THE DEMOCRATIC DILEMMA

REFORMING THE CANADIAN SENATE

Edited by Jennifer Smith

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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.

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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

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 engaeJ-08 1a.kr7ea fo-5.8(per)8enato-

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.

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 govern-

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

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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 u d was

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

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[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'

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

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.

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 n Ottaef*0.P7m0.125rim]TJ14ramentary diaJ2e

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

[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'

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 –

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

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 c*-0. partTa participant in the legislative process[85 Tc0 Tw()Tj9me to severely test propfpv

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 –

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New Brunswick. 2007. Position Paper of the Government of New Brunswick: Bill S-4-An

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

> 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

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

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

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

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,

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

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)	
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	
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)		
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)		
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)		
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)		
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)		
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.

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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

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,

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.

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 modifica-

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

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

on one-person-one-vote. Consequ … erize such federal se
chambers as "demos-constraini … nd Stepan 2004a, b, c).
For instance, to take just one … Senate, a single vote
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trasts are replicated in

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… r points should, however, be noted. It can be ar-
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… federalism. Democracy and governmental responsiveness
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… r 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 fed-
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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

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

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*

Four of the ten provinces – Ontario, Quebec, New Brunswick, and Newfoundland and Labrador –

When discussing Harper's Se[illegible] n addition to considering the constitutional element of the [illegible] consider the federalism factor. Harper describes himse[illegible] deralism. Yet, despite this, the attempts of the Mulro[illegible] Senate appear to be more "open" than Harper's a[illegible] through federal-provincial negotiations. [illegible] way Canadian federalism vis-à-vis Senat[illegible] decades, and ignores the authoritative [illegible] e Canadian federation, the Senate, an[illegible] me Court in 1980. In a similar fas[illegible] umvent constitutional practice[illegible] indi-cation that employing [illegible] for reform will produce[illegible]

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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

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, wWhian such full]rto achera2(g11e1gTwef-)]a2e House welfW137.9aranada.

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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*

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,

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

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 fena7992 Tw[

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

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

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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 New-

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, particularw 2hersons, pars(a)equal respons6 pruni.9()12.9right-0.0104 Tw

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

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[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*.

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.

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*

[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 withm

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

[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
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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,.fiy0f the-216(y0 ar)1667(gue that theSupor)-8.6(me CoFurs of anada')58.4

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[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

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
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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

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 charac-

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 un-
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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

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

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

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

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*

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. Sur-

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.

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9

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.

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 dynamics9 (ealr theabth57term

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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.

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

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.

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

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[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 im-

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

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*

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 ofSenateCh10

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."

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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 Constitutional Amendments Act, 1996 and the Clarity Act passed in 2000.

his lower-key approach to unilateral legislative innovation has continued with inority Conservative government elected in January 2006. Their first con- government action on Senate reform came only a few months into the first on 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

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

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

legisla-
government
osing the Cabi-
06–7 Session, is a
red the bill, but effec-
ndation that the bill not be
has ruled on its constitutionality.
utions are also made when Senate
they are still formally before the House
-study," senators examine the bills in detail
ment that are then considered and often adopted
before the legislation ever formally is introduced into

ase is taken from Smith 2003, 115-6.

ote 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

xpedite m7bills when

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

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[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.

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

[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 sena-

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 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.

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

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

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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 re-

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 under-

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.

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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 libecause 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 engagparties) and campaign spending (by candidates, political parties, and th ties). 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

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"

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

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

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.

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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

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

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

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[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

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

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.

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

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 re not voting fTnerppointment.

district requires parties to present a longer list of
per down into their pool of potential candidates. As
ilable, the more balanced or diverse the list becomes
e or the faction within the party being represented by
02, 103).

le in a district, the less women candidates are disadvan-
mination stage, inside the political party, when a woman
party's candidate must compete directly against all other
irect, head-to-head competition, a woman candidate must
erful male politician in the same party, and then she must go
st powerful man in her district. Her chances are better if she
ngside the most powerful man in her party, as a member on the
hen they can go on together to compete against teams from other

e, when there are multiple seats up for election, there is an implicit
r political parties to design a slate that appeals to a wide variety of
party wants to risk the penalty of ignoring any identifiable group in
gether a list, and the result is a mirror of a country's population in mini-
alanced ticket is also a way to satisfy different factions inside the party,
eby guarantee internal peace; a dream package combining United States
ntial candidates Barack Obama and Hillary Clinton together could be
ved under PR, without one having to defeat the other. As a result, in electoral
ems using proportional representation, the slate of candidates presented to
ers becomes part of the election campaign, and part of the internal power strug-
es and compromises inside the party. This sort of contestation, conducted in
ublic, 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]

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,

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

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, "

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

Unelected senators are of no account at all. Some do very good work. But

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.

[illegible]

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

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

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

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

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 ad [illegible] many) might be asked, “How can you serve in a Sen [illegible] The answer is very straightforward.

When asked by a prime minister – himself o [illegible] system – to take on a task for the country, one [illegible] say no. That being said, if one takes one’s oa [illegible] duty to serve as best one can.

But surely that obligation implies dis [illegible] ocratic imperative of legitimacy nor democrati [illegible] of legitimacy. The motion I proposed i [illegible] 4) affords parliamentarians a broad opportun [illegible] contribute their own perspectives. Should a simil [illegible] House, the debate could be enjoined more broadl [illegible] ote against abolition – for reasons that relate to bo [illegible] hat reflects regional and provincial interest and so [illegible] f federal laws that too frequently are subject to ov [illegible] rafting (e.g., the recent C-10) – my vote is but one vote [illegible] tion, however, does not in any way weaken my deeply h [illegible] ns should get to decide something on the Senate they ha [illegible] d to do.

One of the c [illegible] development of responsible government in Canada is the [illegible] n. To be relevant and engaged, all aspects of our democratic [illegible] e open to reflection and possible scrutiny. The Canadian Se [illegible], thoughtful, constructive and multi-partisan as it may be, can [illegible] he circle of public accountability.

THE INERTIAL APPEAL

[illegible] alling for doing nothing often focus on the quality of the committee work [illegible] e 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 Senate.

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

APPENDIX I

APPENDIX 2

Presented to Parliament by the Leader of the House of Commons and Lord Privy Seal
by Command of Her Majesty

APPENDIX 4

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)

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

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

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 parliamen-

APPENDIX

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.

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

- *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

- *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.
    -

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