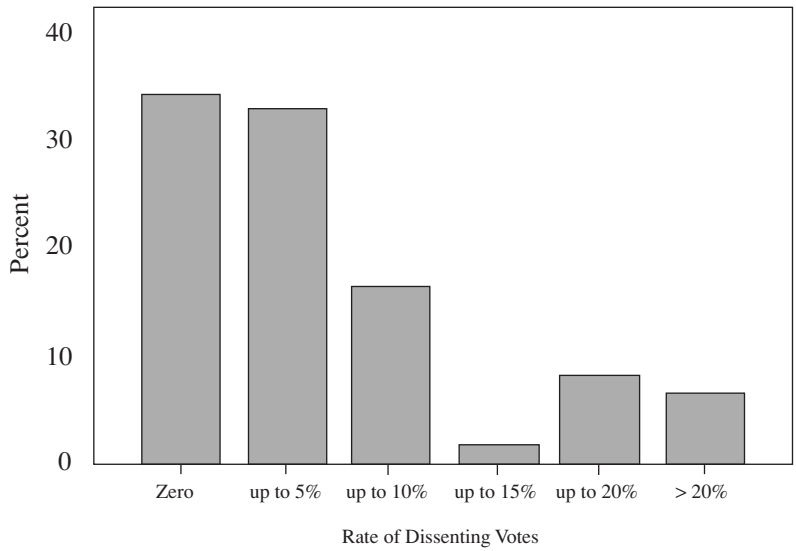
caucus in early 2005. Ironically perhaps, this study excludes Independent and latter-day Progressive Conservatives from the analysis of independent voting, as they lacked the same formal caucus groupings as the two main parties. Five other senators died or resigned before casting a vote in any of the recorded divisions. The presence of seven Independent senators during the period of study should also be noted. The Independent senators were not a major factor during this period of study since their votes never tipped the balance between one caucus or another winning a vote. However, Independents did have a more important role during 1995 to 1997 when neither the Liberals nor Progressive Conservatives controlled an absolute majority of seats in the Senate.

[20] For discussions of party discipline in the Canadian House of Commons, see: David C. Docherty, *Mr. Smith Goes to Ottawa: Life in the House of Commons*, Vancouver, UBC Press, 1997, ch.7; C.E.S. Franks, *The Parliament of Canada*, Toronto: University of Toronto Press, 1987.

FIGURE 1: Rates of Senate Dissent, 2001–2005



Note: Percent senators grouped by rate of dissent
Source: Senate Journals, 37th & 38th Parliaments

probe for some other explanatory variables for the levels of individual autonomy in the Senate, the rate of overall dissension and the proportion of votes cast directly against the caucus position were both tested for relationships with the specific party caucus a senator belonged to, how many votes the senator cast (as a surrogate for personal levels of experience and engagement), as well as whether the senators had been appointed to terms which had to expire within eight years (to test for the effects of Bill C-19).[21] The only correlation to meet statistical tests of significance was the dummy variable for belonging to the Liberal or Conservative caucus; the Pearson correlation of Liberal caucus membership with the rate of voting directly against the caucus position was a relatively feeble 0.198.[22] The greater propensity of Liberal senators to dissent may reflect the larger caucus size or some fallout from the party's leadership succession battles.[23]

[21] The only variable to pass tests of significance was a dummy variable for belonging to the Liberal caucus.

[22] 2-tailed significance: 0.030. The variables were tested for bivariate relationships and then in multiple regression models. In the latter test, the R^2 value was a low 0.057, and the Liberal dummy variable scored an adjusted Beta score of 0.202 and significance or 0.079 with rates of directly voting against the caucus as the dependent variable.

[23] In the period studied, there are 86 senators who sat with the Liberals and 36 with the Conservatives (including one senator who crossed the floor).

A more rounded picture of the Senate emerges from a review of its legislative role, the policy reports of its committees, and the frequency with which many senators vote differently from their caucus leaders. The relative independence of the Senate emerges as an essential characteristic that pervades much of its work. Collective independence is seen in the chamber's moves to substantively amend, reject, or informally bury government legislation that has already passed the House of the Commons. This collective independence may depend on several factors: if different parties control the two houses; if members of the government caucus in the Senate break ranks and support opposition motions to amend or reject bills from the House of Commons; and, theoretically at least, if the governing party's Senate caucus decide to take a different collective position than that desired by the party leadership or their Commons caucus mates. It has been noted that the Senate is most active in times of large government majorities in the House of Commons, regardless of the partisan balance in the Senate. In the end, the collective independence of the Senate depends upon the individual independence of its members, particularly in the governing party, to decide to vote against either their party leaders' positions or those endorsed by a majority in the House.

EFFECTS OF BILL C-19

While the most immediate effect of Bill C-19 is to limit new senators' appointments to a maximum of eight years, the bill will also end mandatory retirement at age 75 for future appointees. The effects of Bill C-19 will now be examined to see how they conflict with the *Upper House Reference*, and for ways in which the bill may be strengthened to better serve the Senate.

Mandatory Retirement

Currently all senators must retire when they turn 75 years old but, as PCO official Matthew King told the Special Committee on Senate Reform, Bill S-4 "effectively removes the requirement" that new senators must retire at 75 if their eight-year term of office has not been completed (Special Senate Committee 2006). One effect of the new section 29 is that new senators can be appointed at any age older than the floor level of 30 years imposed by section 23(1) of the *Constitution Act, 1867*; they could theoretically be appointed at the age of 90. Perhaps this was done as part of a trend in some circles towards ending mandatory retirement. It is ironic that Bill C-19 is intended to breathe new life into the Senate, but it abolishes the very reform of the Senate that did manage to achieve meaningful change in that regard.

The proposed eight year limit may have the effect of reinforcing the unfortunate trend in the last fifteen years of appointing older and older senators. The average age of new senators appointed since 1990 is 60, while the average during the 1970s and 1980s was 55. Shorter-term Senate appointments may end up being accepted by older individuals, as those in their fifties might view an eight-year

Senate appointment as a damaging interruption to their career rather than the career-capping appointment it should perhaps be.

It is true that life expectancy rates continue to lengthen as people live longer and remain in better health for longer than they did in decades past. For example, in 1950–52, the average life expectancy at birth was 66 years for men and 71 for women. However, by 2002 the average life expectancy at birth was 77 years for men and 82 for women (St-Arnaud, Neaudet and Tully 2005, 43). Moreover, men aged 65 in 2003 could expect to live another 17.4 years on average, while women could enjoy another 20.8 years (Statistics Canada 2003). These facts are relevant fodder in arguments about the most common age of mandatory retirement in Canada, at 65.

However, the removal of any upper age limits from new Senate appointees does raise concern about the effect of death rates and late-life infirmity on the Senate's effectiveness as an institution. The reality of average life expectancy numbers is that a large portion of the population is already dead by that age, while many others suffer debilitating infirmities and illnesses. The actual mortality rates among senators may underline the wisdom in maintaining the mandatory retirement age. Of the 276 senators appointed since the 75 year retirement age became mandatory in 1965, 91 are still in office and 101 have died at an average age of 76; and 65 of those deaths occurred at or before age 80. Since 1965, 22.5 percent of individuals appointed to the Senate have died in office before they reached 75. Appointment of senators whose eight-year term stretches into their late seventies or eighties will lead to even shorter terms as some of those die before their term expires. Instead of breathing new life into the Senate, new eight-year terms without retirement at 75 have the potential to increase absenteeism due to late-life illness and turnover due to death.

Effects of Seniority on Limited-Term Senatorial Careers

It is important to consider how the appointment of only limited-term senators in the future would have an impact on the work of the Senate and the degree to which these limited term senators are integrated into the Senate's work along with those current members who will continue to hold office until age 75. Unfortunately there has been little detailed study of many aspects of the internal processes of the Senate to reveal the existence and effects of seniority on the careers of senators. There is a wide-spread consensus in the academic literature looking at elected legislatures that there is a rookie or novice period for most new members that lasts several years. Academic writers generally argue that MPs become most effective only in their second term (Docherty 1997).[24]

[24] Note that Docherty's survey of MPs found that their own estimation of their learning period is much shorter, about a year. There may be a difference, however, in an academic's view of full effectiveness, and the MPs view of "learning the ropes," and those two notions could involve quite different lengths of time.

An examination of the current members of the Senate reveals some clear patterns of a seniority system, however informal, which may have an impact on the appointment and performance of limited-term senators in the future. In early 2008, 39 of the 91 sitting senators had less than 8 full years of service.[25] Of these less experienced senators, 26 (66.7 percent) never held a formal position other than being members of committees. For the purposes of this study, "formal position" covers those for which extra remuneration is provided.[26] Senators who have not held a formal position have only participated as ordinary members of Senate committees. The progressive incorporation of new senators into leadership positions is clearly shown in the following table.

TABLE 3: Senators' Leadership Involvement by Years of Service

Years of Service	*% Have Never Held Office*	*% Have Held Office*	*% Currently Holding Office*
0-4 (N=19)	68.4	31.6	26.3
5-8 (N=20)	65.0	35.0	35.0
8-12 (N=12)	33.3	66.7	41.7
12+ (N=40)	7.5	92.5	60.0

Source: Library of Parliament[27]

Table 3 shows clear evidence of a seniority system at work, which favours senators who have served more than eight years. While there is a steady integration of senators into leadership positions during their first eight years in office, only about a third of those who have served between five and eight years have ever held a leadership position. There is a dramatic shift after eight years of service which demonstrates that leadership positions are disproportionately held by the most senior senators. Indeed, those with more than 12 years of service occupy more than 58 per cent of current offices.

Based on the evidence of informal seniority dynamics in the Senate, most senators appointed to eight year terms would not be well integrated into the life of the Senate, particularly into leadership positions. Because of the retirement schedule of current senators, new limited-term senators may continue to play a less involved role in the Senate for some time to come. It will take until 2014 for half of

[25] As of 29 February 2008.

[26] In addition to Cabinet ministers, this list includes the Speaker, the Speaker Pro Tempore, the caucus leaders, deputy leaders, and whips, as well the chairs and deputy-chairs of Senate or join committees.

[27] These data were calculated from the individual biographies of senators, as of February 29, 2008, available from: "Senators – 1867 to date – by name," accessed 9 September 2006 at http://www.parl.gc.ca/information/about/people/Senate/SenIdx.asp?Language=E&Hist=Y

the current senators to have been appointed to eight year terms.[28] By this time, the other half of the Senate would have an average of over 14 years of service and eventually retire with an average 22 years of service.

If senators were appointed to a limited term of longer duration, perhaps 12 years, they would be much more thoroughly integrated. A twelve-year term would have the advantage of covering the life of three parliaments under the new reform legislation, limiting the life of a Parliament to four years, and it is roughly the average Senate term held since 1867. David Smith has also noted that a 12-year term is long enough to permit the Senate to continue to act as an effective repository of experience in both parliamentary process and specific areas of public policy; such experience is particularly needed when contrasted with the short careers of many members of the House of Common (Smith 2003b, 259).

Effects on Senate Independence of Eight-Year Terms

Bill C-19 could well weaken the independence of the Senate if an eight-year term were not sufficient for new appointees to absorb the institution's cultural beliefs in independence, particularly the ethos of independent voting. The possible restriction of the independence of individual senators would, if widespread, necessarily mean a decline in the relative independence of the Senate, collectively as an institution.

In order to assess the potential impact of shorter terms in office, data from all the recorded divisions in the 37th and 38th parliaments of 2001–5 were analyzed to see if there were discernable differences between voting patterns for those senators who were appointed within eight years of mandatory retirement and those who were appointed to potentially longer terms.[29] The aim with this analysis is to test the hypothesis that individual senators are more likely to develop a sense of

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[28] The timing may be advanced somewhat because of deaths prior to retirement.

[29] None of the tables survived tests of significance for the distribution of results among the cells of the table. The lack of statistically significant relationship in these tables was also borne out when regression analysis was used to test the length of service and rates of dissent; the length of potential term was tested against the percentage of abstentions, votes cast against caucus, and total dissenting votes; tests against dummy variables for terms of less or longer than eight years was also conducted. Several caveats must be made about extrapolating from the results of this study into predictions of future behaviour: the votes may be a result of particular partisan dynamics in play during the period studied; this period of analysis only covers a small portion of the careers of long-term senators; independence may be a function of age, which was not tested for; and, the fact that short-term senators in 2001–5 did not vote in remarkably different patterns from their longer-term colleagues does not mean that future short-term senators will act the same. A more rigorous analysis would also have been possible if the actual length of a senator's service at the time of each vote cast could have been used as a variable, rather than testing for the senators; potential term in office.

personal autonomy if they know they have a secure, long-term tenure in office. This data set provides an admittedly limited snapshot of senatorial behaviour from only this period, but it is useful in providing some concrete evidence of how individual senators behave.

Table 4 shows how senators with different lengths of term at the time of their appointment fit into categories based on the rate at which they recorded formal votes directly against the position of their caucus leaders.

TABLE 4: Senators' Rate of Votes against Caucus by Length of Potential Term

	Maximum Term at Appointment		
% Votes Directly Against Caucus	*Up to 8 Years*	*More than 8 Years*	*Total*
Zero	6	47	53
up to 5	6	37	43
up to 10	2	13	15
up to 15	1	4	5
up to 20	0	4	4
> 20	0	2	2
Total number of senators	15	107	122

Several interesting points emerge from this table. Even senators appointed to shorter terms demonstrate a clear willingness to vote against their caucus; more than half voted against their caucus positions at least once. There is little difference between the two groups in the proportion of those who faithfully supported their caucus in all votes. However, the senators appointed to a longer term include a small group who dissented very much more frequently than any of the short-term senators.

Senators can also dissent from their caucus positions by recording a formal abstention, an option that does not exist in the House of Commons. Interestingly, abstentions were far less popular than formal votes opposing the caucus position; at an intuitive level, one might have expected abstentions to be more popular. Table 5 does reveal that longer-term senators were more likely to abstain than their shorter-term colleagues: note that one senator with a term of less than eight years abstained 33 percent of the time; that person had only participated in three recorded votes in the period of time studied.

When abstentions are added together with votes cast directly against the caucus position, a more complete view of a senator's rate of public dissent emerges. Table 6 shows a significant independence of mind among all senators, as only about a third of either group had never abstained or opposed their caucus. While there are more long-term senators in absolute numbers who are frequent dissenters, the difference is not remarkable when considering the proportions involved.

The results of this analysis show that, during the period of the study, short-term senators appear to have readily acquired the cultural beliefs in personal autonomy

TABLE 5: Senators' Rate of Abstentions by Length of Potential Term

	Maximum Term at Appointment		
Abstentions as % of Votes	*Up to 8 Years*	*More than 8 Years*	*Total*
Zero	9	58	67
up to 5%	3	36	39
up to 10%	2	8	10
up to 15%	0	1	1
up to 20%	0	4	4
> 20%	1	0	1
Total number of senators	15	107	122

TABLE 6: Senators' Rate of All Dissenting Votes by Length of Potential Term

	Maximum Term at Appointment		
Rate of All Dissenting Votes (%)	*Up to 8 Years*	*More than 8 Years*	*Total*
Zero	5	37	42
up to 5	5	35	40
up to 10	2	18	20
up to 15	0	2	2
up to 20	2	8	10
> 20	1	7	8
Total number of senators	15	107	122

and independent voting held by their more senior colleagues. While some longer-term senators were clearly more likely to directly oppose their caucus, most of their more junior colleagues were also prepared to dissent publicly in significant numbers. As a result, the move to adopt shorter periods of tenure for future senator may only slightly weaken rather than threaten the Senate's independence.

CONCLUDING ASSESSMENT OF BILL C-19

These discussions have provided a variety of perspectives on Bill C-19. It is clear that there would be significant changes felt in the Senate with its passage. There are two principal changes the bill would make: new appointees would be limited to an eight year term, and future appointees would not have to retire at age 75.

The removal of the mandatory retirement age may not bring sufficient consequences to change any fundamental elements of the Senate, but it does open the door to an even greater number of deaths and absences due to illness. The statistics on the death rate of senators in the last 40 years show that one out of five senators died before reaching the retirement age of 75 and almost two thirds died

by age 80. Consequently, the abolition of mandatory retirement may well undermine the efficiency of the Senate. Furthermore, the abolition of mandatory retirement may result in a higher average age among new appointees than at present, which undermines one long-standing motivation of senate reform, to bring more vitality into the Senate.

On the more important aspect of senatorial independence, shorter terms for senators may not have a significant impact. The evidence from the voting patterns by individual senators reveals that the traditional propensity of dissenting from caucus positions has been readily acquired by senators in their first years in the chamber. While there was a small group of very frequent dissenters among the longest serving senators, those appointed to shorter terms still evidenced a strong inclination to either abstain or to vote directly against their caucus leaders.

The prospect of senators serving eight-year terms also poses substantial problems when considered in the light of the Senate's informal seniority system. The study of the involvement in leadership positions by senators of different lengths of existing service reveals that there is indeed an informal seniority system. The high proportion of relatively new senators who have never held an official position in the Senate reflects an institutional culture that values the accumulation of experience. The Senate's important committee work, both in legislative review and policy investigations, is undoubtedly enhanced by the weight of experience. In this respect, the eight-year term limits in Bill C-19 may not immediately threaten essential aspects of the Senate, but it could well foster a division between future short-term senators and those with longer terms who will likely continue to hold most of the leadership positions.

At some point, as well, the growing body of relatively inexperienced, short-term senators will weaken the Senate's functions of legislative review and policy development, which have been largely built on the experience of many long-term senators. An amendment to Bill C-19 lengthening the term of appointment would not run afoul of Prime Minister Harper's main objection that he voiced to the Special Committee on Senate Reform: "A government can be flexible on accepting amendment to the details ... to adopt a six year term or an eight year term or a nine year term. The key point is this: We are seeking limited, fixed terms of office, not decades based on antiquated criteria of age" (Canada 2006b). However, the 15-year term that the Senate decided to insert into the former Bill S-4 may simply be too long to be politically palatable. A longer term of office than the eight years proposed, such as 12 years, would allow future senators enough time to gain valuable experience, become fully integrated into the work of the Senate, and continue the institution's cultural traditions of relative independence.

REFERENCES

Ajzenstat, J. 2003. "Bicamerlism and Canada's Founders: The Origins of the Canadian Senate," in *Protecting Canadian Democracy: The Senate You Never Knew*, ed. S. Joyal. Montreal and Kingston: McGill-Queen's University Press.

Ajzenstat, J. 2006. "Origins of the Senate," *Dialogues*, 2(Summer): 5-6.

Campbell, C. 1978. *The Canadian Senate: The Lobby from Within*. Toronto: Macmillan.

Canada. 1982. Parliament of Canada. *Report of the Special Joint Committee on a Renewed Canada*. Ottawa: Queen's Printer.

— 1984. Parliament of Canada, *Report of the Special Joint Committee on Senate Reform*. Ottawa: Queen's Printer.

— 1996. Statutes, c.1. Accessed 28 February 2008 at http://laws.justice.gc.ca/en/ShowTdm/cs/C-36.7///en

— 2000. Statutes, c.26. Accessed 28 February 2008 at http://laws.justice.gc.ca/en/c-31.8/text.html

— 2003. "Reforming Health Protection and Promotion in Canada: Time to Act." Senate Standing Social Affairs, Science and Technology. 19 June. Accessed online 28 February 2008 at http://www.parl.gc.ca/37/2/parlbus/commbus/Senate/com-e/soci-e/rep-e/repfinnov03-e.htm

— 2006a. 30 *Debates of the Senate*, 6 October 6. Accessed online 28 February 2008 at http://www.parl.gc.ca/common/..%5C39%5C1%5Cparlbus%5Cchambus%5Csenate/deb-E/035db_2006-10-05-e.htm?Language=E&Parl=39&Ses=1

— 2006b. Proceedings of the Special Senate Committee on Senate Reform. 7 September. Accessed online 28 February 2008 at http://www.parl.gc.ca/39/1/parlbus/commbus/senate/Com-e/refo-e/02cv-e.htm?Language=E&Parl=39&Ses= 1&comm_id=599

— 2007. Statutes, c.10. *An Act to Amend the Canada Elections Act*. Accessed 28 February 2008 at http://laws.justice.gc.ca/en/showdoc/an/2007_10///en?page=1

Docherty, D. 1997. *Mr Smith Goes to Ottawa: Life in the House of Commons*, Vancouver: UBC Press, 1997.

Franks, C.E.S. 2003. "The Canadian Senate in Modern Times," in *Protecting Canadian Democracy: The Senate You Never Knew*, ed. S. Joyal. Montreal and Kingston: McGill-Queen's University Press.

Heard, A. 1991. *Canadian Constitutional Conventions: The Marriage of Law and Politics*, Toronto: Oxford University Press, pp.89-98.

Joyal, S. 2003. *Protecting Canadian Democracy: The Senate You Never Knew*. Montreal and Kingston: McGill-Queen's University Press.

Library of Parliament. nd. "Senators – 1867 to date – by name," Accessed 28 February 2008 at http://www2.parl.gc.ca/parlinfo/lists/senators.aspx?Parliament=&Name=&Party=&Province=&Gender=&Current=False&PrimeMinister=&TermEnd=&Ministry=&Picture=Fale

Nagle, J. 2003. "Database and Charts on the Composition of the Senate and House of Commons," in *Protecting Canadian Democracy: The Senate You Never Knew*, ed. S. Joyal. Montreal and Kingston: McGill-Queen's University Press.

Reference re: Authority of Parliament in Relation to the Upper House, [1980] 1 S.C.R. 54

Smith, D. 2003a. *The Canadian Senate in Bicameral Perspective*. Toronto: University of Toronto Press.

Smith, D. 2003b "The Improvement of the Senate by Nonconstitutional Means," in *Protecting Canadian Democracy: The Senate You Never Knew*, ed. S. Joyal. Montreal and Kingston: McGill-Queen's University Press.

Special Senate Committee. 2006. Unedited, verbatim transcripts of the proceedings of the Special Senate Committee on Senate Reform, 7 September.

St-Arnaud, J., M.P. Neaudet and P. Tully. 2005. "Life Expectancy," *Health Reports,* Ottawa: Statisics Canada. Vol.17, No.1, Catalogue number 82-003-XPE, 43-47.

Statistics Canada. 2003. "Life expectancy – abridged life table by sex and geography – At age 65," Accessed online 28 February 2008 at http://www.statcan.ca/english/freepub/84F0211XIE/2003000/t028_en.htm?

Thomas, P.G. 2003. "Comparing the Lawmaking Roles of the Senate and House of Commons," in *Protecting Canadian Democracy: The Senate You Never Knew*, ed. S. Joyal. Montreal and Kingston: McGill-Queen's University Press.

Weiler, P.G. 1979. "Confederation Discontents and Constitutional Reform: The Case of the Second Chamber," *University of Toronto Law Journal* 29(3): 253-283.

12

THE CONSTITUTIONALITY OF BILL C-20

Vincent Pouliot

L'auteur nous suggère d'appuyer le projet de loi C-20 de réformer le Sénat car ce projet de loi offre les moyens de concilier sur le plan légal les intérêts particuliers des provinces au sein du gouvernement dans notre fédération. Il démontre de quelle manière notre constitution fournit au Sénat la même nature représentative qu'à la Chambre des communes afin de pouvoir concilier les intérêts des provinces, alors que le projet de loi C-20 n'assure pas au sénat cette même nature représentative. Finalement, il propose certaines modifications au projet de loi afin de corriger ce problème.

Bill C-20 attempts to implement a practice (a consultation of electors) in the appointment of our senators.

This practice is either constitutional or it is unconstitutional. Either it implements the letter of the law and the legislative intent of the Constitution or it contradicts it.

If it implements the Constitution, it could rightly be said to be establishing a constitutional convention regarding the appointment of senators. If it contradicts the Constitution, it could rightly be said to be a constitutional amendment requiring approval in accordance with the provisions of our constitutional law.

Should we care about the constitutionality of Bill C-20? My answer is an unequivocal yes. Bill C-20 is meant to reform the representative and democratic character of the Senate. It is meant to affect the political structure, the constitutional balance of powers and the democratic process, that is, the constitutional framework through which the people govern themselves in Canada. In proposing to reform the Senate, the government has given Canadians an opportunity to renew Canadian federalism. We want to do it right.

THE RESPONSIBLE GOVERNMENT OF CANADA

Section 18 of the *Constitution Act, 1867* explains that the source of the powers and privileges of both the Senate and the House of Commons is the British House of Commons. On 22 May 1868, an Act of Parliament, still in force today, confirmed

that both houses are entitled to the same powers and privileges as those belonging to the British House of Commons in 1867. This confirms that, contrary to the political structure of the British model of parliament providing for the legislative union of the United Kingdom, both houses of Canada's federal Parliament were meant to represent the wishes and interests of the people.

Section 22 provides that senators shall represent the provinces in Parliament. Section 23 states that, among other qualifications, a senator must reside in the province for which he or she is appointed. Section 32 provides that the governor general shall fill the vacancies that occur in the Senate by fit and qualified persons.

The 14th of the Quebec Resolutions of 1864 (on which the *Constitution Act, 1867*, is based) states that the Crown shall appoint the members of the upper house … "so that all political parties may as nearly as possible be fairly represented." It is clear that the Fathers of Confederation intended that the provincial political parties be fairly represented in the Senate.

What is not clear is whether they meant to establish this as the principle underlying the representative character of the Senate, whether it was meant to guarantee only the representative character of the first Senate or whether it was to guarantee the representative character of the Senate until each province chose how it wished to be represented.

One must admit, however, that if all provincial political parties were proportionally represented in the Senate, then the provincial interests of the people, the people in their provincial political capacity or, put more simply, the provinces, would be truly represented in Parliament.

Because Canada is a federation of provinces, the people's political will regarding how they wish to govern themselves is divided. Under the division of powers between Parliament and the provincial legislatures that is set out in the Constitution, if this political will concerns purely local issues, the provinces are vested with the exclusive jurisdiction to govern the matter; otherwise the matter falls under federal jurisdiction. Thus, in general, the jurisdiction of the federal government over public matters is a function of them not being of a purely local nature.

Despite all this, it is thought that the Fathers of Confederation must have intended that the courts protect our local interests because, being appointed rather than elected, the senators cannot legitimately do so within the institution created for this purpose by our Constitution!

Permit me to suggest that the appointment for life of senators was meant to ensure the co-ordinate authority of the Senate by eliminating the possibility that the governor general could revoke the appointment if displeased.

The representative character of the Senate was ensured by section 30 specifically permitting a senator to resign. Within the context of the times, it was understood that if a senator was made to feel that he no longer represented the wishes and interests of the authority to whom he owed his appointment, honour would oblige him to resign. Today, the political party, when selecting their delegate, would require their choice of senator to sign an undated resignation guaranteeing he or she honours their confidence, and thus has the authority to act on their behalf and on behalf of their constituents.

Furthermore, the appointment of senators is essential to ensure a different quality of person in the Senate, one who has proven his or her ability in "sober second thought." Given the real estate or wealth qualification of some $2 million in today's terms, it is likely that our senators would also possess the quality of knowing from whence comes the "government's money."

BILL C-20

Bill C-20 enables citizens within a province to indicate, from within a "list of nominees," who they would prefer to be appointed senator. Section 16(1) charges the chief electoral officer (CEO) with confirming a prospective nominee to be included in the "list of nominees." It assumes the CEO will confirm the nominee if he or she fulfils the requirements set out in the bill. It also assumes that the prime minister of Canada will advise the governor general to appoint those persons the people prefer.

Bill C-20 does not require a nominee to reside within the province being consulted. Nowhere does it state that the nominee, if appointed senator, would represent a province in the Senate.

However, section 19(1) requires the prospective nominee to be endorsed by the political party the nominee upholds in the consultation. It does not require that this political party be provincial in nature, representing the provincial interests of the Canadian citizens living in the province being consulted. It does not permit the provinces to determine for themselves the practice by which they would select and authorize their representatives to act on their behalf in the Senate.

CONCLUSION

It would seem that the constitutionality of Bill C-20 depends on how the CEO decides to apply the law.

This is contrary to the rule of law. According to A.V. Dicey (1959, 202), the rule of law "means the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. (…) Englishmen are ruled by the law and by the law alone."

The Supreme Court of Canada explains that "[t]he principles of constitutionalism and the rule of law lie at the root of our system of government. … At its most basic level, the rule of law … provides a shield for individuals from arbitrary state action" ([1998] 2 SCR para. 70).

RECOMMENDATIONS

To ensure the constitutionality of Bill C-20, it should be amended

- to charge the chief electoral officer to ensure the "nominees" qualify to be senator as set out by section 23 of the *Constitution Act*;
- to change the phrase "political party" to read "provincial political party;"

- to permit the provinces to determine otherwise how they wish to be represented in the Senate.

REFERENCES

Dicey, A.V. 1959. *Introduction to the study of the Law of the Constitution, 10th edition*. London: Macmillan Press Ltd.

Reference re: Secession of Quebec, [1998] 2 S.C.R. 217.

13

BILL C-20'S POPULIST MODEL OF CAMPAIGN FINANCE FOR SENATE ELECTIONS: THE FIRST STEP AWAY FROM CANADA'S EGALITARIAN REGIME?

Peter Aucoin

Le projet de loi C-20 apporte de grands changements au régime de campagne de financement développé par les Canadiens dans le cadre des élections fédérales. Le régime actuel est plus juste envers la compétition car il limite la somme d'argent que les candidats et les partis politiques peuvent dépenser lors d'une campagne électorale, et il lui donne accès aux fonds publics. Ce n'est pas le cas avec le projet de loi C-20. Il permet aux candidats de dépenser autant d'argent qu'ils peuvent se le permettre, alors que le régime de Sénat proposé continue d'imposer des limites aux contributions lors des campagnes. Sous le projet de loi C-20, les candidats aux élections à la Chambre des communes peuvent également se présenter à des élections au Sénat. Si des élections avaient lieu en même temps aux deux chambres, le régime du Sénat aurait un effet négatif car il serait plus difficile de faire respecter les limites imposées à la Chambre des communes.

Canada's federal campaign finance regime has been characterized as egalitarian because its primary objective is to secure fairness in the electoral process between the contestants – candidates and political parties – and those who actively support them by engaging in activities that require the expenditure of money – so-called "third parties." The regime seeks to establish a level playing field. It does so by providing a floor of public financial support (partial reimbursement of election expenses for candidates and political parties; annual grants for political parties; tax credits for contributions to candidates and political parties; free time broadcasts for political parties) and a ceiling on contributions (to candidates and political parties) and campaign spending (by candidates, political parties, and third parties). The regime is buttressed by the requirements of disclosure on contributions and spending. And, only individual citizens may contribute money to candidates and political parties.

A contrasting model is the libertarian model in which freedom to do as one pleases with one's money constitutes the primary value. Under this model, most, if not all, of the egalitarian model's provisions disappear. This is especially the case with spending limits on candidates, political parties or anyone else. These limits infringe on an individual's right to express one's views publicly through those advertising media that impose a price for such expression or, more generally, to expend monies in campaigning in an election. The American system is a case of the libertarian model in regard to spending limits: there are none, and the Supreme Court has declared them unconstitutional (unless voluntarily accepted to gain access to public funding). Contribution limits exist in the US and have been accepted by the Court but not to promote fairness. The Court has declared them a legitimate device to diminish the risk of corruption that can emanate from undue influence on elected officials by those who otherwise could be persuaded or would want to make financially significant campaign contributions. Contributions limits, in other words, are not justified on the ground that they advance fairness in the political process. Hardcore libertarians, it should be noted, are not inclined to accept these contribution limits; at the outer edges of this position, even disclosure laws are rejected.

The Canadian regime has been relatively effective in restricting the significance of spending money in elections, and thus the impact of money in the political process generally. Campaign spending does matter, but this reality has not ruled out a high degree of competition between those candidates and political parties with some measure of public support. Participation, in short, is not financially prohibitive. By contrast, the American regime does not try to restrict the significance of spending money in elections and, as one would expect, spending is critical in American election campaigns, with a steady escalation in campaign spending, combined with a low level of competition in Congressional elections. Equally important, contribution limits in American election law have not been able to arrest the extent to which contributors regard their contributions to candidates and political parties, but especially the former, as earning them the right of influence with those they finance. The shortcomings in the American contribution limits derive primarily from the absence of *spending* limits. With candidates requiring (increasingly) large sums of money to be competitive, or to discourage serious competition before campaigns begin, the incentive is to do whatever can be achieved within the letter of the law, at a minimum, to obtain the necessary funding. The result, unintended as it may be, is a byzantine regulatory scheme with so many loopholes as to render impossible any semblance of reasonable control of financial contributions to candidates. Those who want to contribute sufficiently to be able to exert an influence on candidates are usually able to do so. Efforts to reform the campaign finance regime, of which there is a constant flow, are essentially undermined by the fact that spending limits are constitutionally off limits. To the extent that money is required by candidates to be competitive it is supplied, at least to the incumbents and those challengers who appear heading for election.

Bill C-20 proposes to change fundamentally the foundation of the Canadian regime by having no spending limits on candidates for Senate election campaigns and no direct public funding for them. By having no spending limits, Bill C-20 would create loopholes that would diminish, if not eliminate altogether, the effectiveness of the spending limits on candidates for election to the House of Commons and on their political parties if elections for the Senate and the House of Commons take place at the same time.[1] If no further changes occurred in the near future, the new Canadian regime – with different campaign finance provisions for House of Commons and Senate elections – would constitute a hybrid of the egalitarian and the libertarian models. This hybrid can be labelled a populist model.

While populism as a political ideology comes in various forms, three characteristics tend to be common. The first is an anti-elite disposition: an opposition on behalf of "ordinary" or "average" citizens against those who hold power in financial and government centres. Second, there is a dislike of political parties as the instruments of partisan politics where partisanship is perceived as a conspiracy by a cartel of political elites to restrict access to the elected offices of government, and thus to the spoils of power, by dividing the political community into competing factions that they command and control for their own benefit. These first two characteristics are clearly negative in their orientation, a negativity fuelled by the extent to which populists find themselves in opposition to those in power. The third, one that can be articulated by populists both in opposition and in power, is expressed in more positive terms. This is the preference for majoritarianism, the view that the great bulk of common folk or ordinary citizens share a homogeneous set of political values, opinions and preferences and that this popular will best finds expression when elites or other minorities, especially "special interest groups," are unable to undermine the preference of the majority by controlling or manipulating the political process to secure their minority interests and opinions. This majoritarian view assumes that there is no need to worry about fairness in political processes: the popular will is expressed by the majority of ordinary citizens. Every one is equal, equally free to have their say, and that is sufficient.

Bill C-20 is constructed in response to this populist ideology. First, its anti-elitism is expressed in contribution limits that restrict contributions to individuals and at a relatively modest amount ($1,000). Corporations and unions are thereby not allowed to contribute money at all. Elites, it is assumed, are thereby constrained. Second, political parties are also constrained. They may participate but only as one of many potential participating organizations; indeed, since a political party may participate only by registering as a "third party," they have no greater status than a single individual citizen who may likewise register as a "third party."

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[1] If Senate elections took place at the same time as provincial/territorial elections – the second option in Bill C-20 – the federal regime would have the potential to undermine those provincial regimes where spending limits are an important element of their campaign finance regime. It could also undermine the contribution limits in provincial regimes.

Third, the absence of spending limits and public funding is predicated on the assumption that ordinary citizens, freed from domination by wealthy elites and partisan factions, are equal in all important respects, thus denying that money is a source of inequality in politics that can be offset only by restrictions on the freedom to use money.

Populism in opposition can provide a powerful critique of the economic disparities and political inequalities that exist in a political system, even if the critique invariably lacks coherence and consistency. On the other hand, when populists are elected, at least in political systems like Canada and the United States, their populism either loses its political dynamic or, whatever their protestations to the contrary, becomes mere partisanship. The former was the fate of the Progressives in the 1920s, because those elected refused to function as other than independents and thus not as a political-party formation in the legislature. The experience of the Reform Party, once it became a parliamentary party in the House of Commons and now as the Reform faction in the new Conservative Party, that from 2006 is also the governing party, provides an example of the latter. Populist partisans in power have not shown themselves to be any different than partisans of other stripes: they pursue their partisan-political interests as a political party in maintaining power. Proposing campaign finance laws that advance these interests is thus to be expected. Bill C-20 is an example. A populist campaign finance law for a populist party.

The contribution limits in Bill C-20 clearly disadvantage the Liberal opposition, given the recent fund-raising practices of the Liberals compared to the Conservatives. In this regard, what many would view as a positive measure to reduce the influence of the wealthy is also a convenient advantage to the Conservatives. That does not diminish its merits, of course. The measure extends what the Liberals under Jean Chrétien started with his amendments to limit contributions by source and amount in 2004. The Liberals, accordingly, will now simply have to adapt, as their Liberal counterparts were required to do in Quebec when low contribution limits restricted to individuals were introduced there many years ago.

The treatment of political parties as equivalent to any other political or social group is perhaps merely symbolic, a genuflection to the anti-political-party rhetoric of the populists, especially as expressed in their attack on the third-party spending limits as a measure to give preferential treatment to political parties over other social groups. For populists, the decision by the Supreme Court of Canada to uphold the constitutionality of spending limits as advancing fairness (against several decisions by Alberta courts and one British Columbia court), merely demonstrated that the SCC itself was an integral part of the elite cabal standing against the views of the majority of ordinary citizens. Populists view what the law labels "third parties" as non-partisan citizen coalitions and argue against any regulation of them in election campaigns. The fact that these groups seek the election or the defeat of particular candidates, who also almost always are the candidates of political parties, is ignored, denied, or disregarded as relevant.

Bill C-20 represents a symbolic rejection of political parties as the primary political organizations in elections in parliamentary systems, where the constitutional dynamic assumes party formations in the legislature as the basis of stable but responsive responsible governments. In this sense, the bill might be regarded as little other than an irritant to political parties. However, in parliamentary systems political parties govern and any measure that further diminishes the role of political parties in governance exacerbates an existing defect in Canadian governance. This is the increasing personalization of political parties by party leaders. This phenomenon is one factor in an increasing concentration of power in the office of the prime minister in Westminster systems. The result is the reduced effectiveness of the system of cabinet government, the collective-executive structure that is meant to constitute an important check on a prime minister's imperial ambitions to exercise power unilaterally. In practice, the capacity of the Cabinet to check the prime minister is a function of the capacity of the collective party leadership to constrain the prime minister as party leader. In Canada, it may be that this issue is largely academic because party leaders in Canada's two governing parties no longer are subject to the will of their party caucus, as is still the case in some of the governing parties in other Westminster systems where prime ministers are, on occasion, reined in by the caucus (as happened with the Conservative caucus dismissal of Margaret Thatcher in Britain and the Labour caucus dismissal of Bob Hawke in Australia in the past two decades). Nonetheless, diminishing the legitimacy of political parties as primary political institutions does not improve democracy.

Treating political parties as third parties would have the effect of lowering party spending for Senate elections and this would not necessarily be an undesired outcome from the perspective of fairness, as party spending limits that are too generous can undermine the achievement of fairness in practice. But this outcome of effective spending limits would be undermined by the absence of spending limits for candidates for election to the Senate. The absence of candidate spending limits is further compounded by the fact that political parties (and their constituency associations) are permitted to transfer unlimited goods and services to their Senate candidates without these contributions being deemed "contributions" under the law. In each respect, Bill C-20 departs from the architecture of the *Canada Elections Act*.

Bill C-20, as the chief electoral officer pointed out to the House of Commons' legislative committee on Bill C-20, allows a candidate for the House of Commons to be a candidate for the Senate, a situation that would effectively nullify the spending limit on candidates for the Commons. And, it allows a candidate for the House of Commons to register as a third party for a Senate contest and thus augment her or his spending limit. The CEO suggested that these two possibilities be shut down in order not to have "an unintended impact on the financing regime under the *Canada Elections Act*" (the CEO's assumption being that the impact of these provisions was unintended) (Mayrand 2008, 11).

The CEO also expressed concern about the possible unintended impact of two other elements of the Bill. These are the provisions for a political party (and/or its constituency associations) to contribute "goods and services" to a candidate's campaign and the absence of a spending limit on these candidates. The former would allow a political party to offload some of its campaign resources to its Senate candidates without these being deemed "contributions." The latter would allow Senate candidates to spend in support of their party's campaign their own campaign funds, including funds received as a result of their political party requesting that potential contributors make donations to the candidate's campaign, rather than directly to the party.[2] The effect would be to undermine the spending limit of those political parties willing to take advantage of this huge loophole by directing contributors to make contributions to a party's Senate candidates instead of the political party when the latter cannot use the money because it would have more than it can spend under its spending limit.

If adopted, Bill C-20 will provide those political parties with a supply of funds in excess of what they can legally spend, or the capacity to raise more funds than they can legally use, a way around their spending limit. Exploiting the loophole will require some considerable organizational and administrative capacity, of course, because the regime will be more complex than previously. But any party with a surplus of funds should have no difficulty on that front. The loopholes are, in fact, solely for the well endowed: they do not provide anything for those without the funds to spend over their limit. Moreover, the new contribution limits, designed to keep out big money, ironically also put a premium on having the organizational and administrative capacity to raise funds in the first place. Populist parties, by definition, tend to have a head start on this front by having a base of core supporters. Populist-conservative parties tend to be especially advantaged because their core will usually be financially able to make the required contributions.

The populist regime proposed in Bill C-20 would strike at the heart of the Canadian regime, as so much of the latter's architecture is predicated on effective spending limits on all contestants and participants. Regimes without spending limits find that their other provisions to limit the impact of money on elections, and then on governments, are diminished because money will find its way into the political process, one way or the other. Contributions limits may limit who may give and how much but they have not proven to have much effect on the volume of money in the political process. The government's rationale for not having spending limits is that "nominees [that is, candidates] will need to finance

[2] The loophole bears some resemblance to the Conservative Party's argument that its 2006 election campaign's "in and out" transfers of monies from the national party campaign to Conservative candidates for the purpose of running political party advertisements under their spending limits rather than the party's spending limit was not contrary to the *Canada Elections Act*.

province-wide campaigns" (Canada 2007). The logic here is backwards, because, other things being equal, the larger the electoral constituency the greater the need to ensure that access to money does not become an obstacle to fair elections.

The Canadian regime has demonstrated that there can be a balance in measures to promote both freedom and fairness. Indeed, with the right balance the regime can actually enhance the prospects of vigorous competition. There is no evidence that a weakening of the spending limit component of the regime, as proposed by Bill C-20, advances the cause of electoral democracy.

REFERENCES

Mayrand, M. 2008. Evidence. Legislative Committee on Bill C-20. House of Commons, 9 April.

Canada. 2007. "The Federal Government Introduces Legislation to Create a Democratic, Accountable Senate," Canada News Centre Backgrounder. Ottawa, 13 November.

14

SENATE REFORM: WHAT DOES BILL C-20 MEAN FOR WOMEN?

Louise Carbert

L'auteur s'intéresse aux conséquences de la réforme du Sénat sur les femmes. Présentement, 30 des 87 sénateurs sont des femmes, c.-à-d. 34 pourcent. Le pourcentage de femmes qui siègent au Sénat est plus élevé que dans tout autre corps législatif. Suite au projet de loi C-20, la tendance se maintiendra-telle? La réponse à cette question réside dans le mécanisme électoral du projet de loi. Prenant en considération quatre éléments de la proposition, premièrement, le vote préférentiel, deuxièmement, le financement des campagnes, troisièmement, la liste de candidats; et quatrièmement, l'importance de la circonscription, elle affirme que plus la liste de candidats pouvant être élu dans une circonscription est longue, toute part égale, plus une femme a de chances d'être élue.

Senate reform is in the works. Prime Minister Harper has introduced Bill C-20, the Senate Appointment Consultations Act. If this Bill passes, we could be voting for senators in the very near future. A House of Commons committee is now studying the Bill, and asking for submissions from experts and the provinces. Senate reform holds significant implications for the future of Canada, and the consequences for the federal division of powers and parliamentary procedure are being examined in great detail. The very constitutionality of Bill C-20 is in dispute.

In any case, nobody is asking another important question: what does Senate reform mean for women?

The question is worth asking because the Senate is the House where proportionally more women sit than any other legislative body – national or provincial – in the country. Women have benefited by the traditional method by which prime ministers appoint at their own discretion. As far back as the early 1990s, Prime Minister Mulroney appointed six women to the Senate. Prime Minister Chrétien came very close to achieving gender parity in Senate appointments during his time in office; 21 women and 23 men. Prime Minister Martin appointed a total of 17 senators, of whom six were women. As a result, currently, 30 of the 87 sitting

senators are women – 34 percent. By comparison, 21 percent of parliamentarians in the House of Commons are female. Apparently, appointments are more effective than elections; discretion is preferable to democracy.

There is, in fact, a constitutional basis for the pattern of greater diversity of representation produced by the traditional appointments process. From the outset, a principal purpose of the upper house was to represent the religious and linguistic rights of English minorities in Quebec, and French minorities in the rest of Canada, and thus protect minority rights from the tyranny of the majority in the House of Commons. Since Confederation, the category to be protected has expanded from linguistic English and French minorities to include visible minorities, aboriginal peoples, and women. In this sense, according to Serge Joyal, the Senate has come to operate as a legislative adjunct to the *Charter of Rights and Freedoms*, in the sense that it positively contributes to the preservation of minority rights and interests in the legislative process (2005, 277). An admirable function for the Senate, but one that is rarely articulated, and defended even more rarely. Senator Claudette Tardif is an exception in her willingness to defend this function of the Senate as a reason not to proceed with elections. (In addition to her outstanding personal abilities, Senator Tardif was appointed to represent the historic French communities of Alberta.) Speaking at a panel on Senate reform, she warned:

> Let us never forget that, despite good intentions, it is difficult for a majority always to ensure that the voice of minorities is heard. The Senate must keep its role of ensuring a representation of minorities across the country, as it has done since Confederation. (2006)

The same argument was made, peripherally, on a few occasions during proceedings of the Legislative Committee on Bill-C20.

There is, therefore, the semblance of an emerging convention to make appointments that correspond to the designated equity groups. But it is a convention that rests on the opinion of one, namely the prime minister. And some prime ministers such as Jean Chrétien felt the obligation more keenly than others. Suppose that Prime Minister Harper were persuaded (or directed by the Supreme Court) to proceed with appointments without waiting for elections; would he feel obliged to appoint senators from the designated equity groups? He would probably take care to appoint official-language minorities (Acadians and FranSaskois), but would he appoint women at the same rate as Chrétien? But, supposing that Prime Minister Harper did not observe this emerging convention in appointments: who, outside the parliamentary press gallery, would notice, and who, other than disgruntled party insiders passed over for senate appointments, would care?

If so few people are prepared to make a strong, public case *against* elections in order to make the case for an appointed Senate as the chamber of women and visible minorities, it suggests a basic problem with that convention. Not even the designated equity groups being represented in the Senate are satisfied. When has a spokesperson for any equity group pointed with pride to their higher levels of representation in the Senate? Were the likes of Joyal and Tardif to launch an

advertising campaign along these lines, one can just imagine the response of conservative bloggers, ridiculing the Senate as the "House of Tokens." What sort of legislature is this that it cannot be publicly defended?

If few people are willing to defend the convention to appoint senators on an equity basis in order to represent women and vulnerable minorities in Parliament, and if the penalties for ignoring that convention are light, it is a fragile convention indeed. In a liberal democracy, there is a stronger, implicit, and default convention to select the members of any legislature on the basis of popular consultations with the people. Democracy is, *prima facie*, more compelling than executive discretion.

Apparently, therefore, we are caught on the horns of a dilemma – torn between a goal to achieve the diversity in representation, and a preference for the democratic process. It is entirely possible – indeed likely – that the implementation of elections would yield Canada even fewer women in the Senate than we have now. If we have democratic elections for nomination to the Senate, will we end up nominating the same sort of politicians – male politicians – we've always been electing in the House of Commons? The devil is the details, and much of the answer lies in the exact electoral machinery proposed in Bill-C20.

There are four operational elements contained in Bill C-20 that hold important implications for women's representation. The first element is the preferential vote; the second is campaign finance; the third is the panel of nominees; and the fourth element is district magnitude. With the four elements combined, elections to the Senate can be characterized as proportional representation (PR), but this particular combination is unique.[1]

While the Australian Senate comes close, there is simply no other electoral system in the world like that proposed in Bill C-20. As a result of its singularity, considerable care is required in order to disentangle the elements of PR electoral

[1] The closest parallel is the Australian Senate. It consists of 76 senators, twelve from each of the six states and two from each of the territories. At twelve members, the Australian districts are of the same order of magnitude as provincial electoral districts in the Western and Maritime Senate regions of Canada. The Australian districts are only half as large as Ontario and Quebec districts. The results from the Australian Senate are encouraging; the proportion of women elected to the upper house has always exceeded those elected to the lower house, in a pattern that is parallel to that of Canada. Moreover, the proportion of women elected to Australia's upper house has ranged in the mid-to-high 30 percent range, and thus exceeded the proportion of women appointed to Canada's upper house (Maddison and Partridge 2007, 57-61). Malta and Ireland are the only other countries to use STV in combination with multi-member districts, and their legislatures elect few numbers of women. The experience of these small, ethnically homogenous, and traditionally Roman Catholic countries is not easily comparable to Canada or to Australia, but does make the point that STV does not, automatically, translate into diversity of representational outcomes (Hirczy 1995).

systems that are said (in the political science literature) to promote women's election to public office, some of which are present in Bill C-20, and some of which are not. How votes are counted (by preferential ballots) and campaign finance regulations do not amount to proportional representation; the panel of nominees and district magnitude do. Furthermore, the role that political parties will play in Senate elections is a major factor in women's election, but that is not pre-determined by Bill C-20, and their role will likely vary considerably from province to province and from party to party. This paper considers each of these four key elements in turn to assess their implications for electing women. It concludes that there just might be a chance to achieve equity in Senate representation through a democratic process.

To begin with, the current bill proposes to conduct elections using a preferential voting system. Preferential voting is familiar to Canadians from the standard run-off method that is used to elect party leaders at leadership conventions and to select election candidates during nominations at the riding association level. When a run-off vote is conducted at a single time, on a single ballot, it is referred to as alternative vote (AV) for a single-member district; when it is conducted for a multi-member district, it is referred to as single-transferable vote (STV). STV sets a quota or benchmark for getting elected, selects the candidates who meet that quota on the first round of counting, re-allocates that candidates' surplus votes to second-choice candidates to see if any candidates meet the quota, and repeats the process until enough candidates meet the quota to be elected. Counting ranked choices on the ballot thus accomplishes, in one round of voting, what takes several iterations in a run-off election.[2]

The appeal of STV is its proportionality of result. The electoral outcome is nearly perfectly proportional to the choices expressed by voters on the ballot. This makes the Conservatives' proposal a version of proportional representation, but it is not like other versions of PR around the world, which use a party-list system. STV allows voters to break away from the restrictions of having to choose a party, and only one party. The connection between candidate and party is broken on the ballot, and this break is STV's defining feature. In fact, the Conservative government appears to have decided on STV for just this purpose: to structure

[2] The legislative summary for Bill C-20 explains how the single-transferable vote will operate (Michel Bédard, Law and Government Division, 13 December 2007). Bill C-20 proposes to use the standard Droop formula where the benchmark quota to get elected is set as (total number of votes cast / seats contested + 1) +1. On the first round, any candidate who meets the quota is immediately elected. On the second round, the winner(s)' votes are allocated to other candidates based on the voters' second-choice on the ballot. Any candidate who now meets the quota is elected. It may proceed to a third round if there are more seats to be filled. If no candidate meets the quota, the candidate with the fewest votes is eliminated and their votes are transferred to the other candidates based on the voters' second-choice on the ballot.

Senate elections as contests among individual candidates instead of opposing teams of political parties.

The ballot itself is part of the same agenda to put individual candidates ahead of political parties. The parties will not control the order of nominees on the ballot and they will not be permitted to group their candidates together on the ballot. From these conditions, it is inferred that a candidate's party affiliation will appear on the ballot, alongside his or her name.

In addition to using STV to structure people's choice at the ballot box, the government is relying on campaign finance regulation to break the connection between candidates and political parties. The government's stated goal is to preserve the traditional independent nature of the Senate as a house of legislative review. It may also want to avoid the results of Senate elections in Alberta, where voters cast ballots for the Conservative slate of candidates, and thus reproduced, in the Senate, the same pattern of regional blocs as in the House of Commons.[3] To accomplish this goal of moving parties to the periphery, Bill C-20 applies the *Canada Elections Act* to Senate consultations. Contributions to individual candidates to the Senate will be regulated in the same way as contributions to candidates to the House of Commons. Only individual persons may make contributions to Senate nominees, to a maximum of $1100 per year. Unions and corporations are not eligible to donate. Crucially, political parties are to be considered "third party" to senate consultation campaigns. As a "third-party," they could not transfer money to candidates, and they would be severely restricted in how much advertising they could do on behalf of candidates. Under the *Canada Elections Act*, a third party is limited to a total of $150,000 on election advertising, and no more than $3,000 in advertising on any one candidate.[4] Restrictions on advertising are mitigated by allowing parties and candidates to share office space and staff during campaigns. According to the government, restricting how much money parties can spend in senate campaigns will have the effect of directing citizens to vote for the individual candidate, rather than the party.

As a result, the government expects senators to be able to withstand party discipline inside and outside caucus, but we just don't know how effective these campaign finance rules will be in restricting the role of political parties. I expect

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[3] Roger Gibbons expects a reduced role for party selection and financing of candidates to increase diversity of representation in the Senate. Judging from the Alberta experience of Senate elections, party lists herd voters into voting for the dominant regional party, and thus reproduce in the Senate the same pattern of regional bloc voting that characterizes elections to the House of Commons.

[4] Elections Canada, "Questions and answers about third party election advertising, http://www.elections.ca/content.asp?section=pol&document=index&dir=thi/que&lang=e&textonly=false#note. Also "The federal government introduces legislation to create a democratic, accountable Senate; 13 November, 2007, http://www.democraticreform.gc.ca/eng/media.asp?id=1395.

that party activity will vary considerably by region and party. A party flush with cash, like the current Conservative Party, could be expected to direct members to donate money to specific Senate races in other parts of the country where it does not expect to win seats in the House of Commons. Prairie Liberals might decide to keep their donations inside the province, focused on their own provincial Senate campaign, instead of sending their money off to the central party organization or to their own lost-cause candidates for the House of Commons. Each party will strategize where to spend its funds most effectively, and it is possible that some Senate consultations will be lavishly funded and elaborately advertised.

The first two elements of Bill C-20 – STV and restricted campaign finance – could plausibly achieve the government's stated goal of putting the individual candidate front and centre. How would women candidates fare with a diminished role for political parties? Would they be stranded or liberated? Are there women who could get elected, on their own, without (much) party support? Certainly, women who already have a high profile in the media, such as local television personalities, former lieutenant governors, university administrators, party leaders, or defeated cabinet ministers would be credible contenders. Elizabeth May, leader of the Green Party, could make a more credible run for Senate than for the House of Commons. In Nova Scotia, defeated Progressive Conservative cabinet minister Jane Purves is a credible candidate for Senate. As a Conservative in the NDP bastion of Halifax, Purves stands little chance of being elected as member either provincially or federally, but people would campaign for her, personally, without wanting to commit to joining the Conservative Party or even be seen to be supporting the Conservative Party. The same goes for Saskatchewan's Janice MacKinnon who was finance minister in Roy Romanow's New Democrat government of the early 1990s. MacKinnon no longer has a party to call home, and she could not plausibly be elected to either the House of Commons or the provincial legislature. But MacKinnon has such stature and personal appeal across party lines and beyond the party establishment to voters at large that she could walk to victory by the single-transferable vote. Similarly, in Ontario, former Deputy Prime Minister Sheila Copps would be a shoe-in for election because her profile is province-wide and her support includes both Liberals and New Democrats. The same is true of Anne MacLellan, former Liberal cabinet minister from Alberta, whose personal stature could mobilize people to campaign on a non-partisan basis. The outstanding question is: Are there sufficient numbers of high-profile women who could compete for Senate elections and come out of a preferential ballot near the top? Just how many other people, specifically how many alpha males, would they have to defeat to qualify for a seat in a rank-ordered competition? It depends on how many seats are available.

Herein lies the third relevant feature of Bill-C20. The government is proposing a system by which each province submits a list of nominees from which the prime minister selects individuals for appointment to the Senate. The text of Bill-C20 takes great care to refer to "consultations" (as opposed to elections) in order to avoid constitutional challenge. The purpose of consulting widely and democratically with the entire adult citizen population is to produce a list of nominees who

may then be recommended to the governor general for appointment.[5] This list of nominees is also called a bank or panel.

The important implication for women is that the list of nominees to be voted for is longer than the list of current vacancies in the Senate. Under Bill C-20, Canadians are not voting for Senate nominees as vacancies arise; they are voting for nominees for a standing list to be used over the next few years, until the next general election. To avoid going to the polls between general elections, the prime minister requires a list with enough nominees on it to replace currently sitting senators as they retire or die. It might be that the list of nominees corresponds to the total number of Senate seats in each electoral district.[6] Seeing that the rank-ordered result of the STV ballot produces a rank-ordered list of nominees, the prime minister would presumably appoint senators in that same order.

By using STV to produce a rank-ordered list of nominees, Senate elections will have achieved proportionality. This is exactly the opposite of the "winner-takes-all" result of first-past-the-post electoral systems where a plurality of votes gets the winner elected, and all other votes are irrelevant to the composition of the legislature. Under Bill C-20, the public's voting preferences are fully and accurately translated into the composition of the Senate; this is the essence of proportionality. STV and a banked list of nominees thus amounts to proportional representation, but there are degrees of proportionality, and the degree is crucial to the number of women appointed.

The degree of proportionality depends on the size of the electoral district. District magnitude is the fourth element of Bill C-20 to hold important implications for the question of women's presence in the Senate. A solid body of political science literature establishes that the larger the size of the district, the more candidates there are to be elected, and the more candidates elected, the more likely there is to be diversity in representation. It bears repeating the obvious point that there is no mutually exclusive trade-off between women's representation and the representation of visible minorities because gender is combined with ethnicity and race in each individual, and so individual candidates – male and female – can embody more than one cleavage in their person simultaneously. The more seats

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[5] Under cross-examination in committee, Minister Van Loan and Privy Council Officials agreed that the PM is not bound constitutionally to appoint senators from the list. Roger Gibbons envisaged a situation where the prime minister might reject certain nominees – racists, white supremacists – altogether, or a situation where the primer minister might ignore the rank-ordered results in order to preferentially recommend an Acadian nominee over another higher-ranked nominee.

[6] The ballot cannot feasibly include the names of enough candidates to produce a full list of nominees, enough to replace all senators at one fell swoop. Imagine the ballot for all of Ontario's 24 Senate seats; with even only three major parties contesting 24 seats, the ballot would contain 72 names. Perhaps the government is proposing to add only two or three extra names at a time.

being contested in an electoral district requires parties to present a longer list of candidates, and thus to go deeper down into their pool of potential candidates. As more candidacies become available, the more balanced or diverse the list becomes in terms of the type of people or the faction within the party being represented by that candidate (Matland 2002, 103).

The more seats available in a district, the less women candidates are disadvantaged. It begins at the nomination stage, inside the political party, when a woman who aspires to be the party's candidate must compete directly against all other ambitious men. In a direct, head-to-head competition, a woman candidate must defeat the most powerful male politician in the same party, and then she must go on to defeat the most powerful man in her district. Her chances are better if she can campaign alongside the most powerful man in her party, as a member on the same team, and then they can go on together to compete against teams from other parties.

Furthermore, when there are multiple seats up for election, there is an implicit obligation for political parties to design a slate that appeals to a wide variety of voters. No party wants to risk the penalty of ignoring any identifiable group in putting together a list, and the result is a mirror of a country's population in miniature. A balanced ticket is also a way to satisfy different factions inside the party, and thereby guarantee internal peace; a dream package combining United States presidential candidates Barack Obama and Hillary Clinton together could be achieved under PR, without one having to defeat the other. As a result, in electoral systems using proportional representation, the slate of candidates presented to voters becomes part of the election campaign, and part of the internal power struggles and compromises inside the party. This sort of contestation, conducted in public, thus forces the central party leadership to be accountable for gaps and absences.

By contrast, in single-member districts, there are always compelling reasons for not nominating a woman as the candidate of choice in any particular electoral district. The premium on local grassroots democracy means that the party leadership does not have to take responsibility for what the final roster of candidates looks like; the final roster is the unplanned and unpredictable result of the democratic process.[7]

But is the standard contrast between proportional multi-member elections and plurality, single-member elections to the point here? Almost all that we know about women getting elected to multi-member districts is based on elections dominated by political parties – which Bill C-20 consultations deliberately are not. In

[7] There are solid, countervailing strengths to the single-member, first-past-the-post electoral system that outweigh the goal of greater diversity. Local grassroots democracy at the level of the electoral district has its own value, regardless of who is elected, and the search for proportionality should not jeopardize the integrity of the electoral district and the role of the elected member in that district.

the standard model of proportional representation, each citizen has only one vote to cast, and so votes for the party. A carefully designed slate balanced by gender and race is, in fact, a product of the lack of democracy in a top-down process controlled by central party executives. By contrast, Bill C-20 is proposing a package that shifts control away from party executives and gives it back to the voters with a preferential ballot.

Hence some, but not all, the standard arguments in the literature about PR's ability to elect greater numbers of women are relevant. Under Bill C-20, the party will have the final say in determining who runs under its name in a Senate consultation, and it will produce a slate of candidates, just as in standard PR elections. Unlike PR elections, however, the party cannot depend on its party brand or its party leader to carry the vote for Senate candidates. The fate of the government in the House of Commons is not at stake, and so even loyal party supporters have the opportunity to defect (that is, to choose a Senate candidate from another party) without jeopardizing the outcome of the main race. Therein lies the discipline of putting together an appealing list of candidates to appeal to different segments of the voting public. Who the candidates are as individual people, and who they represent in their physical person and in their personal history of skills, loyalties, and affiliations, moves to the front and centre of Senate consultations.

In the end, with a reduced role for political parties, we are, in effect, pulling out the single argument of district magnitude from the PR package and relying on it to elect more women candidates. By implication, it follows that electoral districts should be as large as constitutionally possible.

In Canada, the Constitution determines district magnitude. The electoral district is the province, and the logic outlined here leads to the conclusion that getting more women nominated to the Senate means defending the province as the electoral district. The distribution of seats corresponds to the logic of four distinct regions at Confederation. Each region – Ontario, Quebec, Maritimes, and the West is guaranteed twenty-four senate seats. Could the senatorial region be the electoral district? Quebec[8] and Ontario are regions unto themselves, but could the Maritimes and the West each be an electoral district? With twenty-four seats in contention, there is ample opportunity to organize creative candidacies and plan electoral strategies accordingly. Once elected, senators could represent a province, and could be appointed as Senate vacancies arise in their province, but why couldn't election campaigns be organized and the ballots counted by region?

[8] Quebec is exceptional because, constitutionally, its 24 senators are appointed to represent 24 regional divisions in the province, corresponding to historic linguistic boundaries. In the rest of Canada, senators have the option to declare a self-selected division, which can be a particular street or neighbourhood. Since senators have no constituency work, there is no reason why Quebec senators appointed to a division could not purchase property in that district in order to become a resident.

If not the Senate region, the province must be the electoral district in order to maximize the crucial element of district magnitude. The more candidates there are to be elected, the lower the electoral quotient required. It becomes feasible to organize a very specialized campaign to elect a woman candidate who is Acadian, who is aboriginal, or who is indigenous African. An individual candidate may not have a province-wide profile outside a particular linguistic, ethnic, or ideological community, but a candidate can be nominated using a campaign that mobilizes intensive support among an identifiable population.

To be sure, such a campaign would take some organizational effort, but it can be done.[9] Such is the nature of democracy; it takes skill and work. The political parties and other organizations should welcome any project that gets people to work on a campaign. Senate elections that are organized around individual candidates could be the spark to re-invigorate democracy. In fact, the central party executive in Ottawa might welcome an opportunity to bypass local party strongmen at the grassroots in the regions; party elites might want to support their own favoured candidates who are more diverse than the sort of candidate than could be elected to the House of Commons through the regular nomination route.[10] For instance, Senate elections would be just the opportunity for Stephane Dion to get his aboriginal candidate of choice Joan Beatty into caucus, without having to take on David Orchard, the Métis Nation of Saskatchewan, and the Liberal Party riding executive.[11]

Personally, as an active member of Equal Voice Canada, I look forward to organizing a campaign for all three of Nova Scotia's next three Senate appointments to be women. Across Canada, there are women who are experienced parliamentarians who have enormous talent and knowledge to contribute, but whose prospects of being elected are low. Women like Anne MacLellan, Sheila Copps, Janice MacKinnon or Jane Purves are accomplished, capable individuals and the country is diminished by their absence from the centre of power and influence.

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[9] Matland cites the 1971 example of municipal elections in Norway where campaigners mounted a campaign to have women vote only for women candidates, and strike out men's names. As a result, women became the majority of councillors in several large cities in a single election, but that strategy has its hazards, because there was, as a result of what became known as the "women's coup," a long-term backlash as men took up a habit of striking out women candidates' names (2002, 99).

[10] In Irish elections using STV, "Each candidate must build up a personal following within the electorate and within the local party, and consequently he has a power base which is not dependent upon the goodwill of the local party officers" (Gallagher 1980, 501).

[11] Stephane Dion designated former NDP cabinet minister Joan Beatty as the Liberal candidate for Desnethé–Missinippi–Churchill River in a 2008 by-election. His decision to designate Beatty without holding a nomination meeting antagonized David Orchard (and others) who had already declared his intention to seek the Liberal Party nomination. Conservative candidate Rob Clarke defeated her.

Furthermore, if our senators are to be effective parliamentarians, they should receive the legitimacy conferred by democratic elections. We all benefit from the appointment of strong, effective leadership in the Senate, and we may not get the leadership that Canada deserves without more democracy. The trick is to achieve strong effective leadership that looks like Canada in all its diversity, including that half of its population who are women.

But we need to ask: If we have democratic elections to the Senate, will we end up electing the same sort of politicians – male politicians – we've always been electing, ever since 1758? How can we get the sort of capable, effective leadership that the provinces need in the Senate? And, in particular, how can we best get more women into the Senate?

Fifteen years ago, a colleague remarked to me that it was typically and traditionally Canadian for the Canadian women's movement to celebrate Person's Day on 18 October each year. Instead of celebrating suffrage, we celebrate the date on which, in 1929, the Judicial Committee of the Privy Council decided that women were indeed, legally and constitutionally, "persons" and thereby entitled to receive a Senate appointment. In what other country, my colleague quipped, would feminists celebrate the date on which women became eligible to receive a patronage appointment? The remark still rankles.

REFERENCES

Gallagher, M. 1980. "Candidate selection in Ireland: The impact of localism and the electoral system" *British Journal of Political Science,* Vol. 10:4 (Oct.) 489-503.

Gibbons, R. 2008. Evidence. 39th Parliament, 2nd Session Legislative Committee on Bill C-20. 14 May. Accessed online at http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=240713&Lang=1&PARLSES=392&JNT=0&COM=13493

Hirczy, W. 1995. "STV and the Representation of Women," *PS: Political Science and Politics* 28(4): 711-713.

Joyal, S. 2005. "Conclusion: The Senate as the embodiment of the federal principle," in *Protecting Canadian Democracy: The Senate You Never Knew*. Montreal and Kingston: McGill-Queen's University Press.

Maddison, S. and E. Partridge. 2007. *How Well Does Australian Democracy Serve Australian Women?* Sydney: Democratic Audit of Australia, Report No.8. Accessed online at http://arts.anu.edu.au/democraticaudit/

Matland, R. 2002. "Enhancing Women's Political Participation: Legislative Recruitment and Electoral Systems," in *Women in Parliament: Beyond numbers* Geneva: Inter-Parliamentary Union, 93-111. Accessed online at http://www.idea.int/publications/wip/index.cfm#toc

McDougall, D. 2008. Evidence. 39th Parliament, 2nd Session Legislative Committee on Bill C-20. 2 April. Accessed online at http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=234181&Lang=1&PARLSES=392&JNT=0&COM=13493

Tardif, C. 2006. "Parliamentary Reform: What about Minorities?" *Dialogues Senate Reform*. Calgary: Canada West Foundation. Summer, 21-22. Accessed online at http://www.cwf.ca/V2/cnt/03b718574b6f9326872571a9004e967c.php

HOW NECESSARY IS SENATE REFORM?

15

SENATE REFORM AS A RISK TO TAKE, URGENTLY

Tom Kent

Les propositions de réforme du Sénat du gouvernement Harper comportent des risques, mais elles sont souhaitables. Le Sénat actuel n'est pas en mesure d'apporter au gouvernement fédéral le soutien dont il a besoin pour être un gouvernement fort, mais une réforme consciencieuse n'augmenterait pas plus les chances d'obtenir l'accord des provinces qu'un amendement à la Constitution afin d'abolir le Sénat. L'illégitimité électorale de la Chambre a permis aux premiers ministres des provinces de jouer un plus grand rôle dans les affaires nationales. Les premiers ministres des provinces n'ayant pas l'habitude de penser en fonction de l'ensemble du pays, les intérêts des provinces tendent à dominer dans les relations fédérales-provinciales au détriment des questions qui touchent l'ensemble du pays. Sans réforme, même si elle se limite à une loi fédérale, les provinces vont avoir de plus en plus de pouvoir et l'on tiendra de moins en compte des intérêts nationaux. Plus la situation persistera, plus elle sera difficile à changer.

The Senate reforms proposed by the Harper government are risky, not for them but for their successors a decade or two hence. Their policies could be frustrated by deadlock between the House of Commons and the "upper house." When it becomes largely elected, the Senate will still have all the legislative authority that the Constitution confers but which it has not dared to exercise, in defiance of the Commons, while unelected.

Nevertheless, the reforms deserve welcome. They should be strengthened, not weakened or abandoned. They are necessary to head off a present danger.

The national electorate is increasingly impatient with federal politics. Public participation will sink further if governmental responsibilities are increasingly confused, the federal government further weakened, because provincial premiers continue to gain a larger say in national affairs. The main countervail to that trend is an elected Senate. It is needed, quickly. Not allowing it to become, in its turn, too powerful, is the business of 2020, not today.

Federalism is more than the division of sovereignty between two orders of government. It is politically viable only if concerns distinctive to the constituent units are brought into consideration in the national business. All federations recognize this need. If they are parliamentary democracies, the chamber where the government stands or falls must be elected nationally on the principle of "rep by pop." The units of the federation are recognized in a second legislative chamber where numbers are discounted, where the smaller units have representation more than proportionate to their populations.

In almost all federations, this second chamber is elected. Canada is the exception. The *British North America Act* aped British practice by giving the trappings of an "upper house" to unelected people. Lordships could not be brought to the New World but senators appointed by the prime minister were the nearest approximation. For 140 years the Senate of Canada has survived as a copy of an anachronism. It gives superficial form to provincial representation in Ottawa. Its reality is solely to endow the prime minister with power to make prestigious patronage appointments undemanding of responsibility. For almost a century, it did no other harm. With distances long and government limited, federal politics produced its own regional leaders. As late as the 1950s, Jimmy Gardiner, for example, would have put any senator from Saskatchewan, however elected, deep into the shade.

The 1960s, however, brought a major shift in political power. Initially thanks to Lesage in Quebec, but quickly followed by Ontario, Manitoba, New Brunswick and soon by others, provincial governments cast off their parochial character. With their modernization, the paternal domination of Ottawa, which had been shaping most intergovernmental relations since 1939, faded away. Further change followed. Within Ottawa, Trudeau began the replacement of Cabinet government by prime ministerial dictatorship. Some ministers might still be strong enough to exert a regional control on patronage, but not on policy.

The vacuum in Canadian governance thus became complete. Where there should have been a Senate, significant because elected, there was effectively nothing. But politics does not long tolerate a vacuum. If created within, it is soon filled from without. Strengthened provincial premiers have been ready and willing to be the penetrators. They have no democratic mandate for the role. They are elected to run the business of their province, not for their views on national affairs. Most have little knowledge and no experience outside provincial affairs. Broader qualifications, the viewpoints of a Jean Lesage, Duff Roblin or Bill Davis, are an occasional bonus, not part of the job description.

In partisan politics, however, absence of a mandate is not an inhibition. For the past forty years, the decisive debates on national policy have often been outside federal elections and Parliament. Many policies have been shaped, deals sealed, in the exchanges, public and private, between federal and provincial leaders.

Such "executive" federalism imperils democratic accountability. It is nevertheless necessary. In contemporary society, government action commonly overlaps the distinctions of federal and provincial jurisdiction. Democracy calls not for collaboration to be limited but for its processes to be made as transparent as possible. Above all, it calls for the politics of collaboration to be made even-

handed. They are not. This is the crucial, neglected reason why Senate reform is urgently important. In its absence, the national coherence of Canada will be increasingly threatened.

We have long been, by constitution and by practice, almost the most decentralized of federations. In others, the necessary intergovernmental collaboration takes place under some process of central leadership. In Canada, for the past 25 years – since, though not made inevitable by, the 1982 constitutional change – central leadership has failed. The scales of intergovernmental relations have been weighted against Ottawa.

Variations in political strengths and in personalities have produced ups and downs, but the trend has been clear. The centre is not holding. The parts increasingly determine what is done, or not done, nationally: about the economy, the environment, the society. Policies crucial for all of Canada are settled, or neglected, by dealings in which the provinces have the upper hand. That hand is inherent in the present politics of the relationship.

Ottawa needs good relations with the provinces. It scores few political points by criticizing them individually, none by attacking them collectively. In contrast, when provinces criticize Ottawa policy, or the lack of it, federal politicians are promptly put on the defensive. Whatever the issue, if it ends in agreement, provincial politicians can claim victory and appreciation from their electorates. They usually have no motive to shower gratitude on Ottawa. And if there is continuing disagreement, they have nothing to lose by further criticism of the feds. It is the Ottawa politicians, with national responsibility, who are held to have failed in their job and who may be hurt in their next election, whereas running against them is usually good for votes in provincial elections.

This asymmetry will grow greater the more thoroughly the "First Ministers" of the provinces become established as the representatives of their constituents' viewpoints on national affairs. That role has no constitutional basis, but political power is built more by practice than by right. The longer the premiers play a growing national role, the more the people elected nationally by Canadians will be diminished. Political accountability will be more than ever confused. In a world society and economy more than ever requiring firm, far-sighted policies, Canada's are threatened with more and more incoherence.

There are two possible countervails to burgeoning provincial power in national affairs, two possible competitors to the premiers. One is an elected Senate. The other is internal to the federal political parties. They do not have to be machines under central control, creating prime ministerial dictatorships when in office. The major parties could again be lively associations of like-minded people, associations from which there emerge, across the country, more men and women who command public respect, in part for the regional viewpoints they bring to national affairs.

That could be. It will not be, while one party is in shambles and a man of Mr. Harper's temperament is prime minister. Even more than under any of his predecessors, his ministers are subordinates of little account beside the premiers of their provinces.

Unelected senators are of no account at all. Some do very good work. But Hugh Segal and Michael Kirby and others do it as able individuals. They have no authority as provincial spokesmen. Their contributions are not identified with the distinctive purpose of a Senate, with the representation of provinces and regions in national affairs. They could be made equally well through commissions and task forces and non-governmental organizations.

In other words, the considerable popular sentiment in favour of abolishing the present Senate is entirely reasonable. What is strange is the identity of the political party that urges abolition. The other policies of the NDP require a strong national government. To abolish the Senate would be to jettison the one institution that could save Ottawa from further weakening before the pretensions of the premiers.

In this respect, Mr. Harper is wiser than his critics. His proposed reforms would somewhat strengthen Ottawa. But in the short run they can do only a little good, and in the long run they can create a new threat to coherent national government.

Constitutionally, the Senate of Canada has powers equal in most respects to those of the House of Commons. Hitherto that has not mattered. An unelected Senate may sometimes huff and puff, but in political reality it can never stand out against a House of Commons majority. Elected senators could. Government in Ottawa could be saved from attrition only to be enfeebled by internal deadlock.

In a parliamentary system, the second chamber of the legislature must indeed be second, not an "upper" house. The United States is different, because executive authority stems from the direct election of the president. The Senate can have power equal to, or in practice greater than, the House of Representatives, because the president is responsible to neither. In a parliamentary system, where legislative and executive authority emerge from the one electoral process, the two chambers cannot be equal. It can only be in the House of Commons, intended to mirror national opinion, that the government stands or falls. Elected senators would bring representation of Canada's regional diversities directly to bear in national politics. They could make other valuable contributions to public discussion. They could consider, criticize, improve proposed legislation. But when opinions differ, they must give way to the Commons.

Full reform therefore requires a constitutional amendment to redefine the powers of the Senate. Unfortunately, that is at present even less likely to command the necessary provincial agreement than would an amendment to abolish the Senate. Certainly no responsible government will today open the Pandora's box of constitutional change.

Mr. Harper's proposals are therefore limited to what can be done by ordinary federal legislation. Appointment to age 75 will be replaced by a fixed term. The proposed 8 years would certainly be an improvement, but it is long beside the time between general elections. A shorter term would be even better, provided senators are as entitled as MPs to run for re-election.

Within the present Constitution, the elections will be "consultative" only. Technically, they will simply advise the prime minister as to whom he should appoint to the Senate. It is therefore essential that they be federal elections under the same

authority and supervision as those for the House of Commons. The past organization by Alberta of its own "election" to fill a Senate vacancy was an arrant invasion of Ottawa's jurisdiction. But provided that the election process is properly federal, there is no serious possibility that the prime minister would incur the political odium of refusing to appoint a duly elected candidate.

So far, so good. But would the public take senatorial elections seriously? How many people would bother to vote? And who would the candidates be? For a good many years, they would be seeking election to the Senate pretty much as it is. How many able people would want to go through an election for that purpose, rather than take up other forms of public service open to them?

If Mr. Harper is as serious as he seems to be, there are several ways to lessen such doubts.

The work of the Senate could be enhanced. For example, the qualifications of proposed appointees to all of the many significant posts in the prime minister's gift could be submitted to Senate committees for review and comment. Again, the Senate could be enabled and encouraged to undertake more enquiries into issues of public concern and long-term public policy. The enablement would be a legislative commitment to make adequate resources available for non-partisan enquiries initiated by the vote of, say, at least two-thirds of the Senate.

In such ways, the Senate could be made, even in the early stages of its change, more attractive to potential members. It is equally important to attract public interest. An occasional election to fill a single Senate vacancy would rouse little media or popular attention. It would be better to fix a "Senate day" – in early May, perhaps – for elections to all the seats that have become vacant during the previous twelve months.

The first one or two of such annual events could be big bangs. Present senators could be encouraged to retire before age 75. They could be offered, for a limited period, the choice of early retirement at the same pension as would be their entitlement at 75. On those terms, the Senate might quite soon be transformed from a retirement home to a largely elected, active national institution. The gain to the public interest would be well worth the cost of the pension bonuses.

Thereby, however, would come the risk inherent in reform without a constitutional amendment. Whereas senators by patronage are timid, the arrogance of elected people can sometimes know no bounds. Once they are most of the Senate, the possibility of serious conflict with the Commons cannot be ruled out. Our present Constitution could then result in deadlocks that enfeeble national policy almost as much as the present politics of provincialism.

The risk has to be weighed. Senate reform without constitutional amendment should not be lightly undertaken. In its absence, however, provincial power will continue to grow. Its politics will increasingly dilute the national interest. The longer it continues, the harder it will be to reverse this trend.

My assessment is therefore that Mr. Harper is right to take the risk of early action and would be wise to make it stronger and quicker.

Canada would never have been created, and could not have developed as it has, without optimists willing to take risks. The optimism needed now is that, once the

process of electing senators has started, and particularly if it is begun with some panache, Canadians will see its value and will not allow its purpose to be thwarted. If a constitutional amendment remains long in coming, public opinion will compel politicians in the Commons and the Senate to contrive some informal arrangement that avoids deadlocks between them. The good sense of the people will make the national interest prevail.

That is not only the faith on which all democracy is built. So far it is a faith that almost always, sometimes haltingly but in the end decisively, has served Canada well.

16

SENATE REFORM AND DEMOCRATIC LEGITIMACY: BEYOND STASIS

Senator Hugh Segal

Dans cet article, l'auteur appuie la réforme du Sénat en raison du manque de légitimité démocratique du statu quo. Étant donné que les Canadiens n'ont jamais conféré la légitimité électorale à la notion d'une chambre haute élue, les efforts fournis par le Premier ministre Harper, en présentant le projet de loi C-20 sur la consultation du public dans le processus de sélection des sénateurs et le projet C-19 qui vise à raccourcir la durée des mandats des sénateurs, sont un signe positif de réforme. Bien que les institutions gouvernementales se soient toujours opposées aux réformes, il est nécessaire de consulter le public sur la question à savoir si le Sénat devrait continuer d'exister sous sa forme actuelle. Cet article affirme qu'il existe d'autres moyens démocratiques, en accord avec la constitution, pour obtenir de tels renseignements.

THE PRESENT SENATE CONUNDRUM

Democracy, as a system of government, is about many principles and operating norms. One of the most important norms, defined by the principle of public legitimacy, is how and in what way legislatures spend their time. The way that time is spent, the good that is done or the folly that may emerge from sins of omission or commission, the time used by legislators in legislatures, is the fodder of election choice and debate. This, in part, explains why, despite the many initiatives on Senate reform from many credible sources, no reform of any substance has occurred for one hundred and forty years. Senate reform strikes almost no one as urgent.

At one level, this may reflect the hard reality that whatever the Senate does or does not do is seemingly of little consequence to the way we live our lives. In consequence, the gargantuan struggle for the political, legislative and constitutional approval required for change may be perceived as simply not justified. With issues like health care, defence and foreign affairs, taxes, the rush to make our borders safe and efficient, climate change, and Iran's pursuit of the weapons

of mass destruction that Israel already has, who in their right mind would argue for any time on the public agenda for Senate reform? And with Canada's self-confident, usually governing party (the Liberals) holding a commanding two-thirds majority in the Senate – one that is likely to endure given a Conservative prime minister determined not to fill vacancies with unelected individuals – the Senate itself has a structural bias against reform. Moreover, whatever Tory policy on Senate reform may actually be – at the time of writing, the introduction of eight-year term limits and statutory consultative referendums for voters in each province to identify candidates to fill Senate vacancies in their respective provinces – many Conservative senators are quite happy to see the process make no progress at all. In fact, motions I have made on televising the Senate or holding a referendum on its abolition or reform have been held up or delayed as much by Conservatives as by Liberals.

Since 1867 we have had thirty-nine federal elections and approximately 300 provincial and territorial elections. The elected legislatures that make our laws may thus surely be seen to have been legitimized on many occasions by millions of voters. And, with the referendum on the Charlottetown Accord in 1992, wherein Canadians voted against constitutional change, it is fair to conclude that there has been some measure of public involvement in a way that strengthens the legitimacy argument.

But, it is surely a reach to include the unelected Senate in that circle of reflected or *de facto* legitimacy. Except in Alberta for Stan Waters in the 1980s, or Bert Brown more recently, Canadians have never voted in any way whatever to legitimize an unelected upper chamber, one with potentially enormous legislative power.

The present government of Canada deserves credit, along with the prime minister, for attempting to address this legitimacy question through proposals in the House to consult the public on Senate vacancies before appointments are made (Bill C-20) and to shorten terms (Bill C-19). In this regard, Prime Minister Harper follows in a long and noble line of federal leaders who have attempted Senate reform.[1]

It is interesting to note that the British House of Lords, on which the Canadian Senate is modelled, is restrained in what it may do by the *Powers of Parliament Act* (1911 and 1949), which ensures that, in the event of conflict, the elected Commons shall always prevail.[2] Similarly, the powerful United States Senate can

[1] Since 1900 there have been 13 proposals for Senate reform. For details, see Appendix 1.

[2] The first Parliament Act, the *Parliament Act 1911,* asserted the supremacy of the House of Commons by limiting the legislation-blocking powers of the House of Lords. It was amended by the second *Parliament Act* of 1949, which further limited the power of the Lords by reducing the time that they could delay bills, from two years to one.

be stymied by the House of Representatives or simply vetoed by the president. It is surely anomalous, therefore, that the British government White Paper on upper chambers around the world, concluded that none, either elected or otherwise, was as powerful constitutionally as our unelected and unaccountable Senate (United Kingdom 2007, 23). This surely suggests that an undemocratic balance is, in terms of form if not substance, beyond equilibrium.

BENIGN DOES NOT MEAN DEMOCRATIC

To the credit of the individuals who have served in the Senate over the years, obstructionism has been the exception rather than the rule, a fact that further serves to undercut any sense of urgency around the Senate reform file.

Having campaigned honestly and sincerely on Senate reform, our present prime minister has delivered legislative proposals on term limits and protecting by statute the voters' right to be consulted about whom he recommends to the governor general for Senate appointment. Given this, he can hardly be expected to turn away; the legacy parties (Reform, Alliance and Progressive Conservative) he and Peter McKay assembled into a national, workable Conservative party and government were and are too committed to the principle here to shelve it or move on. The Liberal position – that no change can be made without formal constitutional agreement – is akin to proposing that all future tax changes require a seven-eighths majority in the House before they can pass. And, in affirming a position that underlines precisely why constitutional negotiation is unlikely to work, the Liberal governments of Quebec and Ontario have opposed any reform that does not pass their veto. While Saskatchewan, British Columbia, Alberta and Manitoba have embraced or are seriously considering a provincial electoral process, one that is provincially based like Alberta's, the difference of opinion highlights how unworkable a constitutional negotiation would be. It would not, in the end, be a negotiation about our far too powerful, profoundly unelected upper chamber. Rather, negotiation would be about everything else that provinces would demand before they would actually entertain any real consensus on the Senate. Canadians have seen this movie series before – Meech Lake in 1989–90 and Charlottetown, its genuine sequel, in 1991–92. That kind of process would be, as it has often been, a great place to send good ideas to die.

THE AMENDING FORMULA AND A REFERENDUM: BETTER THAN CIRQUE DU SOLEIL

The present amending formula requires that, for any fundamental change in our system of government – for example, changes affecting the Crown, Parliament, regular election cycle, etc. – the concurrence of *all* provincial legislatures *and* the Parliament of Canada must be obtained (*Constitution Act, 1982*, s.41; see Appendix 3).

In the design of any referendum on the abolition or maintenance of the Senate, it would be of immense value if Ottawa and the provinces would simply agree that

- Ottawa would sign on if, nationally, a simple fifty percent plus one majority voted for abolition; and
- each premier would sign on if, within their own province, fifty percent plus one voted for abolition.

This agreement would simply be one that embraces the rather dramatic notion that the governments work for the people, even on issues of constitutional legitimacy (or perhaps especially), as opposed to the other way around.

Moreover, such a referendum would allow us to avoid another cycle of reform contortions until we had actually established whether Canadians wanted the Senate to continue in any way.

There is very little that is not intriguing about the back flips, acrobatics, artistry, creativity and physical strength and beauty of the Cirque du Soleil. On Senate reform, however, we cannot continue in perpetuity through a range of Cirque du Soleil acrobatic manoeuvres until the price of admission is paid. We need simply to know if the public wishes to have a Senate to begin with.

A WAY AHEAD

If one assumes that disengaging from the process is not an option for the Conservative government elected in 2006 and that the institutional opposition to reform of the Senate will continue on the part of the Liberal premiers of Quebec and Ontario and their Liberal colleagues who control the Senate of Canada, it is clear that we face a context of deadlock. For their part, the Conservatives have a million reasons to continue to feature Senate reform as part of their platform in the coming campaign (it continues to get strong and enthusiastic audience support in all parts of the country, in partisan and non-partisan audiences). It would seem, therefore, that barring an election shaped exclusively on Senate reform (highly unlikely) and in which the pro-reform side wins a massive majority, we are again at a stalemate – one more time since Confederation and number twenty-nine in a long list of government or party reform proposals in the last 30 years alone – not counting those put forward by the present government (Joyal 2003).

Many of those who believe we need a Senate (of whom the author is one), and even those who argue that an appointed Senate is preferable to an elected one, will argue that senators have no less legitimacy than judges who are also appointed by the duly elected government of the day. There is, however, a huge difference between the functions performed by these two classes of appointees. Judges are appointed to interpret the laws on a case by case basis. In contrast, senators get to change the law and make law and refine or reject the laws sent to it by an elected Canadian Parliament.

The illegitimacy of the status quo emerges from two realities, only one of which the government has tried to address: Canadians have no say in who sits in the Senate, and Canadians have never had a say as to whether we need a Senate.

The Senate of Canada was not always Canada's only upper house. The Maritime provinces had such chambers prior to Confederation, while those of Manitoba and Quebec were granted at that time. All but the national body have now disappeared, with that of Quebec being the most recent to do so (1968). Surely it is in the spirit of constitutional coherence and stability that we now confront the issue of the legitimacy of our last remaining bicameral institution? Fortunately, there may be a stepped and democratic way to accomplish this, a way, moreover, that does not require explicit Senate or constitutional approval (however desirable these unlikely imprimaturs may be). Such a stepped approach might embrace the following elements:

a) The NDP and Conservatives, who have both in the past few months embraced a referendum on Senate abolition,[3] could agree pursuant to the *Referendum Act, 1992* to pass legislation in the House of Commons to put the question of abolition to the Canadian voters within the next twenty-four months. If the Conservatives are re-elected in a minority, they and the NDP can proceed to that referendum. Should the Conservatives not be re-elected, a Liberal minority would have to abolish the legislation within a few months – making a stout stand against democratization in their really early days back in the saddle. But they would likely be stopped by an NDP-Tory plurality. Only a Liberal majority would stop any chance of reform.
b) In the next twenty-four months provinces considering provincial senate elections could proceed to put procedures in place to hold those elections. Elected senators would begin to take their place in the upper chamber after nomination by the prime minister. Vacancies would be filled in places like BC, Alberta, Saskatchewan and Manitoba when elections take place. Provinces where elections do not take place would see vacancies remain and increase. The collateral benefit of this, however temporary it might be, would be an increase in relative strength from the broadly under-represented Western provinces while over-represented provinces in the east would lose relative strength.

If the referendum were held, how might that process likely evolve?

Past referendum experiences in Canada indicate that however far ahead the positive proposition (in this case abolition) may be initially, the contrary side

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[3] *"The NDP tabled a motion in Parliament for a referendum to be held by October 2009 on the abolition of the Senate. Our work builds on the motion that Senator Hugh Segal recently tabled in the Senate and years of democratic reformers in the NDP."* Jack Layton, 4 November 2007.

tends to gain ground by attrition over time. Quebec, 1980, Charlottetown, 1992, Quebec, 1995 all speak to aspects of this phenomenon. My proposal in a motion put to the Senate on 23 October 2007 called for a simple referendum on abolition. My reasoning then, which still remains salient, was and is:

> In a democracy, specifically in the key working elements of its responsible government, respect must be tied in some way to legitimacy. While questioning "legitimacy" of long established democratic institutions is usually the tactic of those seeking a more radical reform, the passage of time does not, in and of itself, confer *de facto* legitimacy, and seems a particularly undemocratic way of moving forward. The purpose of my motion regarding a referendum question put to the Canadian people is to focus squarely on the legitimacy issue. (Canada 2007; see Appendix 4)

If at least 50 percent plus one of Canadian voters nationwide vote to abolish and there is at least 50 percent plus one in each province, no premier (not even the premier of Quebec) would have any rationale to withhold the unanimity required for the constitutional amendment.

If that precise test is not met, then, as the case for non-abolition would likely include a strong series of arguments for reforms, parliamentarians and premiers would have received a strong and explicit message from Canadians on the reform agenda. The public will have been consulted *before* negotiations are begun, as opposed to after. Canadian democracy and our cherished "peace, order and good government" can, I believe, withstand that radical departure and survive very much intact.

COMPLACENCY'S SIREN CALL

The Honourable William Davis would often remind overly activist ministers and MPPs that no government ever got into trouble because of something it did not do. And for Liberals and some premiers – and perhaps Bloc Quebecois members who have little interest in validating or strengthening the federal system – doing nothing may continue to be attractive. But there are risks to the country and its institutional legitimacy if we simply keep Senate reform on a back burner:

a) Voters in Western Canada will know that the federal system is not capable of improvement, further democratization, enhanced legitimacy or responsibility. There is political cost to this – a cost we underestimate at our peril.
b) The core anti-democratic structure of the upper chamber will remain, able to emerge and create constitutional or political crisis at any time and, often, at the worst possible time.
c) The message that an institution cannot change with the times, that we are incapable, as a mature and stable democracy, of making adjustments and modernizing the instruments at the core of that democracy, will be ever more persuasive and endemic. How much more sense of voter alienation and electoral non-participation do we wish to engender? Is the Senate so perfect that it requires special protection in perpetuity from any and all change?

Serving senators who support this proposal (and admittedly, there may not be many) might be asked, "How can you serve in a Senate you feel is illegitimate?" The answer is very straightforward.

When asked by a prime minister – himself or herself duly elected under our system – to take on a task for the country, one needs to be pretty self important to say no. That being said, if one takes one's oath of service and signs it, one has a duty to serve as best one can.

But surely that obligation implies disengagement from neither the democratic imperative of legitimacy nor democratic participation in the architecture of legitimacy. The motion I proposed in the Senate (see Appendix 4) affords parliamentarians a broad opportunity to reflect on the issue and contribute their own perspectives. Should a similar motion be introduced in the House, the debate could be enjoined more broadly still. And while I would vote against abolition – for reasons that relate to both the need for a chamber that reflects regional and provincial interest and some careful reassessment of federal laws that too frequently are subject to overly hasty and careless drafting (e.g., the recent C-10) – my vote is but one vote. My opposition to abolition, however, does not in any way weaken my deeply held belief that Canadians should get to decide something on the Senate they have never been allowed to do.

One of the core premises of the development of responsible government in Canada is the process of evolution. To be relevant and engaged, all aspects of our democratic institutions must be open to reflection and possible scrutiny. The Canadian Senate, venerable, thoughtful, constructive and multi-partisan as it may be, cannot be outside the circle of public accountability.

THE INERTIAL APPEAL

Those calling for doing nothing often focus on the quality of the committee work in the Senate and the need for a constraint on a prime minister with a large majority. They also note the important role the Senate plays in cleaning up errors of substance and detail made, often in haste, in the House of Commons. And these protests are not without a measure of evidentiary substance.

One could say some of those things about the judiciary, NGOs and even hard working municipal and parish councils. But these bodies do *not* have the power to initiate legislation, stop specific spending approved by those elected precisely to approve spending in Parliament, or to do the same to laws passed by folks elected to pass laws. The Senate can, has and does engage in some or all of these activities all the time. And they do so without being elected in any way, by anyone, to do so. And, if appointed at the age of thirty (the minimum age required by the Constitution), they can serve for forty-five years under existing constitutional provisions. If a newly constructed Eastern European or African democracy had created such an assembly as a signal of their embrace of democracy, we would have been quite direct as Canadians in underlining the contemptibility of that charade.

My own experience both with the Senate and senators over three decades, and my explicit experience since being appointed in 2005 as a Conservative by Prime Minister Martin, a Liberal, leads me to agree wholeheartedly with those who extol the sense of honour, duty, diligence and public service that inspires the vast majority of those who have served or do serve in our upper chamber. Conservative ministers like Peter Van Loan, who have attacked the people in the institution, reveal more about their mean-spirited myopia and institutional inexperience than any wise government would embrace going forward. But good people working hard for causes and communities about which they care do not constitute a substitute for democratic legitimacy. And where we sanction ongoing illegitimacy and the separation of those who legislate from accountability to those for whom they legislate, we begin to gnaw at the sinews of democracy itself.

That kind of "let them eat cake" complacency and ever wilful denial of the democratic principle never occurs, especially in terms of today's intense focus on governance, coherence and accountability, without a serious price ultimately being paid.

REFERENCES

United Kingdom. 2007. The House of Lords: Reform Presented to Parliament by the Leader of the House of Commons and Lord Privy Seal by Command of Her Majesty. February. (Cm 7027) p. 23.

Joyal, S. 2003. *Protecting Canadian Democracy: The Senate You Never Knew*. Montreal and Kingston: McGill-Queen's University Press.

Canada. 2007. Parliament. Debates of the Senate. 23 October.

APPENDIX I

Attempts at Senate Reform since 1900

1. 1903 The representation of the Northwest Territories was raised from two to four seats by an Act of the Canadian Parliament.
2. 1915 The Constitution was amended so as to provide for a fourth senatorial division of 24 members, the four Western provinces being represented by six members each. The total number of senators was now 96.
3. 1949 As provided by the *Constitution Act, 1915*, Newfoundland was given six seats in the Senate upon its admission within the Federation.
4. 1965 Under a constitutional amendment, senators appointed after 2 June 1965 must retire from this House at the age of 75.
5. 1969 A White Paper published by the Government of Canada proposed the creation of a new Senate, half of its members to be appointed by the provinces and the other half being appointed by the federal government.
6. 1972 The Molgat-MacGuigan Committee recommended increasing the number of senators from Western provinces and reducing the powers of the Senate to a suspensive veto.
7. 1975 One seat was awarded to each of the two Territories, the total number of senators being raised from 102 to 104.
8. 1978 In Bill C-78, the Government of Canada proposed a reform of the Senate which was judged *ultra vires* of the federal Parliament by the Supreme Court the following year.
9. 1979 The Task Force on Canadian Unity suggested that the Senate be replaced by a council of 60 members appointed by the provinces.
10. 1980 The report of the Senate Committee on certain aspects of the Constitution reaffirmed the necessity for a nominated and substantially reformed Senate.
11. 1982 The *Constitution Act, 1982* reduced the powers of the Senate concerning certain key aspects of its organization to a suspensive veto of six months.
12. 1982 A motion by Senator Roblin proposing the election of senators by the people was discussed in the Senate.
13. 1982 Creation of a Special Joint Committee of the Senate and of the House of Commons on Reform of the Senate.
    (From *Senate Reform Proposals in Comparative Perspective*, Jack Stilborn, Political and Social Affairs Division, Research Branch, November 1992.)
14. 1984 Molgat-Cosgrove Committee
15. 1985 Macdonald Commission
16. 1992 The Beaudoin-Dobbie Proposal
17. 1992 The Charlottetown Proposal

APPENDIX 2

The House of Lords: Reform
Presented to Parliament by the Leader of the House of Commons and
Lord Privy Seal
by Command of Her Majesty
February 2007 (Cm 7027) (page 23)

> **5.10** 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 upon 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.

APPENDIX 3

Amendment by unanimous consent

41. An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province:

(*a*)

the office of the Queen, the Governor General and the Lieutenant Governor of a province;

(*b*)

the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force;

(*c*)

subject to section 43, the use of the English or the French language;

(*d*)

the composition of the Supreme Court of Canada; and

(*e*)

an amendment to this Part.

APPENDIX 4

23 October 2007
Notice of Motion to Urge Governor-in-Council to Prepare Referendum on Whether the Senate Should be Abolished

Hon. Hugh Segal: Honourable senators, I give notice that, at the next sitting of the Senate, I will move:

WHEREAS the Canadian public has never been consulted on the structure of its government (Crown, Senate and House of Commons)

AND WHEREAS there has never been a clear and precise expression by the Canadian public on the legitimacy of the Upper House, since the constitutional agreement establishing its existence

AND WHEREAS a clear and concise opinion might be obtained by putting the question directly to the electors by means of a referendum

THAT the Senate urge the Governor in Council to obtain by means of a referendum, pursuant to section 3 of the *Referendum Act*, the opinion of the electors of Canada on whether the Senate should be abolished; and

THAT a message be sent to the House of Commons requesting that House to unite with the Senate for the above purpose.

17

THOUGHTS ON SENATE REFORM

Lorna R. Marsden

Si l'on réforme le Sénat, il faut que le Sénat conserve son rôle de vérificateur auprès du gouvernement en place, un organe capable de forcer le gouvernement à revoir les clauses les plus douteuses des projets de loi proposés. Jusqu'à présent, le Sénat a toujours fourni une réflexion sereine en raison de la longue durée des mandats de plusieurs sénateurs qui leur permet de jouer à merveille leur rôle de membre du Parlement, entre autres l'habileté à rédiger de bonnes lois. Pour que des élections ne nuisent pas à ce service, la durée des mandats doit être assez longue. Finalement, l'auteur nous avertit qu'un sénat élu entraînera probablement davantage de compétition entre les sénateurs et les premiers ministres provinciaux, une compétition que les Canadiens n'apprécieront pas ou ne comprendront pas.

The debate over Senate reform reminds one of the elderly wife saying to her elderly husband, after he had told an often repeated story to a visitor, "now dear, that's *always* a good one." We hear about Senate reform once again and, once again, familiar ideas abound.

Proposals for Senate reform in Canada are made by successive governments in part as a means of changing the subject because, interesting though such proposals are, reform has almost no chance of succeeding.

The reasons why Senate reform is such an extraordinarily difficult process are also familiar ground. The representation from the provinces which benefit (e.g. PEI) and the complexities of the constitutional reform process are primary among them. The discussion of what seems desirable is always interesting, however, for those who study the theory of Canadian government as well as for those in the practice of it.

As one of the latter, having spent over eight years in the Red Chamber, I have some views that have not been raised in the previous papers in this series. Foremost is the need to maintain a chamber that has checking power on the popularly elected House. A key principle for Senate reform is to maintain the countervailing, balancing powers between the two Houses of Parliament. That is, there needs to be a legitimate means to cause the government of the day to rethink and review its proposals in almost all spheres. While the courts have come to play that role in

some areas, their scope is necessarily limited and often the subject of public conflict between the two institutions. This is not helpful to the orderly progress of a government's agenda and should be reserved for the most significant of disagreements. Indeed, the current Chief Justice conveys such a message repeatedly.

At present and despite the many difficulties with the structure of the Senate, the upper chamber does play that role on a regular basis. Furthermore, if it is properly composed and whether it is elected or not, that role should remain prominent in a reformed Senate for good orderly governance.

An illustration may be helpful here. When Mr. Mulroney came to power in 1984 he was anxious to demonstrate change and to get on with his program. In a previous article I have described the situation in detail (Marsden 1987). In brief, Mr. Mulroney introduced a Borrowing Bill before tabling the Main Estimates thus violating one of the most important principles of Parliament going back to the ancient disputes between king and subjects. The king was forced to explain why he needed money before imposing the taxation or borrowing to get it. In the 1984 case, the prime minister seemed to wander into this error with no idea of what he was doing and, of course, was eventually forced to back down. He did so with the help of the senators of all parties and in a way that saved his face but not until after a great deal of stormy, messy press. Subsequently and throughout my time in the Senate, there were several occasions when "back corridor" discussions allowed ministers and the government to get their legislation through without violating basic principles of democracy.

This illustrates one of the great weaknesses of the House of Commons and one of the strengths of the Senate, a strength that needs to be maintained in any reforms. What are the weaknesses? What are the strengths?

The House of Commons is unusual among lower houses in the parliamentary system for the very high rate of turnover among its members. It is a small band of members who survive three or four elections or more. Furthermore, our political parties are quite capable of electing as leaders people who may have many worthy characteristics but have very little parliamentary experience. It is the exceptional member who knows the history of Parliament, the rules governing spending powers, who has read the estimates in all their parts and who has a grasp of how parliaments really work. They can hardly be blamed for this. In Canada we teach almost nothing about civil society, the history of our parliamentary system, or the composition of governments. Most Canadians see little other than question period and election campaigns. Elections are increasingly popularity contests rather than an examination of the options with deep knowledge and consideration of the candidates' experiences.

Briefings for new members contain a great deal of essential information but it takes more than a few years to really learn about the importance of parliamentary process and why it is essential. Members do not have that time, given their incredible schedules in their ridings as well as the House. Members become ministers with almost no training. Their assistants are most often bright young things with brains, energy and no experience, and they inadvertently embarrass themselves

and their ministers with proposals that are bound to fail. More recently, the PMO has gained enormous power by snatching up the experienced assistants and then demanding that all ministerial proposals go through the PMO – a slow and unfortunate development.

Senators, on the other hand, are often highly experienced parliamentarians from the House or the provincial legislatures. Prime ministers with good sense appoint senators who really have a depth of experience and knowledge about parliaments and popularity doesn't come into it – indeed the Senate and senators are quite unpopular and that is very useful. Indeed, as I argued in the article cited above, it is a good thing to have an unpopular house and one of the reasons that electing senators, desirable though that sounds, will weaken the system of checks and balances.

Senators have more time to study up on parliamentary procedures. I recall meetings of the Senate Finance Committee, on which I sat for about seven years, where senior public servants appearing to defend their estimates would be reminded by a senator that this was the third or fourth attempt to get a particular expenditure through the system and the reasons why it always failed. These senators saw the problems from a provincial and a federal point of view. They had been around the block a number of times and would often offer suggestions for reasonable modifications to help the official achieve the objectives of the minister while not running into the roadblocks that the senator could see ahead.

The role of senators as helpful brakes on the desire to implement unworkable programs and expenditures is largely non-partisan, although there are some notable exceptions. They are often very helpful to the members of the government and a great many amendments and changes are made quietly in this fashion without any great public brouhaha.

Not all senators come with experience and they can be as unknowledgeable as new members. However, they do stay longer, do not have the heavy burden of constituency work, and the great majority become sophisticated about parliamentary procedure and precedent about the crafting of good legislation and the means of implementation. Of course they also learn about blocking legislation at the same time, which can work against a government, which then advocates abolition or something worse.

But would senators gain this knowledge if elected? Election seems highly desirable but it requires three essential elements. First, the senators must not be beholden to the prime minister or the leader of their party. You may believe they are beholden under the appointments system. This is true for a few months, of course, but very shortly it dawns on all senators that once they are appointed there is little a leader can do to unseat them on a point of principle or policy disagreement, and they act accordingly if quietly. So it is essential that senate elections not be party funded, nor subject to party discipline in the way in which members of the House are. Second, senators must have a term of office sufficiently long so that they do learn parliamentary procedure and history and are therefore useful in their work and in maintaining a balance of powers. Without the ability of acting

as a check or balance. there is truly no reason to have an upper chamber. Third, popularity must not trump knowledge, experience and "sober second thought" in the Senate.

Therefore I have some doubts about election and, even if election is essential, I would disagree with the proposed terms of office under the current proposal. At least ten years is needed to really learn about Parliament and legislation unless, of course, all senators are former members of a legislature or the House of Commons – which is unlikely in the extreme.

Others have raised the issue of the views of provincial governments in this matter of election to the Senate. This is an important consideration. But what if senators were elected not from provinces but from real social and economic regions that in many instances crossed provincial boundaries? What if electoral districts for senators were, for example, north-west Ontario and north-east Manitoba? Or the Rocky Mountains (BC and Alberta) or the Quebec-New Brunswick border areas or Newfoundland-Cape Breton-PEI? In short, what if the regional representation were to be a serious matter? What if the jurisdictions were not overlapping provincial boundaries which are mostly arbitrary anyway in both historical and contemporary terms?

Elected senators will want to take substantial actions. The quiet countervailing powers they now practice will be a thing of the past under an elected system. Premiers will be most frustrated by their actions. Their constituents will be confounded by their views and the views of the members of the House – double trouble in many parts of the country. Warring popularity contests in a single constituency? None of these consequences would make life easier for anyone in the governments of this country.

Far more likely than any dramatic constitutional reforms is the gradual improvement of the rules and conditions, a slow reform process that has been underway now for generations. It is not newsworthy and it does not fit with a new government's common desire to rouse the electorate with promises of "real" reform. But in many instances it does lead to success.

REFERENCES

Marsden, L.R. 1987. "What Does a Senator Actually Do? An Inside View by a Neophyte," in *Politics: Canada, Sixth Edition*, eds. P.W. Fox and G. White. Toronto: McGraw-Hill Ryerson.

APPENDIX

BILL C-19: AN ACT TO AMEND THE CONSTITUTION ACT, 1867 (SENATE TENURE)

INTRODUCED: 13 November 2007 by then Leader of the Government in the House of Commons and Minister of Democratic Reform, the Honourable Peter Van Loan.

Note: The bill died when Parliament was dissolved on 7 September 2008.

PROPOSED CHANGES: Amend clause 2 of section 29 of the *Constitution Act, 1867* – limit the tenure of senators to one eight year non-renewable term. (Currently senators, once appointed, sit until the age of seventy-five).

Note: The bill preserves the existing retirement age of seventy-five for current senators.

BILL C-20: SENATE APPOINTMENT CONSULTATIONS ACT

INTRODUCED: 13 November 2007 by then Leader of the Government in the House of Commons and Minister of Democratic Reform, the Honourable Peter Van Loan.

Note: The bill died when Parliament was dissolved on 7 September 2008.

PROPOSED CHANGES: Amend the current *Canada Elections Act* to include procedures for selecting Senate nominees.In either a federal or a provincial general election, the electorate votes for candidates as potential nominees to the Senate. Successful candidates enter a pool of potential nominees to the Senate and then are considered by the sitting prime minister as appointees for the Senate when a vacancy arises. The governor general continues to appoint senators on advice from the Prime Minister. (Currently, under section 24 of the *Constitution Act, 1867*, senators are appointed by the Governor General on advice from the sitting prime minister – the electorate has no official role in the nomination of potential appointees.)

Note: Bill C-20 does not provide for an elected Senate. The Canadian electorate vote on who they would like to see appointed to the Senate; the vote serves as a recommendation to the prime minister. The mrime minister can consider the sucessful nominees as potential appointees. The prime minister continues to advise the governor general on Senate appointments.

Bill C-20 is not a proposed amendment to the *Constitution Act, 1867*; it is an ordinary bill that requires the consent of the House of Commons, the Senate and the governor general to become valid federal law.

BILL C-20: Sets out the procedure for electing Senate **nominees.**

- *Part 1* of the bill deals mainly with the administration of the proposed bill:
    - Outlines the role and responsibilities of the chief electoral officer and the consultation officers (similar to those of the chief electoral officer and the returning officers respectively under the current *Canada Elections Act*)
- *Part 2* stipulates that the consultation elections take place during a federal or provincial general election
- *Part 3* lists (1) the qualifications of nominees – they must be at least thirty years old and be endorsed by at least 100 electors who reside in the province in which they seek nomination; and (2) the rights of nominees including the right to a leave of absence from work.
- *Part 4* lists the qualifications and entitlements of the voter (identical to those stipulated in *Canada Elections Act*).
- *Part 5* sets out the rules and procedures for counting the votes in accordance with the single transferable vote system (STV). This is a system of preferential voting which takes into account the first and subsequent choices that the voters indicate on their ballots.

- *Part 6*, like the comparable section of the *Canada Elections Act,* lists the regulations vis-a-vis communications (e.g. advertising, surveys).
- *Part 7* discusses the rules of third party advertising, including spending limits, and the required information to be included in advertised messages (name of nominee, provinces, identification of third party advertiser and that the advertising has been authorized by the third party). The definition of third parties is broadened from that which is found in the *Canada Elections Act* to include an eligible party and a registered party.
- *Part 8* deals with financial contributions:
    - Contributions are to be made exclusively to the nominee.
    - Individual contributions to the nominee are limited to $1000.
    - Not considered contributions are professional services, shared office accommodation and lists of members or contributors provided by a registered party or a registered association of a party. This exemption does not, however, include advertising expenses.

      Note: There is no direct consultation expenses limit made explicit in bill C-20.
- *Part 9* outlines the enforcement of bill C-20.
- *Part 10* outlines transitional provisions, consequential amendments, co-ordinating amendments and coming into force clauses.

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