

AN EXPERT OPINION ON BILL C-7

AN ACT RESPECTING THE SELECTION OF SENATORS AND
AMENDING THE CONSTITUTION ACT, 1867
IN RESPECT OF SENATE TERM LIMITS

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BIOGRAPHY

Professor Bruce Hicks is currently at the Bell Chair for the Study of Canadian Parliamentary Democracy at Carleton University in Ottawa courtesy of a two-year Social Sciences and Humanities Research Council visiting fellowship. He has been teaching political science at Concordia University in Montreal since 2008. He holds a B.A. and M.A. in Political Science from McGill University and a Ph.D. in Political Science from the Université de Montréal. He is a former associate with the Canada Research Chair in Electoral Studies, which was the seat of the Canadian Election Study and a centre of excellence for the study of electoral systems.

Professor Hicks' current research looks at how societal cleavages, both social and partisan, mediate formal institutions of governance to variously drive and constrain institutional change. This includes formal institutions of governance, constitutions and multilayer institutions in developed countries like Canada, the U.S., the U.K., Australia, New Zealand and Europe. He has also published extensively on constitutional conventions in Westminster-model parliamentary systems.

Prior to entering the academy, Dr. Hicks was Canadian parliamentary bureau chief for *United Press International* (UPI), a syndicated columnist with mostly Thomson Newspapers and the principle author and editor-in-chief of *The Financial Post's* 'Directory of Government', which continues to be the most comprehensive resource book on the Canadian federal government ever assembled. While at The Financial Post, his proposal to amend the Canadian *Constitution* to create an elected Senate, which was dubbed at the time the 'Hicks Amendment', became an integral part of the negotiations of 1990 between Quebec and Newfoundland surrounding ratification of the *Meech Lake Constitutional Accord*.

MANDATE

I have been asked to prepare an expert opinion in connection with the reference filed on April 30th 2012 by the Attorney General of Québec before the Québec Court of Appeal on the initiative of the federal government to unilaterally reform the Senate through Bill C-7, *An Act respecting the selection of senators and amending the Constitution Act, 1867 in respect of Senate term limits*.

In this opinion, I explain the effects of the consultative electoral mechanism provided for in Bill C-7 on the institutional dynamics in the federal Parliament from a comparative and domestic perspective with respect to electoral processes. More generally I explain the consequences of introducing electoral elements into upper chambers.

EXECUTIVE SUMMARY

Australian jurist Herbert Evatt warned that unwatched, constitutional rules “might change, or be changed, without popular approval given with full knowledge into something very different”.¹ When it comes to altering the ‘method of selection’ for the upper chamber, any change will fundamentally alter the chamber along both of the chamber’s two main roles, that of ‘representation’ and ‘review’.

There is no such thing as a ‘best’ or ‘better’ institutional configuration, in general, or a ‘best’ or ‘better’ method of selection for an institution, in specific. Each choice has strengths and weaknesses. And there are as many alternative configurations as there are countries and sub-country governments on the planet.

The choice of institutional design, including the method of selection for a legislative chamber, is a reflection of that society. While often imposed from above, the choice should reflect that society’s values as the institutions of government, and the constitution which establishes them, is a social contract. By extension, they should not be altered without a high-level of public consent.

All but five small federal countries in the world have adopted bicameralism for their federal legislature because this allows for (i) restraint on the lower chamber in which representation is distributed based on population and (ii) alternative representation at the federal-level, often directly for the sub-national regions. An increasing number of non-federal countries have also opted for bicameralism because of the ‘review’ and alternative ‘representation’ roles that a second chamber provides.

The relative merits of one second chamber design over another are closely tied to competing beliefs about what should be the core principles behind the structures of government. Each choice involves trade-offs that will alter the overall institutional

¹ Evatt 1967, vii.

balance both between the executive and legislative branches and within a parliament between the two legislative chambers. These choices will place the institution, and governance more generally, along a continuum that shifts from efficient to effective to responsive to accountable. Changing any aspect of an institution's design will shift its position on the continuum and alter the inter-institutional balance.

Method of selection is one of the most instrumental factors in determining institutional balance. Whether the second chamber is appointed by the federal government or by sub-national units or by both, or whether it is elected by plurality or proportionality in single- or multi- member districts, will each result in a different institutional balance between the two chambers and between the legislature and the executive branch. It will also, though less directly, alter the balance with the other governmental institutions, including the bureaucracy and the courts.

Put simply, every single variation of method of selection results in a different 'review' function for the second chamber and changes the nature of 'representation' that this body provides within a bicameral legislature.

System designers, and ultimately the society itself, have to make choices between what principles are most desirous to have built into the overall structure of government: accountability, party system stability, political equality, representation of diverse viewpoints, governability, policy options or social conflict resolution. Each are relevant, and often conflicting, considerations.

While somewhat true for appointed upper chambers, for an elected body the choice of electoral system is a choice about how fair one wants to be to minor parties and the voters who support these parties' policies. Ultimately, choosing an electoral system is about choosing the rules of the game and any rule is bound to advantage some political parties and societal groups over others.

Multi-member plurality, which is the electoral system contained in Bill C-7, disenfranchises small parties. One political party usually wins all the seats being

contested at the same time in the same district. So, with province wide-voting held concurrent with the provincial legislature elections, the party that forms the provincial government will likely get all its candidates elected to the Canadian Senate. We have seen this with Alberta, which is the only province to be currently holding these elections. And it is noteworthy that the only provinces that have indicated they will hold these elections have provincial governments that are of the same political stripe as the current federal government.

The province of New Brunswick has indicated that it wants to hold Senate elections but using dual member plurality ridings as this would increase the likelihood of Acadians being elected to the Senate due to their numerical inferiority province-wide but concentration in the north of the province. There appears to be a constitutional convention that a certain number of Acadians must be in the Senate from this province and this use of ridings would go part way to protecting this convention. The electoral system proposed by Bill C-7, on the other hand, would result in a reduction from the current level of representation enjoyed by Acadians in this province.

Were Quebec to hold elections as prescribed in Bill C-7, the candidates would have to live or hold property in one of the 24 electoral divisions from Canada East that were established by *The Union Act 1840*. The united province of Canada had an elected upper chamber and these divisions were designed to ensure that the minority Anglophone and Protestant population had representation distinct from the Francophone and Catholic population. As this was an elected body using single member plurality voting in an era where transportation was difficult, the candidates who ran in these divisions usually lived in these pre-Confederation divisions, so this mechanism fulfilled its representational purpose. These divisions were carried forward by the *Constitution Act 1867* and, as this was an appointed body, it has fallen to prime ministers to ensure that these minority groups were represented as the Fathers of Confederation intended. More recently, prime ministers have expanded on the constitutional framers' intent and now they ensure Quebec's Jewish community is represented in the appointed upper chamber. Multi-member plurality severs any

connection between these districts and the representatives. A slate of candidates will be elected province-wide, usually from the same political party at one time. The property/residency requirement will simply be one obligation for the candidates and party to meet. What is more, these 24 divisions only cover the bottom one-third of Quebec, so even if there were to be a connection to these divisions and the candidates who ran, then all of the Inuit of Northern Quebec would be without representation. In practice, the electoral mechanism contained in Bill C-7 would simply eliminate linguistic and religious minority representation from Quebec. Even if there is a constitutional convention that PMs must respect this diversity in recommending appointments, the choice of candidates for appointment is delegated by Bill C-7 to the provincial political parties and at least one if not all of the provincial parties in Quebec would favour Francophone-only slates of candidates. Equally, the Francophone majority in the province would likely vote for a full slate of Francophone representatives, and once 'elected', this slate would be hard for a governor general and prime minister to ignore.

Similar issues arise with respect to linguistic minority Senate seats that have emerged in relation to provinces like Nova Scotia and Manitoba and the balance in denominational appointments from Newfoundland.

In addition, prime ministers have been using appointments to the upper chamber to adjust the under-representation in Parliament of women, Aboriginals, African-Canadians and other minority groups. An elected body using multi-member plurality, where only a few of the province's seats are contested at any one time, would see the number of women and minorities decrease.

The introduction of an elected element will also change the 'review' role of the second chamber. Appointed upper chambers are better at performing detailed review of legislation and the capacity to find technical flaws in legislation increases with longer terms of appointment due to institutional memory and collective experience. An elected upper chamber using multi-member plurality with non-renewable nine-year terms will not be a sober house of second thought in the way the appointed Senate has been. It will offer new things, such as greater provincial governmental influence within

Parliament, and while some may think this would be an improvement it is a substantially different role – a role inter-governmental negotiations and provincial representation in Cabinet has been the lead on up until now – and each new role carries with it new challenges.

One of those challenges is that the institutional dynamics will dramatically change within Parliament. Appointed second chambers will concede to the lower chamber on general policy and, as the government of the day is that which commands the confidence of the lower chamber, that means the government will ultimately get its legislative agenda adopted by Parliament over the objections of an appointed Senate. Elected upper chambers will use the full extent of their constitutional powers to amend or stop legislation they disagree with. And the current constitutional configuration of powers makes the Canadian Senate co-equal to the Commons in all but a few minor ways.

In most countries that have elected upper chambers, a dispute resolution mechanism is provided for in the constitution which allows for the two chambers, that both claim to have a mandate from the people, to resolve a disagreement. Like all other aspects of institutional design, these are crafted based on the institutional arrangements agreed to by the constitutional authors and reflect the principles chosen to underlie the system of government. They contribute towards institutional balance. In some societies they take the form of an override by the lower chamber after a certain number of days, other societies allow for a joint meeting of the two chambers so as to weight the influence of each chamber in favour of the lower chamber, in others conference committees are triggered with the authority to negotiate compromises in individual disputes and in still others an election of both chambers is triggered to break an impasse.

In consciously choosing to have an appointed upper chamber, which would ultimately bow to the demands of the lower chamber if it and the government's resolve was unmoved by the arguments advanced in the Senate, there was originally no provision for any dispute resolution provided for by the Fathers of Confederation. Under pressure from the British government, a single dispute resolution mechanism was included to be used *only* if there was a permanent disagreement between the two chambers. This

allows for the Queen to authorize the one-time appointment of additional four or eight Senators from each of the four regions of Canada. This option was designed to preserve the regional balance in the Senate (though it upsets the provincial balance temporarily) and the requirement for Royal authorization was to ensure that this clause was only used when this disagreement was permanent. It seems that this clause can be accessed in the modern era by prime ministers with ease, but as this was designed for an appointed upper chamber it means that an impasse between the two elected chambers will need to be resolved by *appointing* Senators as no mechanism exists to hold elections in the four regions. As more of the upper chamber becomes elected, the Canadian people will resist the PM turning to this clause just as a dispute resolution mechanism is increasingly needed.

In Canada's parliamentary system, occasionally a government may find resistance to some of its legislative proposals in the lower chamber if its political party does not have a majority but this is the nature of responsible parliamentary government and a constitutional convention exists that will resolve this impasse between the legislative and executive branch by forcing the government to resign or the dissolution of the legislature and a new election held for the lower chamber. The dissolution of the legislature cannot trigger new elections in the upper chamber and a new election in the lower chamber will not convince an elected upper chamber of the legitimacy of the government's demands as its members have their own mandate. Given that the House of Commons in Canada is elected using single member plurality which is designed to give false majorities to political parties that are supported by a plurality of voters though opposed by the majority of voters, not only will elected members of the upper chamber be embolden by their own election, they will likely be unmoved by a government's claim of a new mandate unless that government received a majority of the popular vote, something that rarely happens in Canada.

It was the hope of the Canada West Foundation and the Reform Party (the predecessor to the Conservatives) that at some point there will be a critical mass of elected Senators that conversion to a fully elected body will be irreversible, as happened in the United

States. While this may in fact happen, what can be predicted with certainty is that, at some point, there will be a critical mass of elected members of the upper chamber so as to embolden that body to begin to use the full scope of its constitutional powers. The two chambers will inevitably be at loggerheads if the party in the majority in the lower chamber does not have a majority in the upper chamber. This is evident from the comparative evidence of how appointed versus elected upper chambers deal with legislation from the lower chamber. It was also the experience in Canada in the pre-Confederation province of Canada where elected Councillors were introduced alongside appointed life Councillors (the plan of Bill C-7). It was also the experience in the province of Prince Edward Island where the impasse between the two elected chambers, with no dispute resolution mechanism, was so problematic that a permanent dispute resolution was turned to (i.e. the combining of the two chambers into a single body).

As noted at the outset of this summary, this paper does not make value judgements about the relative merits of the changes proposed by Bill C-7 as there is no 'best' or 'better' institutional design and no 'best' or 'better' method of selection. Each system offers different benefits depending on a person's, and collectively the society's, priorities and values. What it does stress is that the branches of government are in a delicate form of balance and the proposed change will alter that balance. Caution must be exercised when introducing new elements and it is incumbent on governments to explain the possibility of unintended consequences and convince the public of the merits of the intended consequences.

The normative debate which has occurred in most countries where a public debate has been organized around adopting bicameralism or over which electoral system for which chamber or in countries like Canada and the U.K. where people have proposed transitioning the appointed upper chambers to elected upper chambers, is at its core delineated by democratic theory. Supporters of elected second chambers draw on the theory behind divided government and opponents use arguments grounded in majoritarian theory concerning institutional balance and the need for the lower chamber

to ultimately prevail, usually with the cautionary warning that, with no effective dispute resolution mechanism, the result is invariably 'gridlock'. Both are correct.

Finally, it is noteworthy that in the Canadian provinces which have considered modest changes to their electoral system – something within their legislatures' constitutional purview – the trend has been to hold public hearings, citizens' assemblies and referenda. The fundamental changes to Parliament that are being proposed in Bill C-7 are deserving of similar widespread debate, consultation and approval. They will irrevocably alter the upper chamber, its role in terms of review and representation and the institutional dynamics within Parliament and between other federal and provincial institutions.

EXPERT OPINION

Introductory Remarks: Designing a System of Governance

There are no 'best' or 'better' institutional designs. System designers, whether they be a country's founders, constitutional actors or experts specifically retained to help author a constitution and structure the polity's formal institutions of governance, must make trade-offs. The institutions created should reflect the society's values. They should also bring an institutional harmony across branches of government or between the constituent parts.

Constitutions and institutions of governance are the product of history. But it bears remembering that specific institutional rules, whether it be method of selection, the powers allocated to an institution or which societal groups or geographic areas are provided representation, will be favoured by some actors or groups of actors because it is seen to provide their particular group, be it a political party or socio-economic group or linguistic-cultural group, more control over the levers of power and thus over other societal groups.

Method of Selection

The advantage with respect to power is most evident when examining the method chosen for selecting membership within institutions. While some political actors will advocate for an electoral system because they genuinely believe that the strengths offered by that system would benefit the institution and is reflective of the society's values, there will be many who favour an electoral system because they believe it will advantage their political party or societal group.

Political scientists, when we examine these alternative selection mechanisms, should offer insight into the relative merits of one choice for a system design over another and point out how closely tied these choices are to competing beliefs about what should be the core principles of a representative democracy, leaving it up to the society's

population to determine what choices best reflect their values and which aspect an institution should embody. This is the limited scope of this opinion.

Any method of selection, and this includes each electoral system and different choices for direct appointment, involves choices between accountability, party system stability, political equality, diversity in opinion, governability, policy option and institutional reconciliation of social conflict. Choosing a method of selection and term of office requires balancing efficient versus responsive government. And I cannot stress enough, any rule is bound to advantage some political parties and societal groups more than others.

Institutional Balance

Second chambers exist in a permanent legislative tension with the lower house. Method of selection, powers assigned to the chamber, districting, number of representatives and term of office each combine to alter the relationship between the two chambers in the legislature and, in a parliamentary system, that chamber's relationship to the executive branch and, to a less extent to the judiciary and the bureaucracy.

Political scientists put second chambers on a continuum between 'strong' and 'weak'. This is not a judgement on the merits of their design but simply a reference to the capacity for the upper chamber to come into direct conflict with the lower chamber. It is up to a society as to what the relative strength of the second chamber should be vis-à-vis the lower house.

Advocates of weaker second chambers do so out of concern strong second chambers lead to 'gridlock'. It does. And the argument that the lower chamber must be stronger has solid footing in democratic theory as this body is the chamber wherein the population is represented roughly equally by population and thus ensures the will of the majority ultimately prevails at the end of the day. Supporters of strong upper chamber equally use democratic theory to support their contention that only with a sufficient level

of institutional power will the overall system have legislative 'checks and balances'. There is no right and wrong answer. There is a simple choice that governs all institutional design, the trade-off between efficient and responsive.

As will be shown below, system designers consciously choose different methods of appointment precisely because they result in different institutional balance and different institutional focus. An appointed upper chamber with long terms of appointment is advocated because its institutional memory is longer and thus has the greater capacity to do detailed legislative and policy review. Elected chambers will have different strengths and weaknesses, depending the choices made on such variables as the ballot structure, district size and boundaries, timing of election and formula used to count votes.

The choice of institutional design is, and should be, up to a society. This is why so many countries protect their institutional choices with constitutional rules that have a higher threshold for change than what is required for the enactment of normal legislation.

It is the balance between the two chambers and method of selection for each that determines where the polity's final voice resides. Institutional designers understand this, which is why they write their vision over all institutions. Tinkering at the margins, as in changing a method of selection in one chamber or, worse, changing it without a proper discourse over how this will change the balance, is problematic. It will alter the balance. And we know there will always be unintended consequences.

PART I : UPPER CHAMBERS IN COMPARATIVE PERSPECTIVE

A) Overview

In most countries which have two deliberative chambers in their legislature (i.e. bicameralism), the one which is elected and whose representational structure comes closest to representing the population on a proportionate basis is known as the 'first' chamber, though it will be given any number of formal appellations (e.g. House of Representatives, House of Commons, National Assembly). The label 'first' for this chamber is used because it is seen as closest to the people (the one exception to this rule is the Netherlands where the labelling is reversed because their *Eerste Kamer*, literally the first chamber, was established first and is closest to the King).² 'Senate' is the most common formal appellation which countries with a bicameral legislature designate the 'other' chamber and it finds its origin in Ancient Rome, imported to the 18th Century by the founders of the United States.³

Almost 60 of the approximately 190 countries in the world today (roughly one-third) have bicameral legislatures. When one separates out only *democratic* countries, the share that uses bicameralism increases to two-thirds.⁴ Of these, it is the larger countries, in terms of geography or population, which tend to have two chambers.⁵

Unitary (i.e. non-federal) countries are fairly evenly divided between unicameral and bicameral legislatures.⁶ And while federal countries only account for one-third of

² Patterson and Mughan, "Senates and the Theory of Bicameralism" in Patterson and Mughan 1999, pp.1-31.

³ Along with the bicameralism, they drew on the Greco-Roman philosophers' belief in mixed government, expanded upon by Montesquieu into separation of powers, and added their own logical extension, the innovation of federalism.

⁴ J. Uhr, "Bicameralism" in Rhodes, Binder and Rockman 2006, p. 477.

⁵ Massicotte, "Second Chamber Elections" in Rose 2000, pp. 282-87.

⁶ Lijphart 1999, p. 202.

bicameral systems in the world,⁷ the “model of bicameral federalism spread so widely that today all federal countries have bicameral legislatures”.⁸ The reason federations turn to bicameralism is an effort to give voice to provinces (or states), either as administrative units or to their population.⁹ The norm is for federal countries that adopt bicameralism to also adopt it at the state-level (e.g. Australia, except for Queensland, and the U.S., except for Nebraska), Canada being an exception.

While first chambers are popularly elected, many second chambers are not. Where the former must approve all legislation, in many jurisdictions legislation can be adopted over the objections of the second chamber. Members of the second chamber usually serve longer terms and are fewer in number.

The best way to comparatively examine upper chambers is along two main axes: *representation and review*.¹⁰

B) Representation

Whether or not the foundational principle of the first chamber is representation by population, the first chamber represents the people as individuals (or at least it claims to do so). As a result, the size of the chamber will increase with population growth.¹¹ The size of first chambers clusters around the cube root of the population.¹² The challenge for smaller countries is that fewer than 100 seats in a first chamber results in

⁷ Patterson and Mughan 1999, p. 10.

⁸ Tsebelis and Money qualify this broad statement by noting that the *Europa Yearbook* (1994) only has two *minor* exceptions to bicameral federations and those are the small Federated States of Micronesia and the United Arab Emirates [Tsebelis and Money 1997, p. 6, fn.8]. Watts also identified two federal countries that did not use bicameralism, these were the U.A.E. and Ethiopia [Watts 1996, p. 84]. Hicks and Blais (Table 1) reported four unicameral federal countries. This number has now risen for five. These minor variations are due to transition to either bicameralism or federalism in each country's case.

⁹ Lijphart 1999, p. 4.

¹⁰ Hicks 2007; and Paterson and Mughan 1999 refer to the latter as *redundancy*; Tsebelis and Money 1997 with some nuanced differences, use a similar concept under the labels *political* and *efficient*; see also Russell 2011.

¹¹ Dahl and Tufte 1973, pp. 80-84.

¹² Taagepera and Shugart 1989, pp. 173-183.

disproportionality and excludes more political parties that have popular support and can contribute to policy discourse.¹³

Providing an alternative mechanism for representation to the lower chamber's in diverse societies is the attraction of bicameralism, in general, and for federal countries in particular. The only strictly foundational principle for an upper chamber, evident from comparative analysis, is that there must be structural differences in representation between the two houses.¹⁴

Upper chambers are almost universally smaller, with the average size of upper chambers being 83 members and most being no more than 50 members.¹⁵

The earliest bicameral legislatures were designed along society's class division, leading to the other common label: 'upper chamber'. The House of Lords, which was originally populated by the aristocracy, is an example of this upper chamber design. That model has been dying out, being replaced by a model predicated on minority protection along territorial, ethnic or linguistic lines.

1) Ethnic or Linguistic Representation

An example of formal minority representation in a second chamber is Belgium's, which is part elected and part appointed by electoral colleges and Community Councils of the country's three – French, Flemish and German – linguistic groups.

In Ireland, following separation from the United Kingdom, provision was made for a half appointed and half elected upper chamber to ensure representation of the protestant minority. As political parties aligned along religious grounds, this became representation for a minority political party and that alignment exacerbated tension

¹³ *Ibid.*, pp. 173-174; and Lijphart 1994, pp. 83-88.

¹⁴ Russell 2000.

¹⁵ Patterson and Mughan 1999, p. 4.

between the two chambers. Eventually this body was replaced with a new chamber using vocational, rather than religious, categories for representation.

2) Territorial Representation

The most common structure for representation in an upper chamber is territorial. Even in the appointed chambers representation was geographic. This is the case in Canada. But it was even true for class-oriented upper chambers like the British House of Lords as members of the aristocracy had originally been given areas of the country to administer as feudal lords, and the spiritual lords were assigned regions to minister to spiritually as bishop sees.

The relationship between representation and geography is more pronounced in federations, as it is usually by territorial boundary that the administrative sub-units are established (though the units themselves may reflect distinct cultural or ethnic groupings). All but five small countries have adopted bicameralism along with federalism – and even in those five countries, attempts have been made to graft federal sub-unit representation onto their small unicameral legislature.

In all federal bicameral legislatures, representation in the upper chamber at the federal-level is tied in some way to the lower level's administrative units, either in terms of using these same geographic boundaries for direct election or appointment or by indirect election by the subnational administrative unit. In some instances, the upper chamber contains actual members of the provincial governments, such as Germany's *Bundersrat* where members of the *Länder* governments are members of this second federal chamber and have a specific intra-governmental role.

3) Method of Selection

Almost a third of upper chambers are appointed. This includes former and current British colonies like the Bahamas, Barbados, Canada, Grenada, Jamaica and Saint Lucia, where appointments are made by the Governor General on the advice of the Prime Minister or Cabinet.

The most common method of selecting representation in the second chamber today is through direct election. Countries where direct election of the entire upper chamber occurs include Australia, Bolivia, Brazil, Columbia, Czech Republic, Dominican Republic, Haiti, Japan, Kyrgyzstan, Mexico, Palau, Paraguay, Poland, Romania, Switzerland and the United States. In a number of other countries, the core representation of the upper chamber is directly elected and this is supplemented by indirectly elected or appointed members.

Indirect election is half as common as direct election. Indirect elections by local or provincial legislatures occur in places like Austria and India. This was also the method of selection of United States' Senators prior to the 17th Amendment to the U.S. Constitution. Another form of indirect election can be found in France and Ireland, where local electoral colleges elect the region's representatives.

The nature of representation is disputed. American statesman and political theorist James Madison famously argued that representatives only had delegated authority.¹⁶ For members of a first chamber that meant voting the wishes of their constituents; whereas for members of the Senate, at least at the time of the U.S. founding, that meant "giving to the State governments such an agency in the formation of the federal government as must secure the authority of the former, and may form a convenient link between the two systems".¹⁷ America's founders also believed in the equality of representation for the sub-units of a country in the second chamber of a federation.¹⁸

British statesman and philosopher Edmond Burke best articulated the alternative principle, and that is members of a legislature are trustees for the country.¹⁹ Upon election or appointment, they become members, not of a particular constituency, but of parliament and should always vote what is in the best interest of the country as a whole

¹⁶ Madison 1787 in Rossiter 1961.

¹⁷ *Ibid.*, *The Federalist* No. 62, Article II.

¹⁸ *Ibid.*, Article III.

¹⁹ Burke 1790 in Turner 2003.

and not simply what is wanted by a constituent part. He rejected the notion of candidates for parliament making written undertakings with interest groups or the idea that campaign promises were binding.

Hanna Pitkin suggests that this paradoxical understanding of representation is in fact a natural tension and that the autonomy of both the representative and of those being represented should be preserved.²⁰ Representatives must act in the manner that the represented authorize and be held accountable if they do not *and* be free to act independently of the wishes of the represented when necessary. She argued that objective interests are the only way to evaluate the behaviour of representatives.

Pitkin identified four dimensions along which representation may occur and these continue to be used today by political scientists researching representation. The four are: *formal* (institutional arrangements), *symbolic* (the meaning that a representative holds for the represented), *descriptive* (how representatives resemble the represented) and *substantive* (the actions taken on the behalf of the represented).²¹

In addition to the alternative representational roles identified by Madison and Burke, in the modern era, as populations (and much more slowly legislatures) have begun to diversify, representatives have begun to represent not only the public generally, but ethno-racial-linguistic-sexual-minorities, different socio-economic groups and different communities of policy interests (e.g. business, environment), as these groups make demands and as members of these groups break the glass ceiling and become members of legislatures.

Method of selection is thus central to understanding representation. It defines formalistic representation and it is a key determinant for the symbolism a representative

²⁰ Pitkin 1967.

²¹ Pitkin's four different dimensions on which representation occurs was an attempt at reconciling disagreements about representation, which she felt could be eliminated if scholars simply clarified which view of representation was being invoked.

holds for the people they represent; who gets chosen; and the flexibility those chosen have to take actions on behalf of the represented.

The comparative generalizations we can make along the four dimensions of representation, with respect to federal upper chambers, are as follows:

Appointed

An upper chamber which is appointed by the central government may have formalistic representation defined by the federal sub-units, but the representatives rarely provide any substantive representation on behalf of the sub-unit or even its residents, becoming consciously or unconsciously Burkean in their consideration of legislation and policy. On the other hand, in terms of descriptive representation, there are likely to be more women, aboriginals and ethno-racial-linguistic minorities in these upper chambers as governments use these appointments to correct imbalance in the first chamber and to convey to the public support for the country's diversity. Once appointed, depending on the length of term, the members of the upper chamber are likely to have greater flexibility to substantively advance the interests of their minority group or policy community. The symbolism this individual holds for the group, though, may be low as federal government appointment to legislatures is often perceived as lacking legitimacy.

Indirectly Elected

Second chambers which are indirectly elected or which contain delegates from the country's administrative sub-units will both formally and substantively represent those federal sub-units. While they may have some minority group diversity, depending on the number of seats assigned to each sub-unit, this is rare aside from some gender diversity. And even if it comes to be the case in response to societal pressure for diversity, the members of these second chambers have limited flexibility to substantively represent minority or policy group interests. Some (such as the members of the German Bundesrat) are not permitted to vote independent of the other delegates from their sub-unit. These chambers have legitimacy, so minority representatives are symbolic for their group.

Directly Elected

For directly elected upper chambers, the four dimensions of representation vary based on electoral system. What we can say generally, relative to (a) appointed and (b) indirectly elected/delegated chambers, is that directly elected second chambers will tend to represent the people as opposed to a provincial or local government or legislature. The ethno-racial-gender diversity will be less than (a) and probably (b), but for the minority representatives who do get elected the symbolism for their group will be much higher while their capacity to substantively represent their interest will be less than (a) and greater than (b). This limitation is due to the central role of political parties in elections and thus in the organization and management of elected chambers.

C) Review

The kind of review a second chamber will be likely to make will depend on length of terms, powers and assigned functions. Method of selection is also a major determinant of the sort of review the chamber will have the capacity to undertake, just as it directly determines the chamber's representational role.

1) Term

To ensure differentiation in representation and to strengthen the review function, many upper chambers have specific terms of office that are longer than the lower house. Elected second chambers tend to have shorter terms than appointed upper chambers (though longer than first chambers' terms) and the average term for upper chambers ranges from three to nine years, with two-thirds of all senators serving for approximately five years, and often terms are staggered so one-third or one-half are selected at any time.²² In delegated chambers the term of office is tied to the federal sub-unit's term of office.

²² Patterson and Mughan 1999, p. 5.

2) Powers

Review is the capacity to amend, delay or defeat legislation. Some upper chambers have co-equal powers and some, like the United States Senate, have additional functions that the first chamber does not (e.g. ratification of treaties and confirmation of significant appointments to the judiciary and the executive branch). But most second chambers have reduced powers compared to the lower house so as to prevent legislative gridlock

The characteristic of 'weak' and 'strong' second chambers is nothing more than a descriptor political scientists use to describe the relative balance between the two chambers and was most famously applied by Lijphart. It is not meant to imply one design is preferential to another. Lijphart's definition of a 'strong' second chamber is: (i) it has different representation than the first chamber, (ii) coequal constitutional authority to veto legislation and (iii) the public legitimacy to exercise that authority.²³ The degree to which each of these is lacking increases the capacity for the first chamber to override the upper chamber when the two chambers are in disagreement.

Upper chambers with elected members, especially in republics, often have power coequal to the lower house, whereas appointed or hereditary houses and upper chambers in parliamentary systems are most often restricted in terms of legislative powers.²⁴ This is because, in a parliamentary system, the government is drawn from and maintained in office via the first chamber and the government is the primary legislator, so 'weaker' upper chambers are prescribed by system designers, such as the country's founders.

Even in those instances where coequal constitutional powers are given to an unelected upper chamber, public legitimacy to use its powers is lacking, something the country's founders are usually aptly aware of and is the motivation for this design choice.

²³ Lijphart 1999, p. 200.

²⁴ Tsebelis and Money 1997, p. 45.

Temperley, writing the leading book on upper chambers a century ago, advised that "power seems to be enjoyed by the Upper Chamber in proportion as its composition is democratized",²⁵ though today we know that indirectly elected and delegated upper chambers in federations have a level of legitimacy similar to elected bodies.²⁶

3) Review Function

Russell divides review into three specific functions, which are useful for a more nuanced analysis of the role of parliamentary upper chambers, namely being independent from the executive, acting as a veto player and performing different parliamentary duties.²⁷

Independence

First, with respect to independence from the executive, the claim that bicameralism "appears to have little effect on the relationship between the legislature and the executive"²⁸ refers simply to the confidence question in parliamentary democracies, as with the exception of Italy, no upper chamber can defeat a government by expressing its lack of confidence. It is therefore up to the lower chamber to remove or install a parliamentary government subject to the constitutionally specific rules.

"Paradoxically, the very system intended to ensure parliament's control over the executive has led to exactly the opposite flow of control."²⁹ Party discipline, particularly among government parties, is strict in the lower chamber and controversial legislation may find easy passage through the lower chamber as a result. The party(s) of the executive will not necessarily have a majority in the upper chamber and, even if they do, their members may act more independently as their dissension will not directly result in their party's loss of power. Their desertion may even be supported by members of their own party in the first chamber who did not feel able to openly advocate the same

²⁵ Temperley 1910, p. 62.

²⁶ Mastias and Grangé 1987.

²⁷ Russell 2001.

²⁸ Tsebelis and Money 1997, p. 45.

²⁹ Olson 1994.

position due to party discipline and the governmental need to show unity.

The interdependence of government and the lower chamber will mean that most Ministers are drawn from the latter. Even where the upper chamber is directly elected, the convention may be that few, if any, members of that chamber may be included in Cabinet. Where ambitious politicians who seek high ministerial office in parliamentary systems will need to build a career in the lower chamber, the type of person (subject to term of office and method of selection) who serves in a second chamber is usually less interested in an executive role, more interested in parliamentary scrutiny and often at the end of their political or private sector careers.³⁰ Though this varies by method of selection.

Parliament ultimately controls its own legislative agenda, even if the executive in a parliamentary system is the primary driver of legislation. And parliament has the capacity to influence the policy agenda of the executive. Even Tsebelis and Money, who asserted that the second chamber does not affect the relationship between the two branches of government acknowledge that the very existence of bicameralism will impact on policy formation, and this is even true for weak unelected upper chambers, something they dubbed 'Cicero's puzzle'.³¹ There is quantifiable evidence of the relationship in bicameral parliamentary systems between the length of a government's time in office and whether or not they had a majority in the second chamber.³²

As most second chambers are only 60 percent of the size of lower chambers,³³ these smaller chambers will result in more efficient decision making and often more collegial relationships across party lines. And the composition is more likely to include non-party aligned members representing small parties (to varying degrees based on method of selection).

³⁰ Russell 2001, p. 448.

³¹ Tsebelis and Money 1992; and 1997.

³² Druckman and Thies 2002.

³³ Coakley and Laver 1997 .

Veto

The second aspect of review, the idea of veto players, is based on the degree to which the chamber can amend, delay or defeat legislation.³⁴ A strong veto (the capacity to defeat legislation) ensures that a broader consensus is reached over policy or legislation than would otherwise be reached by the government majority in the lower chamber acting alone. Advocates would commend this role as part of a system of 'checks and balances'. Critics warn that this invariably leads to 'gridlock' if the upper chamber is directly elected.

The review of legislation by a body that has different territorial, political or cultural perspectives may increase the chance for flaws in legislation to be identified and corrected. In systems where both chambers have full veto powers, this may result in a government having to negotiate or even abandon controversial legislation, though again the degree to which the second chamber will use its veto is tied to the legitimacy it believes it has or the public perceives it to have.

Activities

The third aspect of review is the different duties that can be performed by a second chamber. As a general rule of thumb, debate in a lower chamber will be on the Bill's principles and will be muddled or clarified by the leadership of political parties posturing over the Bill. Ministers may be reluctant to accept any amendment in this chamber as it could be perceived as political weakness. And given the competing demands on members' of the lower chamber time, the degree of scrutiny may simply be absent.

Upper chambers tend to attract less media attention, have fewer demands from constituents, be composed of older and thus more experienced or mature legislators who have longer or staggered terms in office. This stability creates a longer institutional memory; and gives the chamber the capacity for detailed examination of legislation.

³⁴ Tsebelis 1995; and 2002.

The lower chamber's committee structure in parliamentary systems tends to be organized in alignment with government departments. Upper chambers usually have a different committee structure that is more conducive to detailed legislative study. And when these upper chamber committees are organized based on sectors or subject matter, it will lend itself to much broader examinations of policy than possible in lower chambers.

Their independence from the executive and their committee structure can allow for upper chambers' committees to examine more controversial policy questions. This is particularly true for chambers which are not elected. It is not coincidental that in recent years the appointed upper chambers in the United Kingdom and Canada and the partly-appointed Spanish Senate have each been willing to undertake detailed examination of euthanasia, something most lower chambers are unwilling to debate.

PART II : RESPONSES TO QUEBEC

Having put second chambers in a general comparative perspective, this section more directly tackles the three questions posed to me by the Ministry of Intergovernmental Affairs of the Government of Quebec with respect to the federal government's proposed legislation that would have Parliament authorize provinces to hold consultative elections in advance of the Prime Minister instructing the Governor General to make an appointment to the Canadian second chamber, styled the Senate, from that province.

A) Question 1: From a comparative perspective with a direct electoral process, the effects of the consultative electoral mechanism provided for in Bill C-7.

All elections are about consulting citizens, usually though not necessarily grouped by geographic sub-divisions, as to their individual and collective preferences for representation in a particular institution of governance or for a policy, law or constitutional change.

This assumes, on the one hand, a consultative process during which candidates or advocates for a particular position will lay out their arguments in a fair and honest fashion so as to permit a majority of citizens to identify their joint preference, and, on the other, a fully informed voter who when consulted by the state on preferences will be able to make thoughtful choices. While classic democratic theory requires an electoral system to translate the wishes of a polity equally, modern ideas of distributive justice would support a system that ensures societal groups are effectively represented in institutions of governance.

1) Voting Behaviour

There are a number of obstacles to the implementation of democratic theory. At the elite level, candidates and political parties are primarily interested in competing to obtain power which is accessible through positions made available to public competition

through some form of consultative process like election. Their end goals in using that power might be egalitarian, but an electoral contest is about the acquisition of power. And in obtaining power, even assuming a free election (i.e. one absent coercion), persuasion and manipulation are the psychological tools that will be utilized by every candidate and party during an election in an effort to convince citizens to vote a particular way.³⁵

At the citizen level, there are a number of psychological and sociological factors that go into making a vote choice that are independent of any candidate or political party. Social identity is one of the stronger determinants of whether or not a citizen will support a candidate or party.³⁶ Class, gender, age, race and religion will all influence vote choice. Social connections will also lead to different concerns and these concerns, in turn, are mediated by political attitudes.³⁷ It is now well understood that there is a causal chain of variables (referred to in the voting behaviour literature as a 'tunnel of causality') organized in temporal order with personal characteristics at the beginning and partisan factors along the chain that lead to the choice an individual makes in any election between the candidates, parties or questions.³⁸ The degree to which these variables influence the final vote will vary based on the different cognitive abilities and access to political information of each citizen.³⁹

This is all independent of the issues and candidates that become the subject of consultation in an election or referendum. In terms of legislative elections, the

³⁵ Searing 1995.

³⁶ Lazarsfeld, Berelson and Gaudet 1944; Berelson, Lazarsfeld and McPhee 1986; R. Alford, "Class Voting in the Anglo-American Political Systems" in Lipset and Rokkan 1967; Butler and Stokes 1974; and M. Hout, J. Manza and C. Brooks, "Classes, Unions, and the Realignment of U.S. Presidential Voting 1952-1992" in Evans 1999.

³⁷ Vanneman 1980; Schwartz and Huismans 1995; Brint 1984; Kelley and Evans 1995; and Weakliem 1991; and 1993;

³⁸ Campbell *et al.* 1960; Miller and Shanks 1982; Shanks and Miller 1990; and 1991; and Miller and Shanks 1996.

³⁹ P.M. Sniderman, R. Griffin and J.M. Glaser, "Information and the Psychology of Electoral Choice" in Ferejohn and Kuklinski 1990; Sniderman, Brody and Tetlock 1991; Rivers 1991; and Achen 1992.

relationship between voter and candidate is interactive.⁴⁰ But this interaction does not occur in a vacuum.

2) System Rules

System rules have a significant impact on the outcome of a particular election, which are independent of the issues and the candidates.

Districting

As group identity and social relationships are central to an individual's vote choice, how the citizens are grouped will be a major determinant of outcome. Most countries use geography as a means to group citizens. Whether the geographic boundary is country-wide, province-wide or smaller constituencies, each will have a different, and sometimes predictable, outcome.

At the country-wide or province-wide level, the predictability of outcome will lie in the overall support that each political party has, at the time, in that area, as translated into seats by the different electoral systems outlined below. With smaller constituencies, which are more temporary divisions, the outcome will be dependent on how and where the boundaries are drawn for that election. This allows for distortions in a population's vote preferences over and above those manufactured by the electoral system.⁴¹

In the case of a lower chamber, where representation is based on the principle of proportionality, citizens should be apportioned in equal numbers to constituencies so as to translate 'one-person one-vote' into equal legislative representation. Some jurisdictions, including Canada and its provinces, have chosen to draw electoral boundaries in rural areas with fewer voters than the ridings in urban areas. Also in Canada, districting is used to increase the representation of regionally bounded linguistic groups. It is also

⁴⁰ Sniderman *et al.* (*ibid.*).

⁴¹ March 1957; and Hacker 1963.

used at the federal-level to compensate for the second chamber's failure to effectively represent the regions and smaller provinces. At the provincial-level it is used to accomplish in a unicameral legislature what is often done through bicameralism.

As voting preferences are determined in part by social community, socio-economic status and location, 'malapportionment' causes unequal representation for the population at the aggregate level. And, as ethno-racial minorities locate disproportionately in urban locations, even a modest malapportionment in favour of rural areas may be racially discriminatory.⁴²

A 'gerrymander' is the conscious manipulation of the boundaries of constituencies for partisan advantage. This can be done using both equal and unequal sized constituencies. Gerrymandering can also be done for non-partisan purposes, so as to respect community or geographic boundaries, including ethno-racial-linguistic communities, and while this may correct for a lack of representation at the local-level, the result can equally bias the results in terms of a distortion of a political party's seat share based on its popular support.⁴³

Financing

The second systemic variable that is known to impact on electoral outcomes is money. Bill C-7 leaves the entire question of party and candidate financing, spending and third party advertising in the hands of provinces, with the clause in the prescribed legislation annexed to the Bill simply directing:

27. The laws of the province or territory that govern campaign funding apply with any necessary modifications to the election of Senate nominees.

⁴² Pal and Choudhry 2007.

⁴³ Erikson 1972.

As Table 1 illustrates, provincial election financing laws are dramatically different by province and territory.

British Columbia, Newfoundland, Prince Edward Island and Saskatchewan have no limits on donations. For the provinces that have established limits, Alberta is the most permissive when it comes to amounts of donations and their sources. It allows for contributions from individuals, corporations, unions and employee organizations and while it ostensibly sets the cap for a contribution to a political party at \$15,000 per year, plus an additional \$30,000 during the election, it allows lump sum donations in excess of these amounts to be subdivided between family members and employees. At the other end, Quebec is the most restrictive in terms of both donation sources and amounts. Donations are only permissible from eligible voters and they are currently capped at \$1,000, with legislation to be placed before the National Assembly lowering this cap to \$100.

Alberta and the Yukon have no spending limits for either candidates or political parties. The other provinces have spending limits. Ontario is the lowest at 60 cents per voter for political parties and 96 cents per voter for candidates, though it is also the most populous province with the largest number of voters per riding so the per capita limits in most provinces that have limits are roughly on par.

A number of provinces use public funds to subsidize political parties. The subsidies are based on votes received in the previous election. This funding has been provided as compensation for lower caps on donations. It is an attempt to ensure that money does not provide special access or influence with elected officials and to level the playing field between candidates and political parties. Critics of public financing of elections argue that it is an inappropriate use of taxpayer resources and that fundraising is itself a democratic exercise as donations reflect the candidate's or party's level of support and thus the political opinions of the donors.

Table 1
Provincial Electoral Financing Rules in Canada

Province	Donation Limit	Donors	State Subsidy	Party Spending Limit	Party Reimbursement	Candidate Spending Limit	Candidate Reimbursement	Third Party Spending
	\$15,000/yr + \$30,000/election/party, \$1,000/association + \$2,000/election/candidate only limit on anonymous donations	individuals, corporations, unions, employee organizations	Determined by appointed commissioner	no limit \$4.4 million /election	none	no limit	none	name and address of sponsor
AB								
BC		no restriction	none		none	\$57,000/election	none	\$3,000/riding
MB	\$3,000/party, association & candidate	voters only	min. \$600/party to max of \$1.25/vote	\$1.79/voter	50% of expenses w/10% vote	\$2.72-\$4.33/voter	50% of expenses w/10% vote	reimbursable election expense if approved by party or candidate
NB	\$6,000/party or association or independent candidate	individuals, corporations, unions	based on votes for parties in legislature or w/10 candidates	\$1.00/voter	none	\$1.75/voter (min. \$11,000-\$22,000 max)	lesser of expenses or 96c/voter w/15% vote	1.3% of candidate limit
NF	no limit	no restriction	none	\$3.125/voter (min \$12,000)	none	\$3.125/voter (max \$12,000)	1/3 actual expenses w/15% of vote	no restriction
NS	\$3,000/party, association, candidate and 3 rd party	individuals	\$1.53/vote	\$2.29/voter	none	\$4.29-\$5.72/voter	\$1.43/voter w/10% of vote	\$2,000/riding
ON	\$7,500/party, \$1,000/association & \$1,000/candidate	individuals, corporations or unions	none	60c/voter	\$0.05/voter per riding w/15% vote	96c/voter	20% of expenses w/15% of vote	ads over \$100 approved by candidate counted as donation
PEI	no limit	no restriction	parties in legislature (not paid since 1993)	\$6.00/voter	none	\$1.75/voter	75c/voter w/15% of vote (min \$1,500-\$3,000 max)	name of sponsor
QC	\$1,000/party, independent MNA or candidate	voters only	based on votes for all registered parties	69c/voter	50% w/1% of vote to max \$0.71/voter	\$1.19/voter	50% expenses to max \$1.23/voter w/15% of vote	\$300/intervener

SK	no limit	none from non-citizens	none	\$673,783/party	50% of expenses w/15% of vote	\$52,108/candidate in north and \$39,082/candidate in south	60% of expenses w/15% vote	Prohibited or expense if approved by candidate or party
Territory								
NU	\$2,500/candidate	none from individuals outside jurisdiction	none	n/a	n/a	\$30,000	none	allowed
NWT	\$1,500/candidate	none from individuals outside jurisdiction	none	n/a	n/a	\$30,000	none	allowed
YT	no limit	no restriction	none	no limit	none	no limit	none	allowed

Source: Elections Canada 2012, pp.72-81; D.E. Blake, "Electoral Democracy in the Provinces and Territories", in Dunn 2006, pp.134-135.

Some provinces have prohibitions on third party advertising during election campaigns. Others provinces do not and one province seemingly rewards it through reimbursement incentives. The normative debate over third party advertising involves similar arguments as those used in the debate over public financing of political parties.

Only two provinces have enacted legislation allowing for Senate consultative elections. Under Alberta's legislation, a donation cap has been set at \$30,000 per candidate. There is no spending limit. Saskatchewan has a law on the books governing senatorial elections though it has not been proclaimed into effect. That law sets the spending limit per candidate at one-sixth the combined maximum spending limit for all federal ridings in the province during the previous federal election. There are no limits on donations.

There is no reason to believe that other provinces would follow the example set by either of these provinces as each jurisdiction has different philosophies when it comes to election financing. What we can expect each province to do is to base their spending and donation limits on existing party and candidate financing legislation. In Table 2, the provincial limits based on the average between the per capita limit set for political parties and candidates is used to calculate the potential cost of a senatorial campaign in that province. This is calculated using the number of electors on Elections Canada's permanent register of voters in the 2011 federal election.

Table 2 Cost of a Province-wide Senate Election based on each Province's set Spending Limits									
<u>Newfoundland</u>		<u>Maritimes</u>		<u>Ontario</u>		<u>Quebec</u>		<u>West</u>	
NF	\$1,296,184	NS	\$2,411,879	ON	\$7,045,947	QC	\$5,762,489	MB	\$1,873,997
		PEI	\$420,267					BC	\$4,622,500
		NB	\$815,125						

Source: Elections Canada (Table 1, Official Voting Results 2011 Election) and Table 1 in this paper (above).

The decision to use an average between political party caps and candidate caps is because each jurisdiction favours either candidates or parties in setting spending limits, based on provincial experience as to where the bulk of the election monies have been, and should be, spent: either directly by the party or locally by individual candidates. While this is only a rough predictor of what the maximum spending limit might be for these provinces, it is a good general indicator of what it would cost to run a province-wide campaign. The cost of running a serious province-wide campaign for the Senate ranges from around \$400,000 in the smallest province, Prince Edward Island, to over \$7 million in the most populous, Ontario.

Irrespective of provincial election financing limits that may, in fact, be enacted, this level of money will not be raised or spent in the short to medium term. Senate candidates have no option of re-election and the political parties they are running under are provincial, so a candidate's capacity to fundraise or build a personal campaign organization will be limited. Senate candidates will likely simply rely on the provincial party for both funding and organization, and thus ride the provincial election campaign into federal office.

Obviously a province would be free to set a lower limit for Senate elections than is being spent for provincial elections. This is the approach favoured in Saskatchewan. But the danger with that is the Senate candidates will be competing with both individual candidates for the provincial legislature and the provincial parties in terms of spending during these elections. Even if the limits were set the same, the Senate elections will be outspent in terms of election advertising. Without significant funding, Senate candidates will end up relying on the provincial election campaign to win federal office.

Once the Senate becomes sufficiently elected as to be a sought after public office, the combination of competition and corporate interests will likely make provincial finance rules, including third party advertising, a factor in Senate electoral outcome in some provinces.

Money can be expected to play a bigger role in Alberta, which has no spending limit and virtually no effective donation limit, than in other provinces where the practice has been to set limits on one or both. At the other end, provinces like Quebec have virtually eliminated donations and replaced them by state subsidies. It is unclear how individual candidates' campaigns for a non-renewable Senate election would be financed in these provinces. What is clear is that different Senators will be elected under different rules by province, something that will contribute to an uneven playing field across Canada and, as a result, undermine the cohesiveness in the Senate, something that will impact on the legislative balance between the two chambers.

3) Type of Electoral Systems

What will have the greatest impact on outcome is the electoral system.⁴⁴ Of particular relevance are three key factors (each has a separate and substantial impact on outcome): *ballot structure* (how voters are permitted or constrained in expressing their vote choice), *district magnitude* (the number of seats in each district), and the *electoral formula* (the mechanism used to count votes in order to allocate seats).⁴⁵ In addition, the *timing of election* (whether they coincide with the lower chamber or provincial elections or at yet another time), the role of *political parties* (control of the nomination process, role in campaign and profile on ballot), and the *length of term* (how much longer than the term for members of the lower chamber) are important considerations for an upper chamber as these can impact on both representation and review.

To simplify our discussion of electoral systems, we will confine our examination of electoral systems that have been proposed in the past or currently as a method of selection for the Canadian Senate.⁴⁶ The schedule of Bill C-7 currently before Parliament contains prescribed provincial legislation to hold consultative elections using *multi-member plurality* voting. Two earlier versions of the legislation introduced by the

⁴⁴ Martin 1997; Reynolds and Reilly 1997; Blais 1988; and Rae 1967.

⁴⁵ A. Blais and L. Massicotte, "Electoral Systems" in LeDuc, Niemi and Norris 2002.

⁴⁶ This is the approach we used in Hicks and Blais 2008; see also Blais and Massicotte (*ibid.*); Bogdanor and Butler 1983; Lijphart and Grofman 1986; and Norris 1997.

Conservative Government would have allowed for the federal government to hold consultative elections directly, or in the alternative authorize provinces to hold them, using *single-transferable voting*.⁴⁷ The current Minister of Democratic Reform has said that the government will be flexible in the electoral system that a province decides to use and has agreed, in principle, with the Government of New Brunswick using sub-provincial *ridings* for their Senate elections.⁴⁸ In light of that, and as all six of these electoral systems have been proposed in the past for Senate elections in the context of government-sponsored or public-initiated debate over constitutional amendment, they will each be considered here.⁴⁹

Single Member Plurality

Single-Member Plurality contests, or 'first-past-the-post' as it is referred to in Canada, have candidates competing in single member constituencies where the representative elected for that riding is the individual who received the most votes – not necessarily a majority of the votes cast, simply more than the next placed candidate. Plurality is a 'winner-take-all' process, so it is possible to win in a race between three equally popular candidates with as little as 33.4 percent of the popular vote. Because of the uneven distribution of votes across ridings, this will usually result in a party winning a majority of seats in a legislature without having won a majority of votes and perhaps even a smaller percentage of votes than another party. The exaggerated parliamentary majorities, it is argued with respect to lower chambers in a parliamentary system, is a worthwhile feature because it delivers clear mandates to govern and sufficient majorities to implement a legislative program. The parties which are most adversely impacted upon are the ones whose support is not concentrated regionally. This system disenfranchises smaller parties. Plurality is most susceptible to malapportionment and gerrymandering distortions, in addition to its intentional false majority vote distortion.

⁴⁷ Bill C-32, 1st Session, 39th Parliament; and C-20, 2nd Session, 39th Parliament.

⁴⁸ Hicks 2013.

⁴⁹ For a survey of all Senate Reform proposals see J. Stilborn in Joyal 2005 (the six electoral systems explained here is based on our previous discussion of these systems in Hicks and Blais 2008).

Multi-Member Plurality

Multi-Member Plurality elections employ larger constituencies and elect several representatives for each constituency under the same principle as SMP. So if a constituency is to be represented by three members then the candidates who come first, second and third are elected. Large multi-member constituencies operating under plurality will tend to elect most or all of their representatives from the same political party. It is argued that since these are larger ridings with multiple representatives, the connection between the voter and the representatives is less and the influence of the political party over the members is greater.⁵⁰

Single-Member Majority

Single-Member Majority usually requires either multiple-round voting or the use of the 'alternative vote', since rarely will a candidate receive a majority (i.e. more than 50 percent of the vote) on the first ballot. In the former case the usual practice is to hold *two rounds* of voting and the second round or 'runoff' is restricted to the top two leading candidates. With *alternative voting*, the voters rank candidates in order of preference on a single ballot. If and when no candidate gets a majority of first preferences, the candidates who received the least number of votes are eliminated one-by-one, and their votes are transferred according to voters' second preferences until one candidate achieves a majority. Runoff elections, it is claimed, consolidate support behind the successful candidate, encourage coalition-building and lead to cross-party alliances in the final stages of the campaign, whereas the alternative vote simply translates a close lead into a more decisive majority of seats by discriminating against those at the bottom of the pole.⁵¹

Multi-Member Majority

Multi-Member Majority requires multiple rounds of voting. Two round voting is the norm

⁵⁰ Madison (1787) in *The Federalist Papers*; and Silva 1964.

⁵¹ Norris 1997, p. 302.

and this can be done with party lists, so that the two parties that received the greatest number of votes in the first round compete in the second (with the winning list gaining every seat in the constituency), or by electing individual candidates with an absolute majority in the first round and a plurality in the second (if a second vote is needed). The use of party lists gives the party great influence over the candidates, though it will also often lead to diverse representation as parties try to balance their list along gender, ethno-racial, linguistic and regional lines.

Single Transferable Voting

Single Transferable Voting has voters rank the candidates; winning candidates must receive votes beyond a *quota*. Voters' ballots are re-allocated to their next preferences when there are excess votes for an elected candidate (above the quota) or when their first candidate is eliminated. This system is advocated on the grounds that it permits voters to choose their representatives on the basis of individual characteristics. Choices from among candidates of one particular party are possible, but this will depend on ballot design. This system may result in candidates from the same party regularly competing against each other.⁵² That this undermines party cohesion in the process is thought by some to be a positive characteristic (see Canada West Foundation below).

Proportional Representation

Proportional Representation has voters choose between party lists of candidates and the seats are distributed among the parties according to their proportion of the vote. If a party receives one third of the vote it receives one-third of the seats in the chamber, though there are several alternative formulae which can be used to calculate proportionality. Minimum thresholds are often used to limit the number of smaller parties represented in a legislature. When a *closed list* is used, votes are cast for a party and the candidates who win are the ones prioritized by the party. In the case of

⁵² Katz 1980.

an *open list*, voters can express a preference for a particular candidate within a party's list. PR is usually credited with ensuring 'every vote counts' by electing a larger number of smaller parties to a legislature. PR requires multi-member constituencies and while closed lists provide political parties greater control over their candidates, they usually result in greater legislative diversity. It is well chronicled that the list system of PR facilitates female candidates' entry into politics as parties strive for balance.⁵³

Table 3 Electoral Systems used for Senate Elections where the Upper Chamber is Directly Elected				
Formula	District Magnitude	Timing	Parties	Terms (yrs)
<u>Single-Member Plurality</u>				
Dom. Rep.	30 separate constituencies (29 provinces/1 federal district)	Same time	Same parties	4 years
<u>Single-Member Majority</u>				
Czech Rep.	81 separate constituencies NB: Two Round Voting	Separate	Same parties	6 (33% every 2 yrs)
<u>Multi-Member Plurality</u>				
Bolivia	3 seats per department (2 seats to majority party, 1 to next party)	Same time	Same parties	5 years
Brazil	3 seats per state and federal district	Same time	Same parties	8 (33%/66% 4 yrs)
Palau	Based on population (multi-member and single districts)	Same time	No parties	4 years
Philippines	nation-wide constituency	Same time	Same parties	6 (50% every 3 yrs)
Poland	2-4 seats per constituency	Same time	Same parties	4 years
U.S.	2 seats per state (majority needed in Georgia and Louisiana)	Same time	Same parties	6 (33% every 3 yrs)
<u>Multi-Member Majority</u>				
Haiti	3 seats per department NB: Two Round Voting	Same time	Same parties	6 (33% every 2 yrs)
Switzerland	2 seats per canton NB: Two Round Voting	Same time	Same parties	4 years
<u>Single-Transferable Voting</u>				
Australia	12 senators per state (and 2 per territory)	Same time	Provincial parties	6 (50% every 3 yrs)
<u>Proportional Representation</u>				
Columbia	100 seats nation-wide (2 seats for aboriginals)	Same time	Same parties	4 years
Paraguay	45 nation-wide seats	Same time	Same parties	5 years
Romania	42 2-12 seat constituencies (one senator per 160,000 people)	Same time	Same parties	4 years
<u>Mixed Member Proportionality</u>				
Mexico	3 seats per state plus federal district (2 go to majority party and 1 to next party/ plus 32 seats are used for list PR)	Same time	Same parties	6 (50% every 3 yrs)
Japan	73 from multi-member & single-member constituencies; and 48 seats allocated using PR	Separate	Same parties	6 (50% every 3 yrs)

Source: Hicks and Blais 2008, Table 2.

⁵³ W. Rule, "Multimember Legislative Districts: Majority and Anglo Women's and Men's Recruitment Opportunity" in Rule and Zimmerman (eds.) 1992; W. Rule and P. Norris, "Anglo and Minority Women's Underrepresentation in Congress: Is the Electoral System the Culprit?" in *ibid.*; and Welch and Studlar 1990.

4) Impacts of Chosen Electoral System

Clearly the system chosen can cause dramatic differences in electoral outcomes. The relative merits of one dimension of a system over another are closely tied to competing beliefs about what should be the core principles of a representative democracy.

The choice of system is dependent on what democratic principles are most desirous to have: accountability, party system stability, political equality, representation of diverse viewpoints, governability, clear choices in terms of policy or the ability for the system to handle social conflict. Each are relevant and sometimes conflicting considerations. Simply put, choosing an electoral system is a choice between efficient and effective versus responsive and accountable government; though it is also about how fair one wants to be to minor parties and the voters who support these parties' policies.⁵⁴ Ultimately, choosing a system is about choosing the rules of the game and any rule is bound to advantage some political parties over others.

As Table 3 shows, each of the six aforementioned systems has been adopted for directly electing an upper chamber, and many of these have country unique variations. The only obvious pattern is that the majority of second chambers hold their elections at the same time as the lower chamber elections using the same political parties, though most of these stagger the terms for their senators so that one-third or one-half of the chamber is elected at any one time. This will not be the case for the Canadian Senate under the process established by Bill C-7.

Implications of Electoral System on Party Success

The specific electoral mechanism prescribed in Bill C-7 is *multi-member plurality* with elections held province-wide coinciding with provincial or municipal elections and with provincial political parties responsible for the nomination of candidates. It can be expected that one political party will win all the seats being contested at the same time.

⁵⁴ Norris 1997.

The ridings are province-wide, so the candidate will be dependent on the provincial political party for resources, at least in the short to medium term. When conducted simultaneously with a provincial election, which is the more likely scenario given the party resources necessary to run such a large province-wide campaign, the Senate campaign will be an artifact of the provincial general election, meaning that the party which wins the provincial election will likely win all the Senate seats being contested.

The provincial political party will have complete control over the members who wish to contest this election beyond simply controlling the nomination process. The fact that Senators cannot run for re-election is intended to mitigate political party control. What the single term does is reduce the number of potential candidates for these positions — something already limited due to the property qualification required for appointment to the Senate. The evidence from the pre-Confederation province of Canada (see below) was that the larger constituencies, property qualification and lack of potential for political advancement (members of the upper chamber rarely get appointed to Cabinet as the confidence chamber is the lower house) combined to discourage talented people from contesting these elections. That will be exacerbated by a non-renewable term.

Implication of Electoral System on Diversity

Given that the current plan is to hold elections for vacancies as they occur, the diversity of the upper chamber will be reduced. Seats in the Senate have been used by successive prime ministers to partially compensate for the imbalance in representation in the House of Commons in terms of gender and of ethno-racial and linguistic communities. Some of this is ad hoc and subject to prime ministerial whim. Some of it is historic, such as the appointment of linguistic minority senators from New Brunswick, Nova Scotia, Manitoba and Quebec, and likely constitutes a constitutional convention.

There is some evidence that multi-member constituencies, where multiple seats are being contested at one time, may result in more women being elected than occurs in

single member districts.⁵⁵ The reason for this is because some political parties insert themselves into the nomination process to ensure female representation on the slate of candidates being advanced in the election. But this is a small increase; it does not mimic the data from proportional representation systems where gender balance is much more likely.

The holding of provincial elections for Senators under Bill C-7 would not be for the complete roster of a province's Senate seats at one time, so were the provincial political parties interested in ensuring diversity among their candidates there will simply not be the opportunity. Even when the nine-year term of office comes into effect after the retirement of all pre-2008 Senators, in most provinces there will only be two or three vacancies to be filled during a provincial government's mandate. For any political party to organize a slate of candidates that reflects the province's diversity, the slate needs to be larger than three, though gender balance can be achieved two at a time.

Implication of Electoral System on Quebec's Representation

Quebec's representation is of particular note. The decision to use the 24 electoral divisions that had been put in place for the Legislative Council of the Province of Canada for this province's Senate representation was to ensure that the Anglophone and Protestant minority in the province would always be represented in the chamber (and in the upper chamber of the Quebec Legislature which, until its abolition in 1968, also used these same divisions). More recently, prime ministers have begun using one of the Quebec Senate seats to give legislative representation to Quebec's Jewish community. Under the prescribed electoral system, these practices would be eliminated. The main provincial political parties in Quebec would be unlikely to nominate and the francophone majority in Quebec would be unlikely to elect either Jewish or Anglophone senators as part of province-wide electoral contests to determine Quebec's representation in the federal upper chamber.

⁵⁵ Welch and Studlar 1990.

Linguistic and Ethnic Minority Communities outside of Quebec

As noted above, the federal government may accept different electoral systems in different provinces. The dual member plurality system that it has indicated it would accept for New Brunswick would actually allow the appointment of Acadians to continue. Of course, the federal government has not formally provided for this in Bill C-7 and, if it does not, the multi-member province-wide plurality system mandated by the Bill would naturally eliminate Acadian representation in the upper chamber due to their numerical inferiority in the New Brunswick population. It would be up to political parties to ensure that Acadians won spots on their party's list, something that would conceivably happen given the major provincial parties' sensitivity to this community.

However, for other provinces, given their minority communities' weaker influence in provincial politics, it is unlikely that provincial political parties will ensure representation for Acadians from Nova Scotia, Franco-Manitobans, Franco-Albertans and members of the First Nations outside of the territories, all of whom have senators from their communities appointed regularly under the current process of non-consultative Prime Ministerial recommended appointment.

Issue of Fairness of Multi-member Plurality Districts

In addition to diversity of representation in the chamber (descriptive, formal and symbolic) there is the issue of representing the political and ethno-racial-linguistic diversity within the constituency (substantive). In the United States, following a series of Supreme Court's rulings on the question of district fairness,⁵⁶ state legislatures began to move to eliminate multi-member plurality districts. This was in response to a growing literature that questioned the validity of the plurality electoral system in multi-member ridings and a belief that the High Court's attitude towards districting was shifting.⁵⁷

⁵⁶ *Reynolds v. Sims*; and *WMCA, inc. v. Lomenzo*.

⁵⁷ E.g., Banzhaf 1966; and Silva 1964.

There are 13 states that still use multi-member districts, and there has been a great deal of litigation surrounding the discriminatory nature of this design. The U.S. Supreme Court in 1973 upheld a lower court's opinion that certain multi-member districts were in violation of that country's Equal Protection Clause as the districts were being used to cancel out or minimize the voting strength of racial groups.⁵⁸ When the Court, in 1980, set the onus on litigants to prove that a multi-member district had a discriminatory purpose,⁵⁹ Congress amended the *Voting Rights Act* so that it would be sufficient for district boundaries to be seen as discriminatory based on effect rather than intent.⁶⁰

The U.S. Court has said that single-member districts are preferable to multi-member districts, at least when courts do apportionment.⁶¹ But it will not invalidate multi-member districts unless a minority group can show it is of sufficient size that it could constitute a single member district, is politically cohesive and is having its vote preferences denied by the majority in the district.⁶²

Multi-member plurality also eliminates dissenting political opinion in the district. This is why Bolivia, where multi-member plurality is used to elect its three senators per district, gives one seat to the second place party to ensure diversity of representation in the chamber.

As noted in the comparative discussion of electoral systems, the principle strength of plurality argued by those who favour this system for first chambers is that it delivers artificial majorities in parliamentary democracies. This is truest in Anglo-parliamentary systems where, for example, in the United Kingdom and New Zealand more than 60 percent of all their governments have held a majority of seats in the legislature without

⁵⁸ *White v. Regester*.

⁵⁹ P. Stewart (for the majority), *Mobile v. Bolden*.

⁶⁰ *Voting Rights Act* of 1965 (42 U.S.C. §§ 1973–1973aa-6).

⁶¹ *Connor v. Johnson*.

⁶² *Thornburg v. Gingles*.

having received 50 percent of the popular vote.⁶³ The argument is that this ensures a clear winner following an election, gives the government stability and inversely enables the voter to punish a government for its policies in a subsequent election.

It is hard to make a case for plurality's distorting the public's vote preferences artificially to advantage the more popular party absent the need for parliamentary government formation. A second chamber cannot bring down a government under the Anglo-parliamentary constitutional conventions. As elections would not be run simultaneously with federal elections, nor would federal parties be contesting them, voters cannot punish a government. From a normative perspective, therefore, it is hard to see a legislative justification for delivering multiple seats to the slightly more popular provincial party. In fact, it will amplify the already distorted message being sent by House of Commons' elections that Canada's regions have diametrically opposed political and ideological beliefs and support the erroneous assumption that political parties favoured in one region have no supporters in another.⁶⁴

B) Question 2: The evidence from Canada, either recent or from pre-/post-Confederation provinces, of the consequences of introducing electoral elements into upper chambers.

All constitutional rules will be mediated by historical, temporal and cultural factors.⁶⁵ The fact that Canada has some limited experience with elected upper chambers offers additional insight into how the introduction of election will impact on the Canadian upper chamber.

⁶³ Blais and Carty 1988.

⁶⁴ Cairns 1968.

⁶⁵ Hicks 2012a and Hicks 2010b.

1) The Alberta Movement for an elected Senate

Canada West Foundation

The most recent evidence of how multi-member plurality elections will operate comes from Alberta which has been using plurality in its 'Senate elections' since 1989.

The Alberta movement for an elected Senate begun by the Canada West Foundation, favoured single transferable voting, something the federal government's first two consultative election Bills equally contained. This has its roots in Australia.

The current strategy of the Alberta and federal governments with respect to Senate consultative elections also has comparative roots, and those are in the United States where states began holding primaries and then elections for their senators, creating popular momentum toward wholesale reform leading to the 17th Amendment of the Constitution.

The provinces of Canada and Prince Edward Island both experimented with an elected upper chamber. Their experiences, while in a different era of responsible government and party politics, offer some domestic insight into how electoral elements impact on Canadian bicameral legislatures.

The Government of Alberta's and the Reform Party's, later Canadian Reform Conservative Alliance's, and now the Conservative Party of Canada's plans for Senate Reform owe their origin to a Canada West Foundation series of publications beginning in 1981 which laid out a plan for a 'Triple-E Senate'.⁶⁶

Under Triple-E, the 'reformed' Senate would have *equal* representation from each province, each senator would be directly *elected* and the body as a whole would have

⁶⁶ McCormick *et al.* 1981.

effective legislative powers (less than it currently has, so as to avoid 'gridlock', but at a sufficient level so as to amend or delay legislation).

The Canada West Foundation noted that plurality voting, whether involving single- or multiple-member constituencies, tends to elect groups of regional representatives from one political party; while proportional representation ensures that voters in a region who support a popular, but not the most popular, political party have representation in the legislature, thus ensuring diversity of opinion and policy ideas. However, the CWF felt at the time that PR was too controlled by party headquarters and too closed to independent candidates outside of parties.⁶⁷ Independent voices, they felt, were essential for a second chamber so as to reflect regional, as opposed to party, representation. Single transferrable voting, they argued, forces candidates to develop personal positions on the issues.

The CWF recommended province-wide constituencies to ensure that senators represent regional concerns and to differentiate them from MPs, who represent local communities. And it recommended Senate and House of Commons elections be held at the same time, arguing that holding Senate elections simultaneously with provincial elections would see the Senate election overshadowed by provincial campaigns; and they pointed out that provincial parties in many provinces have no relation to a federal party.

There is a direct causal relationship between the evidence from the second chambers of Australia and the United States, the Canada West Foundation's proposals for Triple-E, the Alberta Legislature's proposals on the same, the holding of Senate consultative elections in Alberta and Bill C-7. This relationship is relevant to the consideration of the consequences of Bill C-7.

⁶⁷ It has recently come to favour PR on the grounds that women and ethno-racial-linguistic groups, and not just the regions, are under-represented in Parliament, see Gibbins and Roach 2010.

Lessons from Australia

The Canada West Foundation's proposals for the Senate's electoral system are based on the upper chamber in Australia. Australia also offers the best insight into how a fully elected upper chamber will operate within the Westminster-model of responsible parliamentary government that Canada shares with that country⁶⁸; including our common constitutional conventions, such as confidence and dissolution.⁶⁹

When Australia was created as a federation, in 1901, their Senate was elected using the plurality system. This resulted in the government winning majorities in both the upper and lower chambers. Since 1949, the Senate has been elected using *single transferrable voting*, which has resulted in an increase in the number of parties elected and in none of these parties usually obtaining a majority in the upper chamber.

In Australia there are six states, which are represented in the Senate by twelve senators each and there are three territories represented by four senators each, for a total of seventy-six members. There is a constitutional requirement that the Senate be half the size of their lower chamber. The senators for the territories stand for election every three years along with half of the senators from the states, and this election is held at the same time as election for all members of the lower chamber.

In the House of Representatives, two centre-right parties have a semi-permanent coalition and have proven effective in working together to use the *alternative vote* to win majorities. These are currently the Liberal and National parties, though there have been other incarnations in the past. The coalition partners make strategic moves to ensure seat maximization under the electoral system, including making recommendations on how voters should mark their ballots. This strategic approach and the electoral system itself have resulted in smaller parties finding themselves largely excluded from winning

⁶⁸ Smiley 1985.

⁶⁹ Hicks 2012b.

seats in the lower chamber. They have responded to this by focusing their resources on the upper chamber.

In the last election, Labour and the Liberal/National Coalition each won 72 seats, so the Labour PM negotiated support from the independent MPs in the lower chamber for the continuation of the government. Aside from a few exceptions like this one, the alternative vote for the lower chamber has resulted in clear majorities in the House of Representatives for either the Coalition or the Labour party.⁷⁰ Yet in the Senate chamber, again with a few exceptions, the governing party has not had a majority. Additionally, the number of minority parties in the Senate has increased, particularly since the mid-1980s.⁷¹

The inability of the government party to control the second chamber has led to frequent clashes between the two chambers, as the majority in the first chamber has found its legislation amended or defeated. In 1975, this led to a 'constitutional crisis'. In that instance, Labour Prime Minister Gough Whitlam was unable to get supply through the Senate (i.e. approval for its budgetary expenditures). Having received assurance that Coalition leader Malcolm Fraser could get supply through the Senate, the Governor General, Sir John Kerr, dismissed Whitlam and appointed Fraser as Prime Minister on the understanding that as soon as supply was passed he would recommend a 'double dissolution'.

This event raised a number of issues that have been hotly debated in Australia and have never been fully resolved, including whether or not the Senate has the right to block money bills, how a government and the lower chamber should respond when the Senate refuses to grant supply and when it is appropriate for the Governor General to intervene in disputes between the two chambers.

⁷⁰ Hicks and Blais 2008.

⁷¹ The STV system in Australia elects few independents. This is, in part, due to the ballot which allows voters to select a political party rather than deciding between candidates.

The Australian Constitution specifically allows for a double dissolution to break an impasse between the two chambers. Section 57 states, in part, that:

"If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time."

By convention, the Governor General dissolves the two chambers only on the advice of the Prime Minister, though he is not obligated to take that advice. There have been double dissolutions in 1914, 1951, 1974, 1975, 1983 and 1987. Following the election, if the House of Representatives again passes the Bill and the Senate again fails to pass it or amends it, the Governor General can convene a joint session of the two chambers and if the Bill, including any amendments which have been previously proposed or any new amendments, is then passed by an absolute majority (more than 50% of the combined number of seats in the two chambers), they are deemed to have been dealt with by each chamber in the same way and Royal Assent is given.

While there has not been a repeat of the outright denial of supply by the Australian Senate as occurred in the famous 'Kerr's Cur', Australian governments have nevertheless found their budgets subject to demands from minority political parties who have seats in the Australian Senate. This is in keeping with the comparative empirical evidence which shows a correlation between bicameralism and budgetary deficits, as the increased number of parties that have vetoes forces governments to cut deals over spending.⁷² Upper chambers, whose members have a perceived electoral mandate,

⁷² Heller 1997.

are going to be more willing to use all the available constitutional powers of their chamber for partisan advantage, either independently or in co-operation with their party colleagues and leadership in the lower chamber, and this includes obtaining programs a party thinks beneficial for the public or 'pork' for their constituencies so as to facilitate their re-election.

Given the frequent clashes between the two chambers in Australia, the literature on bicameralism produced by political scientists studying Australian bicameralism focuses on conflict and power distribution between the two chambers.⁷³ When placed in the context of responsible parliamentary government under the Westminster model, the conclusion is that the country is under constant siege due to legislative gridlock, endless bargaining and trade-offs.⁷⁴

Others argue that having a second chamber with no clear majority is a useful check in keeping with the federal principle of divided government and gives voters the opportunity to 'split the ticket', placing different parties in control of different political institutions. Just as governments claim that elections provide them with a mandate to govern, the smaller parties in the Australian Senate equally claim a mandate to keep the government accountable, to wit, the Australian Democrats' senate election slogan: "keep the bastards honest".⁷⁵

Alberta Legislature's Proposal

In response to the Canada West Foundation, the Alberta Select Special Committee came up with its own proposal for a Triple-E Senate.⁷⁶ They endorsed the idea of an equal number of Senators (six) elected in a single province-wide constituency, but they recommended using plurality, not single transferable, voting. During senatorial

⁷³ J. Uhr, "Generating Divided Government: The Australian Senate" in Patterson and Mughan 1999.

⁷⁴ Jackson 1995.

⁷⁵ Uhr, "Generating Divided Government" (*op cit.*), p. 98.

⁷⁶ Report of the Alberta Select Special Committee on Upper House Reform, *Strengthening Canada, Reform of Canada's Senate* (Edmonton: Legislature of Alberta, March 1985).

elections, voters would select representatives from a list of candidates, and have as many votes as there were seats to be filled. The candidates with the largest number of votes would win. So, for example, if three seats needed to be filled, then the three candidates with the most votes would each win a seat. Additionally, they recommended that Senate terms be fixed to the length of provincial legislatures; and that senatorial elections for a province be held at the same time as provincial elections.

The partisan logic to their choice was obvious. Alberta has been throughout its history a one party system, though the party in the dominant position has changed.⁷⁷ It was assumed, given the way mixed member plurality works, that the Progressive Conservative Party of Alberta would have the advantage to win all of the province's senate seats, at least for as long as this party dominated the provincial system.

Meech Lake Era

The door opened to Alberta holding votes on a list of potential nominees during the *Meech Lake Constitutional Accord*, which would have amended the *Constitution* to require the PM to choose nominees to the Senate from a list provided by the relevant province. During the ratification period for this *Accord*, Prime Minister Brian Mulroney had agreed to operate as if the *Accord* was in place.

The Alberta government had the legislature enact provincial legislation to determine its list through a province-wide consultation.⁷⁸ The political parties to contest these elections were to be provincial parties. However, members of the federal Reform Party of Canada, which had broken away from the Progressive Conservative Party at the federal-level and was popular in Alberta, registered a provincial Reform Party specifically to contest these Senate elections, which it did during the first two: 1989 and 1998. Both of these were conducted simultaneously with municipal elections.

⁷⁷ Stewart and Carty, "Many Political World? Provincial Parties and Party Systems", in Dunn 2006, pp. 97-114.

⁷⁸ *Senatorial Selection Act* (S.A. 1989, c.S-115).

Stanley Waters, the Reform Party candidate, 'won' the senate 'election' in 1989 and, under pressure from the Reform Party and the Alberta Government, Prime Minister Mulroney agreed to summon him to the Senate in 1990. Waters died a year later. When the *Accord* was defeated, Mulroney stopped obtaining provincial lists of potential Senate nominees. Jean Chrétien was unconstrained by any list, Waters having been elected for a single available Senate seat, and filled Waters' seat in the traditional manner.⁷⁹

In 1998, the Alberta government held elections for two seats, and Bert Brown and Ted Morton claimed the first and second spots. These were the two Reform Party candidates, and two independents ran against them. No other political party fielded candidates. Paul Martin refused to follow the list. So Bert Brown would only be summoned to the Senate in 2007 under Prime Minister Stephen Harper, having won a second, 2004, senatorial 'election' as a Progressive Conservative candidate (Reform in its various incarnations having been rolled into the Conservative Party).

Alberta's Senatorial Elections

Under the Alberta legislation, the Cabinet determines in advance of the election the number of spots on the appointment list.⁸⁰ This is based on the number of expected Senate vacancies during the legislature's term. Senators who win a spot on the list remain on the list for six years or until another Senate election is held and a new list created.

Bert Brown, a Progressive Conservative candidate, received the most votes and, as noted above, was appointed to the Senate by Stephen Harper. In that same 2004 Senate election, Betty Unger, also a Progressive Conservative candidate, came second

⁷⁹ Chrétien would not have followed the list in any event.

⁸⁰ *Senatorial Selection Act* (R.S.A. 2000, c.S-5).

of four places on the list which was contested by ten candidates.⁸¹ When the six year term for the list expired, an Alberta order-in-council was passed extending the list until the provincial election. Unger was appointed to the Senate from this list by Prime Minister Harper on January 6, 2012.

In the most recent Senate election, which occurred in connection with the Provincial General Election on April 23, 2012, the Progressive Conservative Party of Alberta and the new provincial Wildrose Party, which for the first time in Alberta posed a serious threat to the PC Party's hold on power, each fielded three candidates for the three Senate positions which will become available during the province's legislative term. The three seats were won by the candidates for the Progressive Conservatives; and the Wildrose candidates not surprisingly came fourth through sixth.

There is no Wildrose Party federally so the candidates from this party all committed to sitting with the Conservative Party of Canada's caucus in Parliament if they had won. So, no matter which party won the three spots on the list, three new Conservative Party senators would be appointed. The Evergreen Party fielded one candidate thinking that if it only ran one then their candidate might win a spot by being the second or third choice of everyone who opposed the two right of centre parties (each voter could indicate their three preferences for the three seats being contested), and this candidate came seventh. In addition, six independents ran.

Lessons from the U.S.

The idea that Alberta holding Senate elections might encourage other provinces to follow suit (even in the absence of federal legislation encouraging them to do so) and that this, in turn, would put pressure on all governments to reform the Senate finds its roots in the United States.

⁸¹ While the government set the list number at four, based on expected vacancies, the Progressive Conservative Party did not use a nomination process to select their four and five candidates ran under the PC banner, three under the Canadian Alliance (successor to the Reform Party) and two independents.

The *U.S. Constitution* provided for the selection of senators by the legislature of each state (indirect election).⁸² Calls for direct election of senators began as far back as 1826. Divisions over slavery and states' rights that led to the Civil War began to make the selection of senators by state legislature difficult beginning in the 1850s. Divided state legislatures resulted in long vacancies as no consensus could emerge as to who the representative of the state should be in Washington.

The Civil War more directly impacted on Senate appointments with the union divided between 1861 and 1865. And the war eroded support for state influence at the federal-level and removed federalism from popular discourse vis-à-vis the role of the Senate. Senators began to be selected by different mechanisms in different states, throwing into doubt the legitimacy of some senators.⁸³

In a number of states, political parties began to select their party's nominees for the Senate through primaries. By 1908, ten states were using primaries to select their party's Senate nominee, with the state legislature then voting to decide between the two parties' nominees. The transition to election in these states was virtually no change; in other states it was a necessary corrective for a system that had serious flaws; and in the rest it was the result of public pressure as voters demanded the same right to choose their senators as the voters in neighbouring states.

As Table 4 shows, once Oregon adopted legislation in 1906 to hold consultative elections, it created a domino effect, with other states following suit and ratifying the requisite constitutional amendment by 1913, though the entire Senate would not be elected until 1918.

⁸² Article I, section 3, *Constitution of the United States* (1789).

⁸³ In 1866, Congress moved to fix this problem by adopting regulations for how and when senators were to be elected by a legislature. This improved things but deadlock in state legislatures continued to result in vacancies.

It is therefore not unreasonable for the Alberta and Canadian governments to believe that an idea like direct election for Canadian Senators will be adopted by province-after-province fuelled by popular pressure. We know, for example, that proportional representation was adopted by country-after-country in Europe due to the temporal popularity of this electoral mechanism.⁸⁴ Australia's transition to the alternative vote at the state-level is another example.

Table 4
Order in which U.S. States held consultative elections to choose Senators

<i>Year of State Vote</i>	<i>State</i>	<i>Class of Senators</i>
1906	Oregon	2 (Vacancy 1907; Full Term 1907-1913)
1908	Nevada, Oregon	3 (Full Term 1909-1915)
1911*	Arizona	1 (Long Term 1912-1917), 3 (Short Term 1912-1915)
1912	Colorado, Kansas, Minnesota, Oklahoma, Oregon, Montana	2 (Full Term 1913-1919)
1913	17th Amendment	to the U.S. Constitution
1914	All	3 (Full Term 1915-1921)
1916	All	1 (Full Term 1917-1923)
1918	All	2 (Full Term 1919-1925)

Note: Two Senators are elected from each state, each with the same length of term for each Senator, but the start of the term is staggered into three classes so as to reduce the percentage of turnover in the Senate at each two-year period (article I, s.3, *U.S. Constitution*).

* This election was held in advance of statehood.

During the period of ratification for the *Meech Lake Constitutional Accord*, following the lead of Alberta, the legislature of British Columbia adopted a law to allow for direct election of their nominees, though this Act contained a sunset clause and has since lapsed.⁸⁵ Keeping in mind that each of the following legislatures has a right-of-centre political party similar to the Conservative Party of Canada in the legislative majority:

⁸⁴ Blais et al. 2004.

⁸⁵ *Senatorial Selection Act* (S.B.C. 1990, c.70).

recently Saskatchewan adopted legislation modelled on the Alberta law;⁸⁶ there is a private members bill in B.C. that Premier Christy Clark said she would support that would establish Senate elections; a Special Committee on Senate Reform in Manitoba has recommended an electoral process be adopted in that province,⁸⁷ and Premier David Alward of New Brunswick has, as noted above, expressed a willingness to hold elections using dual-member constituencies.

The lessons of the United States, that the Alberta and Canadian governments have learned in terms of altering the method of selection province-by-province, does appear about to bear fruit. The scenario, imagined by the Canada West Foundation and Alberta Government, is that provincial Senate elections will lead to the “eventual reopening of the Constitution that full Senate reform will require” out of fear that incremental Senate reform “will create a Frankensenate (i.e., a second elected body without a clear mandate and very few legal restrictions on its power).”⁸⁸ The threat of such a body would force the federal government and the provinces to negotiate a formal transition to election under common electoral rules with a reduction in the Senate’s powers. How such a threat would force Ontario, Quebec, Nova Scotia and New Brunswick to accept a reduction in the number of senators from those provinces is unclear, but the goal is to achieve Triple-E Senate reform.

2) Elected Upper Chambers in Canada’s Provinces

With the exception of Saskatchewan and Alberta, which were carved out of the Northwest Territories in the early 20th century, all the original provinces had upper chambers and thus offer lessons on bicameralism. Two provinces adopted elected upper chambers prior to Confederation; the united province of Canada and the province

⁸⁶ *Senate Nominee Election Act* (S.S. 2009, c.S-46.003). It has not been proclaimed into force.

⁸⁷ Though they would like to see Elections Canada administer and pay for Senate elections, see Legislative Assembly of Manitoba, *Report of the Special Committee on Senate Reform*, Nov. 9, 2009.

⁸⁸ Gibbins and Roach 2010.

of Prince Edward Island. As we are most interested in how the introduction of elected elements can alter upper chambers, this section confines its discussion to the developments in these two provinces and the resulting experiences.

Lessons from the united Province of Canada

The Union Act, 1840, united Upper Canada and Lower Canada into a single province. It established a bicameral legislature of which the lower chamber had equal representation, 48 each, from Upper Canada and Lower Canada, which were renamed Canada West and Canada East by the Act though continued to be called by their previous provincial labels by politician and public alike.

The upper chamber had no cap on its size, which was to allow the government to summon additional members as the need arose so as to break any impasse. The minimum to be called to the Legislative Council was 20 appointed members. To serve in the upper chamber, one had to be at least 21 years of age and a citizen of the Queen (either natural born or naturalized through an Act of the British, the U.K. or of the Upper or Lower Canada legislatures).

A decade later, a movement emerged among leading members of the lower chamber to change the upper chamber to an elected body. This had long been a desire of the House of Assembly of Lower Canada.⁸⁹ After some legislative and election wrangling, including the obtaining from the United Kingdom Parliament the constitutional authority to alter the method of selection of the provincial upper chamber, 24 elected councillors from Canada East and 24 elected councillors from Canada West were grafted onto the chamber to serve alongside the councillors who had been appointed for life.⁹⁰

⁸⁹ Resolution No. 27, *Journals of the House of Assembly of Lower Canada* (February 21, 1834), pp. 310-38 and 316.

⁹⁰ *An Act to change the Constitution of the Legislative Council by rendering the same Elective* received the assent of the Queen-in-imperial council on June 24, 1856 and was proclaimed by the Governor General of Canada on July 14, 1856.

The councillors would be elected for eight year terms with one-quarter elected every two years. To be elected one had to be the minimum age of 30, have property in the amount of £2,000 in the province. Property did not have to be in the district for which a candidate ran. The qualification to vote for councillors was the same as for the lower chamber which, in this era, was linked to owning property in the electoral district. The speaker would be chosen by the government and sat in cabinet, as had been the practice with the appointed council. There was no power to dissolve the upper house early.

The logic to the design was explained by the government at the time. The intention was that once the life councillors resigned or died, they would not be replaced making the entire chamber eventually elected.⁹¹ As all 48 members would be elected in the first instance, they would be familiar with the wishes of the public alongside the life senators who were removed from the vagaries of public opinion. Once the Council became fully elected through attrition, at any time one-fourth would be fresh from meeting with electors while another quarter would be getting ready to meet the electors, and half of the members would be removed from temporary shifts in public opinion.⁹² The large number isolated from campaigning was intended to preserve the 'sober house of second thought' dimension of the Council:

"For if that House were to be a mere reflex of the lower chamber, it would be better to abolish it. But if the object of the chamber was to check hasty legislation and give the people time to reflect, in that case it must be so constituted as to attain those objects".⁹³

While the first candidates for election to the Legislative Council had been reportedly exceptional, the quality diminished due to the expense of mounting campaigns across such large ridings.⁹⁴ A Council riding was at least twice, though a few were 10 times the

⁹¹ Minister Cauchon, *Debates of the Legislative Assembly of the Province of Canada* (March 16, 1855).

⁹² *Ibid.*, (March 27, 1855).

⁹³ *Ibid.*

⁹⁴ Minister Macdonald, *Debates on Confederation of British North American Provinces* (February 6, 1865).

size of a lower chamber riding, in an era of limited modes of transport and communication.⁹⁵ The Legislative Council was failing to attract candidates who were well known or were willing to raise and spend the resources to run in these large constituencies.

It was the lower house that was seen as the way to eventual membership in the ministry, and to a lifetime of public service through subsequent governmental appointments. So anyone with political ambition was contesting the smaller assembly ridings which were easier to win, easier to represent and offered the potential for a role on the government benches if not a paid seat at the Cabinet table with a government department to run and all the perquisites and patronage that entails.

Determining what makes a 'good' candidate is subjective. In this era, status was significant so the disappointment in the quality of candidates complained of by John A. Macdonald, George Brown and George-Étienne Cartier reflects, in part, their dissatisfaction with the resumes and experience of the persons who ran and, more importantly, were getting elected. Councillors were getting elected on party tickets for variously the Grits, Rouges, Blueus, Conservatives and Liberals, as these parties came to be favoured by different communities in the two halves of the province.

In terms of inter-chamber disputes, the introduction of these elected councillors made debate in the second chamber more partisan, undermining its ability to do measured review of legislation. But the large number of life councillors ensured that the government's legislation would be enacted, providing it could get it through the lower chamber. The party divisions in the lower chamber, which were aligning differently in Canada East and West, had exacerbated tensions between the two halves, making all legislation linguistically and religiously controversial in at least one half. Passage of legislation through the first chamber was difficult and governing, due to the need to maintain the confidence of this divided chamber, was equally so.

⁹⁵ Minister Brown, *Debates on Confederation of British North American Provinces* (February 8, 1865).

These same party divisions were playing out in the upper chamber, just tempered by the presence of life councillors who could be called upon to ensure passage of the government's legislation. Had a different government, than the (frequently rejiggered) Liberal-Conservative coalition, been able to obtain and hold onto power for any period of time then the Legislative Council would have been placed on a collision course with the Assembly, and demands for institutional change may have focused solely on the upper chamber.⁹⁶ Instead, the deep divisions in the lower chamber made the larger institutional change of Confederation the focus.

Lessons from Prince Edward Island

Following the lead of Canada, Prince Edward Island began its own experimentation in institutional redesign. The first change they made was that the assembly was increased to four dual member constituencies in each of the province's three counties.⁹⁷ There was a property qualification on candidates, that they own property worth at least £50; and to vote one need to be a male over the age of 21 in possession of property worth at least 40s in the riding for at least 12 months.⁹⁸

For the upper chamber, the government and lower chamber of the legislature proposed election, with half the number of councillors as lower house assemblymen: six dual-member districts with an additional councillor from Charlottetown, elected for fixed terms of eight years, staggered so half the councillors were elected every four years. To serve as a councillor one would have to be at least 30 years of age and possess at least £600 of land in the district in which one was elected. The change would be grandfathered so as not to impact on the current life councillors.

⁹⁶ The Rouge-Grit government of Dorion and Brown lasted just two days.

⁹⁷ *An Act to increase the number of Members to serve in the General Assembly and to consolidate and amend the Laws relating to Elections, 1856.*

⁹⁸ You could cast ballots in more than one riding, providing you met the property qualification, and the property could be co-tenancy, so male children could vote, provided the value of the property subdivided met the minimum threshold of 40s.

By the time the proposal made its way to London, the colonial office was having doubts about the model adopted by the Province of Canada. Its formal response was that: (i) the proposed change had been done in Canada and elsewhere so was constitutionally sound; (ii) the fixed terms and staggered election would preserve the role of the chamber as a check on "any popular or governmental influence"; (iii) the current councillors could be removed in favour of the elected chamber as they had only been given the trust of the Crown which could be withdrawn by the Queen at any time; and (iv) electors should be the holders of property rather than the councillors, as an upper chamber is to "represent not only the settled principles, and what on a large scale is called the traditionary policy of the country, but also, to a certain extent, its property, experience and education".⁹⁹ In support of this last point, the colonial secretary wrote:

"Speaking broadly, a well-chosen constituency will choose a good representative, and any limitation upon its choice can only operate by occasionally preventing them from choosing the best. An ill-chosen constituency, on the contrary, will tend to choose an indifferent representative. But this tendency will not be controlled by any property qualification, which can never be so stringent as to prevent their finding within the prescribed limits some man as they may desire".¹⁰⁰

The evidence from the Province of Canada was that too many restrictions on who could stand as a candidate severely limited the talent pool. The focus should be on making workable ridings and, in this era, tying voting to property ownership was believed to ensure the best voters as these stakeholders (i) had a material interest in the success of the community and (ii) a greater capacity to make informed decisions due to life skills and education.

The *despatch* from the colonial secretary was laid before each chamber, and the assembly reworked its Bill to reflect its input, setting the property qualification to vote for a councillor at £100 of property, councillors would have to be at least 30 years and

⁹⁹ *Despatch* from Newcastle to Dundas (February 4, 1862).

¹⁰⁰ *Ibid.*

resident in the province for five years. The Bill was given Royal Assent on April 18, 1862.¹⁰¹ Thus Prince Edward Island had two entirely elected chambers when it joined Confederation in 1873.

Elected upper chambers feel empowered to amend and defeat government legislation, as they lay claim to their own mandate. The additional problem for Prince Edward Island was that the province was very small. Provinces were seen to have limited tax capacity; the federal government having been given indirect taxation at Confederation, which was the bulk of government revenue in this era, and while PEI had been forced to impose direct taxation, this was very unpopular. Bicameralism was not only a difficult legislative structure with two competing elected chambers, it was an expensive one.

By the 1879 election, the Liberal-Conservative party was running on a platform of cutting government expenses as a means of balancing the budget while eliminating direct taxation. The promise of eliminating taxes resulted in them winning 24 of the 30 seats in the lower chamber.¹⁰² Part of the promised government cuts was to be the abolition of the upper chamber.¹⁰³ After summoning the legislature, the government introduced a Bill that would have abolished the Council, and raised the property qualification for assemblymen to \$600 and the residency requirement for voters to five years.¹⁰⁴

This inflamed an already confrontational relationship between the House of Assembly and the Legislative Council. As an alternative, the Council proposed reducing the number of members of the lower chamber and offered to reduce their own ranks as well and combine their deliberations in a single chamber to eliminate duplication of printing and administration.

¹⁰¹ P.E.I. *Journals of the House of Assembly of Prince Edward Island* (April 17, 1862). The legislation was entitled *An Act to change the Constitution of the Legislative Council, by rendering the same Elective*.

¹⁰² Nancy MacNeill MacBeath, "Sir William Wilfred Sullivan", *Dictionary of Canadian Biography Online* (Toronto: University of Toronto Press and Université de Laval, 2000).

¹⁰³ MHA Yeo, *Debates of the House of Assembly of Prime Edward Island* (March 17, 1880).

¹⁰⁴ *Journals of the Legislative Assembly* (1979).

There was no willingness on the part of government, the opposition and the upper chamber to compromise. Bills and motions went back and forth between the two chambers for the next decade. But as the upper chamber could claim to have a mandate from the people and an independent function, that of representing the landowners, it was intransigent; and so was the government, claiming it had a mandate to govern and had the support of the majority of the people's representatives ensconced in the lower chamber.

It is noteworthy and relevant that both elected assemblymen and elected councillors claimed to have a mandate for their specific solutions to the legislature's design flaw, having consulted with their constituents both via election and through town halls.

When the Liberal government came to power, it took several tries, but it was able to get the legislature to ratify the *Act respecting the Legislature* in 1893, which was essentially the upper chamber's plan. The Legislative Assembly would consist of 15 dual member constituencies, half elected using the property qualification of \$325 of freehold or leasehold property and half elected by men who were British citizens, having attained the minimum age of 21 and who owned or occupied property in the riding worth \$6 a year. Property owners could vote in more than one riding if they owned property in that riding. To be a candidate for either councillor or assemblyman one need only be at least 21 years of age and male. Councillors would campaign against each other in the riding, as would assemblymen, and the winner need only get a plurality of votes. The Bill passed the council on April 19 and received Royal Assent the next day.¹⁰⁵

Merging the two chambers into a single chamber eliminated the inter-chamber conflict. While it marks the end of bicameralism, this was not abolition, as both assemblymen and councillors continued to be elected, the former by universal male suffrage and the latter by property owners as before.

¹⁰⁵ *Journals of the Legislative Council of Prince Edward Island* (1893).

It took until 1963 for the property qualification to vote to be eliminated.¹⁰⁶ By then, property ownership was no longer the dominant cleavage in the province, which had become a religious Catholic-Protestant divide. As the province was evenly split between the two groups, and there were two representatives elected in each riding – an assemblyman and a councillor – the practice had emerged where the political parties ran Catholic against Catholic and Protestant against Protestant to ensure dual religious representation in the legislature. When the property qualification was eliminated, the distinction between assemblyman and councillor was maintained so as to permit this practice to continue.

It is noteworthy and relevant that the same political party would usually win both seats in a riding, even when there was a more restrictive property qualification to vote for the councillor position.

It would take until 1996, in response to changing demographics of the province and a decline in religiosity which had seen political parties stop the practice of using the councillor and assemblyman positions to provide religious balance, for the province to move from dual- to single- member constituencies, eliminating the title councillor in the process.

One of the key differences between the upper chambers in the province of Canada and the province of P.E.I. is the property requirement to serve in the former body. For Canada, this limited the pool of available candidates beyond the limitations imposed by dramatically larger ridings and the lack of career advancement. The different tack taken by Prince Edward Island did more than facilitate more candidates; it also created a direct representational role for councillors. In the Legislative Council of Canada, a councillor could only lay claim to being landed gentry, a representational role that even in its era was losing legitimacy. In the Legislative Council of Prince Edward Island, the councillor was a representative of Islanders who owned property. Given the province's

¹⁰⁶ *Elections Act, 1963.*

history with absentee landlords, property ownership was not simply a symbol of social class but a rite of passage into the provincial dream. For the increasing number of people who were able to acquire previously undeveloped or tenured land, having separate representation was so central to the province's founding myth that no one could question the need for separate representation until well into the 1960s (in spite of public distain for the fact that some people could cast multiple votes due to the ownership of property in multiple ridings).

The other key difference was the presence of life councillors. In Canada, this moderated the behaviour of the elected councillors and facilitated the passage of government legislation. While both upper chambers became emboldened when compared to their appointed predecessors, the fully elected PEI Council, with an alternative representational role, was much more so. Had the province not merged the two chambers, it is likely that there would have been continued gridlock. And, of course, had the opposition parties become the government in Canada, their Legislative Council would have been found to be equally obstructionist.

C) Question 3: The effects of the consultative electoral mechanism provided for in Bill C-7 on the institutional dynamics in the federal Parliament.

1) Strong or Weak Second Chambers and its Impact on Institutional Dynamics

In terms of institutional dynamics, second chambers are usually considered to be junior bodies to the first.¹⁰⁷ The reason there are so few 'strong' upper chambers is because it

¹⁰⁷ L. Massicotte, "Legislative Unicameralism: A Global Survey and a Few Case Studies" in Baldwin and Shell 2001.

is believed by many that one body needs to be senior so as to prevent gridlock over legislation. When polities have opted for strong upper chambers, they usually constitutionally entrench dispute resolution mechanisms.

In a parliamentary system, due to the executive branch's need to be chosen by and continually accountable to the legislature, one chamber needs to be central to determining confidence. This is, with the one exception noted above, always the first chamber, due to its representational design based on population. In the first instance this chamber acts as an electoral college and determines which political party, or group of parties in coalition, have the confidence of the majority in the chamber. And in the next instances it regularly expresses its confidence or lack thereof by voting on the government's legislation or on motions that specifically affirm or deny its confidence in the government.

Upper chambers are made weak by several mechanisms. In some cases it is by giving them few powers relative to the first chamber. In these instances the second chamber's role becomes that of a 'voice' for particular groups or viewpoints that were ignored by the government and the first chamber with respect to legislation, policy or the particular situation of the group.¹⁰⁸ This is a useful role in a democracy and one which the Canadian Senate as currently configured does well. This is not a role strong second chambers are inclined to fulfill.

In most instances, there is a constitutional limitation on the second chamber's powers, either through the identification of specific areas where its concurrence is not required or a time limitation on its capacity to amend or delay legislation. In a few instances, the choice has been to make the body appointed or partially appointed, in part, so as to limit the extent to which it will exercise its powers. In bodies that fall into these categories, the role of the upper chamber will be focused on the review and improvement of

¹⁰⁸ Hirschmann 1970.

legislation or the undertaking of broad policy studies. These are roles the Senate as currently configured also does well. The former is not a role strong second chambers are able to fulfill, as the stronger the body the more partisan it will become. Whether a strong upper chamber undertakes extensive policy studies will depend on its committee structure and legislative agenda, though any elected body will be disinclined to court controversy.

The partisanship that a strong upper chamber takes on will be an artifact of its method of selection. It is a role that the leadership of the political parties in the lower chamber ensure comes into play as, on the government-side, the desire is to see its legislation make it through the upper chamber unaltered and, on the opposition side, the motivation is the opposite due to ideological differences or electoral positioning.

In elected second chambers, members will cede control to the party leadership because of common legislative, policy and electoral goals and to curry favour with the leadership out of a sense of debt for having obtained office or a desire for advancement as party leaders often control or can influence appointments (from committees to Cabinet), nominations, fundraising and other perquisites. Depending on the electoral system used, the degree that this occurs and to which leadership decision making is ceded – party leadership in the senate, party leadership in the lower house, national party leadership or provincial party leadership – will vary. In fact, to vary just this sort of control is central to the debate over which electoral system to use for each chamber, when to time elections, length of term and what political parties should be permitted to field candidates.

Canadian Senate Acquiescence

The Canadian Senate has long been considered a weak upper chamber by scholars.¹⁰⁹ Yet it has almost identical constitutional powers to the House of Commons for ordinary

¹⁰⁹ C.E.S. Franks, "Not Dead Yet, But Should it be Resurrected?" in Patterson and Mughan 1999.

legislation with the modest restriction that money bills must originate in the lower chamber at the behest of the government and the Senate cannot increase (only reduce) amounts.¹¹⁰ It is only the perceived lack of legitimacy of this upper chamber, in both the public and in its own members' minds, that has prevented its regular use of these powers.

While the method of selection has prevented the Senate from using its powers; another factor that is key to understanding when upper chambers will be willing to use their powers is political party alignment: if the same party dominates both chambers, the party leadership will use organizational control to prevent its members in either chamber from altering legislation; if different parties control each chamber then the second chamber will be more likely to use its powers to impede the lower chamber/government's legislative agenda.¹¹¹ Where method of selection makes an important difference is in how unrestrained members feel they are by their own party's leadership.

Appointed upper chambers will use their powers when controlled by a different political party, but not to the degree and not with the frequency as elected chambers. Appointed chambers can be expected to back down in the end in most cases. Only when the members of the appointed second chamber are convinced that public opinion is squarely on their side will they refuse to back down and, even then, the mechanism to override an appointed second chamber, if none is provided for in the constitution, is the lower chamber going to the electorate and obtaining a mandate with respect to the issue in question, something the upper chamber cannot do.

¹¹⁰ It only has a suspensive veto on constitutional amendments which require provincial legislative concurrence.

¹¹¹ R. Scully, "Dealing with Big Brother: Relations with the First Chamber", in Baldwin and Shell 2001.

Examples of Parliamentary Disagreement and Resolution

In the mid-1980s, when the Progressive Conservative Party had large majorities in the House of Commons and used these to undertake a series of changes to government programs, the second chamber which was dominated by the Liberals, many of whom had been members of the government which had established these programs, repeatedly challenged the government. This was in spite of the self-imposed constraint that lack of legitimacy had fostered in these senators.

While the Mulroney government was frustrated in its legislative agenda, it was not thwarted. In the end, it achieved all of its legislative goals by the upper chamber backing down with two exceptions. The first was the Canada-U.S. Free Trade Agreement in 1988, where the upper chamber insisted that such a fundamental change needed to be settled through an election, which the Prime Minister had the Governor General call. The government was already in the fourth year of its mandate, so even absent the need for a mandate for this significant governmental initiative it would have had to face the electorate within the year. In that election it won a majority in the first chamber and the second chamber immediately ratified the treaty when it was presented again (as the only item in the first session of that parliament). The second was the Goods and Services Tax, on which the upper chamber also demanded an election be called, the chamber's objections being silenced by the appointment of additional Progressive Conservative Senators.¹¹²

Canadian Senate During Transition to Election

An elected upper house is a much different body than an appointed one. Obviously election empowers members as individuals. Collectively, it gives the body legitimacy and this enables the chamber to use the full range of powers constitutionally available to them.

¹¹² Frith 1991.

Bill C-7 does more than simply introduce an elected element to the upper chamber. It reduces the term of senators. So there are actually three types of Senators who will be serving in the chamber and each will contribute differently to institutional behaviour. As their relative balance shifts, the institutional dynamics of the federal parliament will change.

First, there are the pre-2008 Senators, who were appointed until age 75 and have been conditioned by their membership in the Canadian Senate, many of whom satisfy themselves with the traditional roles of weak second chambers such as giving voice to ignored groups and causes, revising and improving the details of legislation and engaging in policy studies. Second, there are the Senators who are subject to the shorter term limit of Bill C-7. Third, there are the elected Senators.

The first Alberta Senators were Reform Party advocates for Triple-E Senate and this was their primary if not sole interest. This limited mandate and the fact that they were unique in the body meant they had little impact on the chamber. The more recent appointments, including the three just elected in Alberta, come with the belief that they have received a mandate. During the most recent Alberta campaign all the candidates made policy promises, among the ones made by the winning Progressive Conservatives to be appointed during the next few years were increased natural resource production/export and fewer federal regulations, especially in the area of the environment. As individuals, they can be expected to act as though they have a mandate to obtain their election promises. Though being few in number and by joining the Conservative government's political party, they will have little impact on the chamber's behaviour.

As the number of elected Senators increases, with other provinces holding elections, the chamber's behaviour will shift. Once a critical mass of elected Senators is introduced, the Senate can be expected to start to behave as a strong second chamber and begin to use the full extent of its powers when, and if, the majority disagrees with legislation coming from the House of Commons.

There will be a period of legislative unpredictability. Any fundamental change to a legislature, such as changing the method of selection of its members, requires some time for the institution to adapt. For example, when New Zealand changed its lower chamber to proportional representation in 1996, which means that no single political party is likely ever to have a majority, it experienced tumultuous parliaments and short-lived unstable governments before the political parties learned how to work within the new institutional dynamics. And that was with the help of a Governor General who was a former appeal's court judge guiding them (and the public) through the constitutional conventions and actively mediating discussions in support of government formation. Since 2000 they have found their legs with the new system, and their example has even led Australia and the United Kingdom to make improvements in how responsible parliamentary government should operate.¹¹³

At some point, elections will make the party configurations in the two chambers of the Canadian Parliament divergent. If the multi-member plurality system delivers the most Senators to the Conservatives across provinces, then a change in government brought about through the lower chamber will put the two chambers at odds.

2) Dispute Resolution

Unlike Australia, there is no capacity in Canada to dissolve the upper chamber so as to trigger new elections. The only constitutional provision for dispute resolution is section 26 of the *Constitution Act, 1867*, which allows for the appointment of an additional four or eight senators from each of the four divisions in the Senate: Maritimes, Quebec, Ontario and the West. Once the Senators have been appointed, pursuant to s.27, no new appointment (or election) can be held in the division until the number of Senators returns through attrition to below 24.

¹¹³ Hicks 2012b.

The Fathers of Confederation specifically requested that only the Queen authorize use of this clause over the objections of the British Government. It was intended to be used only if “a difference had arisen between the two Houses of so serious and permanent a character, that the Government could not be carried on without [the Queen’s] intervention, and when it could be shown that the limited creation of Senators allowed by the Act would apply an adequate remedy”, as Liberal Prime Minister Alexander Mackenzie was told in 1874 by the Crown’s legal officers when he asked to appoint additional senators to lessen the Conservative majority in that chamber accrued since Confederation.¹¹⁴ Both Laurier and Borden considered trying to access this clause, but decided against since the two part test for its use had not been met. Yet this clause was used with surprising ease by Prime Minister Mulroney in 1990 to get one piece of legislation, the Goods and Services Tax, adopted.

The reason Mulroney could access this clause with ease is that the role of the Monarch has changed.¹¹⁵ As a result, there is no longer an arbiter to mediate between the Commons and Senate.¹¹⁶ This clause is now a simple override mechanism for the party in the majority in the lower chamber to alter the number of seats it has in the upper chamber.

The paradox of this clause and the introduction of elected senators into the appointed upper chamber is that: governments will be inclined to use these rare appointment powers in direct proportion to the increase of elected members that thwart its legislative agenda; just as public disapproval over ‘stacking’ the Senate will increase in direct proportion to the increase in the number of elected senators.

¹¹⁴ *Despatch* from Lord Kimberley printed in the *Journals* of the Senate of Canada (1877), p. 77.

¹¹⁵ Hicks 2010b.

¹¹⁶ Dunsmuir 1990.

3) Other Impacts and Unintended Consequences

The balance in Cabinet will also be altered by the change in institutional dynamics. Currently, there are few appointments from the upper chamber. Most recently, the Canadian practice is to only appoint one (the leader of the government in the Senate), but in the past the chamber has been used to allow for provincial representation at the Cabinet table from a province where the government does not have any members in the lower chamber. As the lower house is the chamber of confidence, a prime minister will still want to offer these positions to people in the lower chamber so as to ensure his control of this chamber, on the one hand, and the Commons will want this to continue so as to ensure government accountability, on the other. But with an elected element in the upper chamber, the Prime Minister will need to offer some enticements and ensure leadership and party cohesion in the upper chamber.

Introducing election will alter the work that the Senate does. A partially or wholly elected second chamber will be much more partisan. It will cease being a chamber of sober second thought. It will also become less useful for governments to fix their own legislation that they whipped through the Commons over the objections of the opposition. Upper chamber votes will need to be whipped as well once there are elected senators, and the media attention that these senators will attract will make amendment in this chamber equally appear to be admission of error or defeat (the reason government are reluctant to accept opposition amendments in the Commons).

Finally, it is worth considering the impact of an elected second chamber on intergovernmental relations within a federation. This has been a point of much speculation. Debate over proposals to shift the Canadian Senate from being one appointed federally to one appointed by the provincial governments was characterized by the federal government as something that would decentralize the federation; where this model was seen by the Government of Quebec as likely to centralize the federation as intra-governmental relations became a role for the upper chamber lessening the role

of intergovernmental negotiation.¹¹⁷ Not surprisingly, debate over an elected Senate has also been characterized as having both centralizing and decentralizing tendencies, the latter particularly if bicameralism does not also exist at the provincial level.¹¹⁸ Even the Canada West Foundation, which first advocated Triple-E with provincially elected Senators as a way to restrain federal government power, is now warning of unintended consequences including centralization and bigger government.¹¹⁹

While elected upper chambers do not normally contribute to intra-state federalism, given the electoral mechanism contained in Bill C-7, some provincial political party leaders (and their governments) are likely to gain influence over the senators from their party in the provinces which hold elections. It will increase the number of players who have vetoes over federal legislation and thus phenomena associated with multiple vetoes, like government instability and greater independence of the bureaucracy and the judiciary.¹²⁰

All institutional change will have unintended consequences. What will be key to both its impact on the federal institutional dynamics and on federal-provincial balance is the diversity of *federal* political party interests in the chamber, the level of *federal* party cohesion or discipline and the number of seats in total the government has in the chamber. While these candidates run under the banners of *provincial* parties, the leadership of the federal parties in the lower chamber will work to draw these senators into their caucuses.

In opposition, provincial party leaders who were instrumental in getting the Senators elected will strive to exert control, even when they are no longer the provincial government, since different Senators from a province will be elected along with different provincial governments. In some provinces money plays a much greater influence in

¹¹⁷ Smith 2003.

¹¹⁸ Smiley 1985.

¹¹⁹ Gibson 2004, p. 3.

¹²⁰ Tsebelis 2003, p. 143; see also Tsebelis and Money 1997.

politics than in others so some will be more open to non-governmental influence. As the Senate terms are not fixed to some cycle as they are in other countries (e.g. half or one-third elected alongside their lower chamber counterparts), there will be no common election issues for Senators across provinces that could form a basis for caucus unity. The result could be a dysfunctional chamber that remains so well beyond the expected transition period learning curve while political actors come to terms with a new system and a new institutional dynamics.

General Conclusion: Significant Change in the System of Governance

Canada's experience prior to Confederation was that it is hard to attract good candidates to run for their elected upper chamber. Upper chamber ridings are bigger than those used for the lower chamber. Responsible government requires that the government be accountable to and have the confidence of the lower chamber. So, while senators can be Cabinet ministers, the practice over time has been to only appoint one senator to the Cabinet. People with ambition and talent would and did choose to run in the smaller ridings of the lower chamber which were less expensive to campaign in, easier to represent when elected and held the possibility for advancement into the ministry. So the first impact of Bill C-7 will be on the type of senator who will be elected to the upper chamber.

The proposed Bill would allow senators to only serve one nine-year term. Under Bill C-7, candidates will have to run a province-wide campaign. Even if a province was permitted to use electoral divisions by an amendment to Bill C-7, only in the case of P.E.I., New Brunswick and the three territories would these ridings be the same size as for the House of Commons.¹²¹ In all other provinces, a Senate riding would be bigger and some dramatically so. In the case of Ontario, were the province to use ridings for its senators, a Senate riding would be 20 times the size of a House of Commons riding.

¹²¹ This is because the provinces have a constitutional guarantee of no fewer seats in the Commons than in the Senate and the territories have only been given one seat each in both chambers.

And if Ontario did not use ridings but had candidates run province-wide as is required by Bill C-7, the candidate would have to run a campaign similar to the provincial premier's campaign, with national media buys and cross-province tours, just to get noticed.

Getting noticed is made all the more challenging because the Senate elections are to be held at the same time as a provincial or municipal election. Obviously provincial and municipal issues will dominate during these campaigns, at least until the Senate emerges in the public psyche as a major institutional player, so candidates will have to work harder to make voters aware of the Senate election, and to inform them of the federal issues and their positions. If Senate election campaigns are not big (which means expensive), they will be subsumed by the provincial or municipal campaign taking place at the same time.

With no incumbency, there will be little capacity to build party campaign infrastructure for Senate elections and the larger ridings will make it difficult to co-ordinate with the party's provincial riding associations to share theirs. Aside from the NDP, the provincial political parties have little or no relation to the federal parties. And, of course, if the vote is held at the same time as municipal elections there are usually no political parties municipally and, if there are, they usually have no relation to provincial political parties.

Therefore, given the multi-member plurality electoral system, it can be expected that most if not all of the seats being contested at any one time will be won by the same political party: the most popular provincial political party (i.e. the party that wins the provincial election if the vote is held during that election).

Once a critical mass of elected Senators has been chosen through consultative elections, the currently weak Canadian Senate will transform into a strong second chamber. Most strong second chambers have a mechanism to resolve disputes between the chambers. The only dispute resolution currently provided for is s.26 of the *Constitution Act, 1867* which allows for the appointment of additional senators so as to break an impasse. It is possible public pressure will restrain its use if Canadians become supportive of the elective nature of the institution.

If the public becomes supportive of the elective element, other provinces will come under pressure to adopt consultative election legislation. To date, five provinces have expressed a willingness to hold these consultative elections. As for the two largest provinces, which account for 46 percent of the Senate seats, while the Liberal Party of Ontario has rejected on principle the process outlined in Bill C-7, the same is not true for the Progressive Conservative Party of Ontario. One can realistically imagine a scenario where Quebec is the one outlier with federally appointed Senators in a body that is entirely elected outside of Quebec.

Consultative elections will have a number of consequences for constitutional conventions surrounding appointment to the Senate. For example, Eugene Forsey noted that a Governor General should reject a Senate appointment, pursuant to the caretaker convention, if a government, defeated in the House or stripped of its majority at the polls, tried to fill Senate vacancies before another party took the reins of power.¹²² But if the individual being appointed had been chosen by the voters in a legislatively mandated consultative election, the Prime Minister would be freed from this convention and the Governor General would feel obliged to accept the recommended appointments.

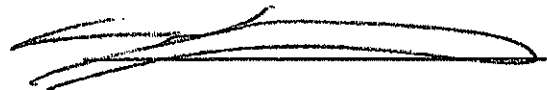
If Quebec were to hold elections, the guarantee of minority Senate representation that was enshrined in the Constitution by the requirement that a Quebec Senator hold

¹²² Forsey 1946.

property or be resident in one of 24 ridings that covered Quebec's territory at the time of Confederation would no longer apply. Given the province's provincial politics, it is unlikely that the minority communities now given representation will get nominated as party candidates and, if they do, it is unlikely they would get elected in a province-wide vote. It will equally eliminate the appointment of linguistic minority senators from Nova Scotia, Manitoba and Alberta and First Nations outside of the territories, and probably reduce the Acadian representation from New Brunswick.

The institutional dynamics will change with the introduction of appointed term senators and, especially, elected senators. Senators who are elected will claim to have a mandate, in general, due to election and, in specific, due to their campaign promises. At the individual-level their behaviour will be different than appointed senators.

As the proportion of Senators who are elected increases, the institution as a whole will begin to behave like an elected body and start to make use of its full legislative powers. While this is not likely to be a problem if the same party has a majority in both chambers, the result of a divergence in party control between the two chambers is endless bargaining and legislative gridlock. While democratic theory would support this change because it introduces much needed checks and balances at the federal-level; which is prescribed by the federal principle of divided government, it is nevertheless significant a change.

A handwritten signature in black ink, consisting of several overlapping, fluid strokes that form a cursive representation of the name Bruce M. Hicks.

Bruce M. Hicks, Ph.D.

SELECTED BIBLIOGRAPHY

- Achen, C. 1992. "Social Psychology, Demographic Variables, and Linear Regression: Breaking the Iron Triangle in Voting Research", *Political Behaviour* 14, pp. 195-211.
- Baldwin, N.D.J. and D. Shell (eds.). 2001. *Second Chambers*. Abingdon: Frank Cass and Company Limited.
- Banzhaf, J.F. 1966. "Multi-Member Districts: Do they Violate the 'One Man, One Vote' Principle", *The Yale Law Journal* 75 (8), pp. 1309-1338
- Berelson, B., P. Lazarsfeld and W. McPhee, 1986. *Voting: A Study of Opinion Formation in a Presidential Campaign*. Chicago: University of Chicago Press.
- Blais, A. 1988. "The Classification of Electoral Systems." *European Journal of Political Research* 16.
- _____, and R.K. Carty. 1988 "The Effectiveness of the Pluralist Rule", *British Journal of Political Science* 18 (1), pp. 550-553.
- _____, A. Dobrzynska and I.H. Indridason. 2004. "To Adopt or Not to Adopt Proportional Representation: The Politics of Institutional Choice", *British Journal of Political Science* 35 (1), pp. 182-190.
- Bogdanor, V. and D. Butler (eds.). 1983. *Democracy and Elections*. Cambridge: Cambridge University Press.
- Brint, S. 1984. "'New-class' and Cumulative Trend Explanations of the Liberal Political Attitudes of Professionals", *American Journal of Sociology* 90, pp. 30-71.
- Burke, E. 1790. Frank M. Turner (ed.), *Reflections on the Revolution in France*. New Haven: Yale University Press (2003 edition).
- Butler, D. and D.E. Stokes. 1974. *Political Change in Britain: The Evolution of Electoral Choice*. London: Macmillan Publishing.
- Cairns, A. 1968. "The Electoral System and the Party System in Canada, 1921-1965", *Canadian Journal of Political Science* 1 (1), pp. 55-80.
- Campbell, A., P.E. Converse, W.E. Miller and D.E. Stokes. 1960. *The American Voter*. New York: John Wiley & Sons.
- Coakley, J. and M. Laver. 1997. "Options for the Future of Seanad Éireann" in *The All-Party Oireachtas Committee on the Constitution, Second Progress Report: Seanad Éireann*. Dublin: Government of Ireland.
- Connor v. Johnson*, 402 U.S. 690 [1971].
- Dahl, R.A. and E.R. Tufte. 1973. *Size and Democracy*. Stanford: Stanford University Press.
- Druckman, J.N. and M.F. Thies. 2002. "The Importance of Concurrence: The Impact of Bicameralism on Government Formation and Direction", *American Journal of Political Science* 46(4), pp. 760-771.
- Dunn, C. (ed.). 2008. *Provinces: Canadian Provincial Politics*. Toronto: University of Toronto Press.
- Dunsmuir, M. 1990. "The Senate: Appointments under Section 26 of the Constitution Act, 1867", *Library of Parliament Research Paper* BP-244E.
- Elections Canada. June 27, 2012. *Compendium of Election Administration in Canada: A Comparative Overview*. Ottawa: Office of the Chief Electoral Officer of Canada.

- Erikson, R.S. 1972. "Malapportionment, Gerrymandering, and Party Fortunes in Congressional Elections", *The American Political Science Review* 66 (4), pp. 1234-45.
- Evans (ed.). 1999. *The End of Class Politics: Class Voting in Comparative Context*. Oxford: Oxford University Press.
- Evatt, H.V. 1967. *The King and His Dominion Governors: A Study of the Reserve Powers of the Crown in Great Britain and the Dominions*. Second edition ed. London: Frank Cass & Co. Ltd.
- Ferejohn, J. and J.H. Kuklinski (eds.). 1990. *Information and Democratic Processes*. Champagne: University of Illinois Press.
- Forsey, E. 1946. "Appointment of Extra Senators under Section 26 of the British North America Act", *Canadian Journal of Economics and Political Science* 12 (2), pp. 159-167.
- Frith, R. 1991. *Hoods on the Hill: How Mulroney and His Mob Rammed the GST Past Parliament and Down Our Throats*. Toronto: Coach House Press.
- Gibbins, R. and R. Roach. 2010. *A New Senate for a More Democratic Canada*. Calgary: Canada West Foundation.
- Gibson, G. 2004. "Challenges in Senate Reform: Conflicts of Interest, Unintended Consequences, New Possibilities", *Fraser Institute's Public Policy Sources* 83, p. 3.
- Hacker, A. 1963. *Congressional Districting*. Washington: The Brookings Institute.
- Heller, W.B. 1997. "Bicameralism and Budget Deficits: The Effect of Parliamentary Structure on Government Spending", *Legislative Studies Quarterly* 22 (4), pp. 485-516.
- Hicks, B.M. 2007. "Can a Middle Ground be Found on Senate Numbers", *Constitutional Forum* 16(1), pp. 21-39
- _____. 2010a. "British and Canadian Experience with the Royal Prerogative", *Canadian Parliamentary Review* 33 (2), pp. 18-24
- _____. 2010b. "The Crown's 'Democratic' Reserve Powers", *Journal of Canadian Studies* 44 (2), pp. 5-31.
- _____. 2012a. "The Westminster Approach to Prorogation, Dissolution and Fixed Date Elections", *Canadian Parliamentary Review* 35 (2), pp. 20-27.
- _____. 2012b. "Lessons in Democracy from Australia: From Coalition Government to Parliamentary Privilege", *Canadian Parliamentary Review* 35 (4), pp. 25-36.
- _____. 2013. "Advice to the Minister of Democratic Reform", *Constitutional Forum* [forthcoming].
- _____. and A. Blais. 2008. "Restructuring the Canadian Senate through Elections", *IRPP Choices* 14 (14).
- Hirschmann, A. 1970. *Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations and States*. Cambridge: Harvard University Press.
- Jackson, R. 1995. "Executive-Legislative Relations in Australia", *Political Theory Newsletter* 7, pp. 1-18.
- Joyal, S. (ed.). *Protecting Canadian Democracy: The Senate You Never Knew*. Montreal: Canadian Senate for Management Development.
- Katz, R.S. 1980. *A Theory of Parties and Electoral Systems*. Baltimore: Johns Hopkins University Press.

- Kelley, J. and M.D.R. Evans. 1995. "Class and Class Conflict in Six Western Democracies", *American Journal of Sociology* 83, pp. 386-402.
- Lazarsfeld, P., B. Berelson and H. Gaudet. 1944. *The People's Choice*. New York: Columbia University Press.
- LeDuc, L., R.G. Niemi and P. Norris (eds.). 2002. *Comparing Democracies 2: New Challenges in the Study of Elections and Voting*. London: Sage Publications.
- Legislative Assembly of Manitoba. 2009. *Report of the Special Committee on Senate Reform*.
- Lijphart, A. 1994. *Electoral Systems and Party Democracy*. Oxford: Oxford University Press.
- _____. 1999. *Patterns of Democracy*. New Haven: Yale University Press.
- _____. and B. Grofman (eds.). 1986. *Choosing an Electoral System* (New York: Praeger).
- Lipset, S.M. and S. Rokkan (eds.). 1967. *Party Systems and Voter Alignments: Cross National Perspectives*. New York: Free Press.
- Madison, J. 1787 in C. Rossiter (ed.). *The Federalist Papers*. New York: Mentor (1961 edition).
- March, J.G. 1957. "Party Legislative Representation as a Function of Election Results", *Public Opinion Quarterly* 21, pp. 521-542.
- Mastias, J. and J. Grangé. 1987. *Les secondes chambres du Parlement en Europe Occidentale*. Paris: Economica.
- Martin, P. 1997. *Les systèmes électoraux et les modes de scrutiny*. Paris: Montchrestien.
- McCormick, P., E. Manning and G. Gibson, *Regional Representation: The Canadian Partnership*. Calgary: Canada West Foundation.
- Miller, W.E. and J.M. Shanks. 1982. "Policy Directions and Presidential Leadership: An Alternative Interpretations of the 1980 Presidential Election", *British Journal of Political Science* 12, pp. 299-356.
- _____. 1996. *The New American Voter*. Cambridge: Harvard University Press.
- Mobile v. Bolden*, 446 U.S. 55 [1980].
- Norris, P. 1997. "Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems", *International Political Science Review* 18(3), pp. 297-312.
- Olson, D.M. 1994. *Democratic Legislative Institutions: A Comparative View*. Armonk: M.E. Sharpe.
- Pal, M. and S. Choudhry. 2007. "Is Every Ballot Equal? Visible-minority Vote Dilution in Canada", *IRPP Policy Choices* 13 (1).
- Patterson, S.C. and A. Mughan. 1999. *Senates: Bicameralism in the Contemporary World*. Columbus: Ohio State University Press.
- Pitkin, H. 1967. *The Concept of Representation*. Berkeley: University of California Press.
- Rae, D.W. 1967. *The Political Consequences of Electoral Laws*. New Haven: Yale University Press.
- Report of the Alberta Select Special Committee on Upper House Reform. 1985. *Strengthening Canada, Reform of Canada's Senate*. Edmonton: Legislature of Alberta.
- Reynolds, A. and B. Reilly. 1997. *The International IDEA Handbook of Electoral System*

- Design*. Stockholm: International Institute for Democracy and Electoral Assistance.
- Reynolds v. Sims*, 377 U.S. 533, 563 [1964]
- Rhodes, R.A.W., Sarah A. Binder and Bert A. Rockman (eds.). 2006. *The Oxford Handbook of Political Institutions*. Oxford: Oxford University Press.
- Rivers, D. 1991. "Heterogeneity in Models of Electoral Choice", *American Journal of Political Science* 35, pp. 737-757
- Rose, R. (ed.). 2000. *International Encyclopedia of Elections*. Washington: Congressional Quarterly.
- Rule, W. and J.F. Zimmerman (eds.). 1992. *United States Electoral Systems: Their Impact on Women and Minorities*. New York: Praeger.
- Russell, M. 2000. *Reforming the House of Lords: Lessons from Overseas*. Oxford: Oxford University Press.
- _____. 2001. "What are Second Chambers for?", *Parliamentary Affairs* 54(3), pp. 442-58.
- Schwartz, S. and S. Huismans. 1995. "Value Priorities and Religiosity in Four Western Religions", *Social Psychology Quarterly* 58: 88-107.
- Searing, D.D. 1995. "The Psychology of Political Authority: A Causal Mechanism of Political Learning through Persuasion and Manipulation", *Political Psychology* 18(4), pp. 677-696.
- Senatorial Selection Act* (S.A. 1989, c.S-115).
- Senatorial Selection Act* (S.B.C. 1990, c.70).
- Senatorial Selection Act* (R.S.A. 2000, c.S-5).
- Senate Nominee Election Act* (S.S. 2009, c.S-46.003).
- Shanks, M.J. and W.E. Miller. 1990. "Policy Direction and Performance Evaluations: Complementary Explanations of the Reagan Elections", *British Journal of Political Science* 20, pp. 143-235.
- _____. 1991. "Partisanship, Policy, and Performance: The Reagan Legacy in the 1988 Election", *British Journal of Political Science* 21, pp. 129-197.
- Silva, R.C. 1964. "Compared Values of the Single- and the Multi-Member Legislative District", *The Western Political Quarterly* 17 (3), pp. 504-516.
- Smith, D.E. 2003. *The Canadian Senate in Bicameral Perspective*. Toronto: University of Toronto Press.
- Smiley, D. 1985. *An Elected Senate for Canada? Clues from the Australian Experience*. Kingston: Institute for Intergovernmental Relations.
- Sniderman, P., R. Brody and P.E. Tetlock. 1991. "The Role of Heuristics in Political Reasoning: A Theory Sketch", *Reasoning and Choice: Explorations in Political Psychology*. New York: Cambridge University Press.
- Stewart, D.K. and R.K. Carty, 2006. "Many Political World? Provincial Parties and Party Systems", in C. Dunn (ed.). *Provinces: Canadian Provincial Politics*. Toronto: University of Toronto Press, pp. 97-114.
- Taagepera, R. and M.S. Shugart. 1989. *Seats and Votes: The Effects and Determinants of Electoral Systems*. New Haven: Yale University Press.
- Temperley, H. 1910. *Senates and Upper Chambers*. London: Chapman and Hall Ltd.
- Thornburg v. Gingles*, 478 U.S. 30 [1986].

- Tsebelis, G. 1995. 'Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism', *British Journal of Political Science* 25 (3), pp. 289-325
- _____. 2002. *Veto Players: How Political Institutions Work*. New York: Russell Sage Foundation.
- _____. and J. Money. 1992. "Cicero's Puzzle: Upper House Power in Comparative Perspective", *International Political Science Review* 13 (1)
- _____. and J. Money. 1997. *Bicameralism*. Cambridge: Cambridge University Press.
- Vanneman, R. 1980. "U.S. and British Perceptions of Class", *American Journal of Sociology* 85. pp. 769-790.
- Voting Rights Act of 1965* (42 U.S.C. §§ 1973–1973aa-6).
- Watts, R.L. 1996. *Comparing Federal Systems in the 1990s*. Kingston: Institute of Intergovernmental Relations.
- Weakliem, D.L.. 1991. "The Two Lefts? Occupation and Party Choice in France, Italy, and the Netherlands", *American Journal of Sociology* 96, pp. 1327-1361
- _____. 1993. "Class Consciousness and Political Change: Voting and Political Attitudes in the British Working Class 1964 to 1970", *American Sociological Review* 58, pp. 382-397.
- Welch, S. and D.T. Studlar. 1990. "Multi-Member Districts and the Representation of Women: Evidence from Britain and the United States", *The Journal of Politics* 52 (2), pp.391-412.
- Welch, W. and D.T. Studlar. 1990. "Multi-Member Districts and the Representation of Women: Evidence from Britain and the United States", *Journal of Politics* 52 (2), pp. 391-412.
- White v. Regester*, 412 U.S. 755 [1973].
- WMCA, inc. v. Lomenzo* 377 U.S. 633, 653 [1964].

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Formal rules and institutions of governance (including constitutions, legislatures, governments and federalism) in the developed world, with particular emphasis on Australia, Canada, New Zealand, U.S. and U.K.; and the relationship between social cleavages, partisan politics and institutional change. Priority research fields are comparative politics, Canadian politics and political representation.

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Research: Comparative study of institutions, constitutional rules and the behaviour of political actors: qualitative and quantitative survey research

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- 1992-1997, Bureau Chief and Journalist, Parliamentary Bureau, United Press International (UPI), Ottawa, Ontario.
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- 1983-1984, President, Students' Society of McGill University, Montreal, Quebec.
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Research Contributions

Book Sections

Hicks, B.M. 2012. "The undiscovered province. A modest proposal for First Nations self-government: make all Aboriginal lands the 11th province", in E. Henderson (ed.), *Active Reader*, Toronto: Oxford University Press.

Journal Articles

Hicks, B.M. 2013, "Advice to the Minister of Democratic Renewal: Senate Reform, Constitutional Amendments, Fixed Election Dates and a Cabinet Manual", *Constitutional Forum* 19 (4): Forthcoming.

- Hicks, B.M. 2013, "Language policy without the emotion", *Inroads* 32: 92-99.
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- Hicks, B.M. 2012. "Rehabilitating Constitutional Conventions", *National Journal of Constitutional Law*, 31 (1): 90-101.
- Hicks, B. M. 2012. "The Westminster Approach to Prorogation, Dissolution and Fixed Date Elections", *Canadian Parliamentary Review* 35 (2): 20-27.
- Hicks, B. M. 2010. "The Crown's 'Democratic' Reserve Powers", *Journal of Canadian Studies* 44 (2): 5-31.
- Hicks, B. M. 2010. "Use of Non-Traditional Evidence: A case study using heraldry to examine competing theories for Canada's Confederation", *British Journal of Canadian Studies* 43 (1): 87-117.
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- Hicks, B. M. 2009. "Do Large-N Media Studies Bury the Lead, or Even Miss the Story?", *Canadian Political Science Review* 3 (2): 89-104.
- Hicks, B. M. 2009. "Guiding the Governor General's Prerogatives: Constitutional Convention Versus an Apolitical Decision Rule", *Constitutional Forum* 18 (2): 55-67.
- Hicks, B. M. 2009. "Pro Forma Bills and Parliamentary Independence from the Crown", *Canadian Parliamentary Review* 32 (4): 13-22.
- Hicks, B. M. 2009. "The reserve power as a safeguard for democracy, and other lies my forefathers told me", *Inroads* 25: 60-69.
- Blais, A., Gidengil, E., Fournier, P., Nevitte, N. & Hicks, B.M. 2008. "Measuring Expectations: Comparing Alternative Approaches", *Electoral Studies* 27 (2): 337-343.
- Black, J. H. & Hicks, B.M. 2008. "Electoral Politics and Immigration in Canada: How Does Immigration Matter?" *Journal of International Migration and Integration* 9 (3): 241-267.
- Hicks, B. M. & Blais, A. 2008. "Restructuring the Canadian Senate through Electoral Rules", *Policy Choices* 14 (15).
- Loewen, P. J., Milner, H. & Hicks, B.M. 2008. "Does Compulsory Voting Lead to More Informed and Engaged Citizens? An Experimental Test", *Canadian Journal of Political Science* 14 (3): 655-672.
- Milner, H., Loewen, P., & Hicks, B.M. 2007. "The Paradox of Compulsory Voting: Participation Does Not Equal Political Knowledge", *Policy Matters* 8 (3).
- Hicks, B. M. 2007. "Can there be Equality in Heraldic Symbols?", *Heraldry in Canada* 41 (1-4): 52-62.
- Hicks, B. M. 2007. "Can a middle ground be found on Senate numbers?", *Constitutional Forum* 16 (1): 21-39.
- Hicks, B. M. 2007. "Bilingualism and the Canadian House of Commons: Forty Years after B&B", *Parliamentary Perspectives* 8.
- Black, J. H. & Hicks, B.M. 2006. "Strengthening Canadian Democracy: The Views of Parliamentary Candidates", *Policy Matters* 7 (2).
- Black, J. H. & Hicks, B.M. 2006. "The Views of the Underrepresented: Visible Minority Candidates on Electoral Democracy in Canada", *Electoral Insight* 8 (2): 17-23.

- Hicks, B. M. 2006. "Are Marginalized Communities Disenfranchised? Voter Turnout and Representation in Post-merger Toronto", *IRPP Working Paper* 2006 (3).
- Black, J. H. & Hicks, B.M. 2006. "Visible Minority Candidates in the 2004 Federal Election", *Canadian Parliamentary Review* 29 (2): 26-31.
- Hicks, B.M. 2003. "The Transition to Constitutional Democracy: Judging the Supreme Court on Gay Rights", *Review of Constitutional Studies* 8 (2): 203-227.
- Hicks, B. M. 2002. "The Voters' Tax Credit", *Policy Options* 23 (4): 63-68.
- Hicks, B. M. 2002. "Baton of the Speaker", *Heraldry in Canada* 36 (1): 10-13.
- Hicks, B. M. 2001-2002. "The Baton of the Speaker of the House of Commons", *Canadian Parliamentary Review* 24 (4): 16-18.
- Hicks, B. M. 2001. "Proposal for Arms for the Supreme Court", *Heraldry in Canada* 35 (1): 14-20.
- Hicks, B. M. 2000-2001. "A 'Call to Arms' for the Canadian Parliament", *Canadian Parliamentary Review* 23 (4): 29-32.
- Hicks, B. M. 2000. "Proposal for Arms for the Canadian Parliament", *Heraldry in Canada* 34 (3): 20-24.

Reviews

- Hicks, B.M. 2012. "Samara's Book Shelf: 'Democratizing the Constitution' by Aucoin, Jarvis and Turnbull" available at <http://www.samaracanada.com/samarablog/samara-main-blog/2012/02/02/samara-s-book-shelf-democratizing-the-constitution-by-aucoin-jarvis-and-turnbull>.

Conference Papers

- Hicks, B.M. June 4-6, 2013. "Coalition Government Formation: Lessons for Canada", Canadian Political Science Association (CPSA) Annual Conference (Victoria) [Forthcoming]
- Hicks, B.M. Nov. 7, 2012. "Choosing an Electoral System", Council of Canadian Academies (Ottawa).
- Hicks, B. M. Oct. 11, 2012. "Comparatively and domestically, what do we know about the impact of election on upper chambers?" Bell Chair in Canadian Parliamentary Democracy (Ottawa).
- Hicks, B. M. June 14, 2012. "Comparative analysis of the 'Prerogative Powers of First Ministers'", Canadian Political Science Association (CPSA) Annual Conference (Edmonton).
- Hicks, B.M. June 4, 2012. "How the United Kingdom, Australia and New Zealand have defined their unwritten constitutional conventions", Your Canada/Your Constitution (Ottawa).
- Hicks, B. M. Nov. 18, 2008. "Reform of the Canadian Senate: Objectives and Constraints", Institute for Research on Public Policy (IRPP) and the Forum of the Federations (Ottawa).
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Research Projects

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Professional Service

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Honours

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