

AN EXPERT OPINION OF 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 David Smith earned a Bachelor of Arts at the University of Western Ontario (1959), and both a Master of Arts (1962) and a Doctorate of Philosophy (1964) from Duke University. He began his career at the University of Saskatchewan in 1964, first as a member of the Department of Economics and Political Science and then, in 1985, as a member of the newly created Department of Political Studies, eventually serving as chair of the department from 1997 to 2000. Today, he is a professor emeritus of political studies at the University of Saskatchewan and a senior policy fellow at the Johnson-Shoyama Graduate School of Public Policy at the University of Regina.

A well-known and respected expert on Canadian constitutional governance, Professor Smith's research interests encompass representation, bicameralism, the House of Commons, the Senate, and regional sentiment in Western Canada. He is the author of numerous journal articles and of some highly regarded books, which earned him many awards throughout his career. Professor Smith is a leading authority on constitutional governance in Canada. In particular, his scholarship explores the central political institutions and political processes of Canadian democracy. His scholarship has not only contributed to political studies in Canada, but has informed studies of comparative politics generally.

MANDATE

I have been asked to prepare an expert opinion for 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*.

My mandate is to define and explain what are the fundamental features or essential characteristics of the Senate and to demonstrate if and how the Senate term limits and the consultative electoral mechanism provided for in Bill C-7 will affect those characteristics.

EXECUTIVE SUMMARY

L'institution du Sénat est un élément essentiel du compromis politique à l'origine de la fédération canadienne. La nomination à vie des sénateurs et leur mode de sélection ont été sciemment choisis par les Pères de la Confédération pour que le Sénat puisse porter un second regard attentif aux lois adoptées par la Chambre des communes et assurer une représentation équitable des minorités au sein du Parlement fédéral. Pour s'acquitter de ces deux rôles, le Sénat bénéficie d'une continuité institutionnelle et s'appuie sur l'expérience de ses membres et, surtout, sur son indépendance tant vis-à-vis de la Chambre basse que de l'opinion publique. Or, la réduction de la durée du mandat des sénateurs conjuguée à la mise en place d'élections consultatives aura pour effet de compromettre ces caractéristiques essentielles du Sénat tout en transformant de façon significative la relation entre les deux chambres du Parlement. Les changements proposés par le projet de loi C-7 touchent à des aspects si fondamentaux du Sénat et du système parlementaire canadien qu'ils ne peuvent être introduits de façon unilatérale par le Parlement fédéral.

The Senate is a key feature of the political compromise on which the Canadian federation is founded. The Fathers of Confederation deliberately chose life appointment for senators, to put the Upper Chamber in the best position to provide a "sober second thought" on laws enacted by the House of Commons, while the method of selection ensured an equitable representation of minorities in the federal Parliament. These two roles can be fulfilled by the Senate as a continuous legislative body built upon the experience of its members and, above all, through its independence towards the lower house and public opinion. The reduction of the term of senators, combined with the introduction of consultative elections will harm these essential characteristics of the Senate while significantly altering the relationship between the two Houses of Parliament. In sum, the changes proposed by Bill C-7 will affect fundamental features of the

Senate and the Canadian parliamentary system. For this reason alone they should not be allowed to be enacted unilaterally by the federal Parliament.

EXPERT OPINION

The role of the Senate: The intent of the Founding Fathers

In order to address Bill C-7, it is important to clarify a fundamental characteristic of the Senate of Canada agreed to by the Fathers of Confederation at Quebec -- its independence: 'The desire was,' said George Brown during the Confederation Debates in the Parliament of United Canada, 'to render the Upper House a thoroughly independent body—one that would be in the best position to canvass dispassionately the measures of this House, and stand up for the people's interests in opposition to hasty or partisan legislation' (*Parliamentary Debates on the Subject of the Confederation* [hereafter, *PD*], 90). [It is noteworthy that Brown and the other politicians of the Confederation era quoted below had sat for some time in colonial legislatures, often in government. Most continued to hold comparable positions in Ottawa or the provincial capitals after 1867.]

Because senators are appointed, and because appointees have been overwhelmingly supporters of the government-of-the-day, the claim to independence of Parliament's upper chamber requires scrutiny. While it may not be the case that Canadians associate appointment, in and of itself, with partiality—the judiciary are not viewed in this light --appointment on nomination of the prime minister to a chamber of the legislature is, if surveys are correct, a matter of concern for many Canadians.

This is one reason the public, when questioned about the composition of the Senate of Canada, favour election as the basis for choosing its members. Notwithstanding the question asked, from the responses given it is clear that to the modern mind legislative positions secured through appointment are viewed as incongruous and—another favourite adjective --illegitimate. The House of Lords, the one parliamentary upper chamber with which Canadians have some

familiarity, in part because periodic attempts to reform it have received attention in Canada, has for most of its history been predominantly a hereditary body (albeit with an expanding appointed component after 1958), and thus viewed as having slight application to Canada. By contrast, the Senate of Australia, the only elected upper chamber of a parliament based on the Westminster model, commands favourable interest although infrequent study. For instance, its constitutional relationship to the Australian parliament's lower chamber (the House of Representatives), particularly the mechanism provided to break deadlocks when they arise between the two chambers (s. 57, *Commonwealth of Australia Constitution Act, 1900 [United Kingdom]*), is seldom discussed or its crucial importance in a parliament with two elected chambers acknowledged. Finally, there is the highly visible United States Senate whose members for over a century were appointed by state legislatures but following adoption of the seventeenth amendment in 1913 are elected by voters in each of the states. That alteration in method of selection is often noted as a precedent by those who propose reform of the Senate of Canada; less frequent in the discussion, however, is recognition that neither of the two houses of Congress is a confidence chamber.

Comparative study has done little to improve understanding of the structure, operation, and function of the Canada's Senate. On the contrary, it might be said to have had the opposite effect, by adding to Canadians' intolerance for and discontent with the upper chamber of their Parliament. Whatever the cause of this condition there is a deep misunderstanding in Canada of what the Senate was intended to accomplish and of the design the Fathers of Confederation adopted to realize that end. Part of the incomprehension may be attributed to the absence of examples of upper houses in the provinces; only five ever had second chambers, with Quebec's Legislative Council the last to be abolished in 1968. It should be noted too that Canada is unusual in this constitutional

asymmetry: all but one (Queensland) of Australia's six states is bicameral, and all but one (Nebraska) of the fifty states of the United States is bicameral.

There is irony in this ignorance of the Senate, for it is the one part of Canada's Parliament purposely designed to serve the needs of the new federation. Similar in some respects to the House of Lords, in its vital features of appointment, size, and powers, it was quintessentially Canadian. Unlike the House of Commons, a vestigial chamber emulating, borrowing from, imitating, and mimicking the Commons at Westminster-- according to Dawson and Ward: 'Whenever a matter of legislative practice or procedure is not covered by the Canadian rules, the usages and customs of the British House will be followed so far as they are applicable' (Dawson and Ward, 344) --or the governor general, who was a surrogate sovereign, the Senate of Canada was an original creation over whose design and rationale the Fathers of Confederation spent more time at Quebec than any other part of the constitutional settlement. In other words, ss. 21-36 of the Constitution Act, 1867, appeared not as a result of accident or inattention. The appointed Senate was a deliberate decision of the delegates at Quebec. How deliberate, might be appreciated when it is realized that the Legislative Council of the Province of United Canada, created as an appointed body in 1840, had from the mid-1850s gradually been undergoing transformation into an elected body, only to be scrapped, at the hands of some of that colony's most prominent politicians (two of whom were John A. Macdonald and George Brown) as a model for the new Senate. The reasons offered for the reversion to appointment included 'the enormous extent of the constituencies and the immense labor [sic] which devolved on those who sought...election' (Macdonald, *PD*, 35); and the difficulty of 'find[ing] the gentlemen who have the will to incur the labor' (Brown, *PD*, 89). Or 'enormous expense,' both said. It was Macdonald's belief, voiced at Quebec, that 'in order to have no local jealousies and all things conciliatory, there should be a different system in the two chambers' (Pope, 57).

Fundamental features of the Senate of Canada

But there was a more fundamental reason for the return to appointment, one that lay at the heart of the Confederation agreement and the unique nature of the new federation. The Accord of 1867 sought to create equality of regions that were unequal in many respects; and it sought to promote harmony between peoples who were separated by language, religion, and laws. In this enterprise the Senate had a special role to play. It was the institution intended to compensate other provinces disquieted by Upper Canada's quest for entrenching the principle of representation-by-population in the House of Commons: 'On no other condition [equality of members among the original three senatorial divisions] would we have advanced a step,' said Toronto's George Brown (*PD*, 88). 'To the Legislative Council,' said Sherbrooke's Alexander Galt, 'all the Provinces look for protection under the Federal principle' (Pope, 117). How were the Senate and its members to realize such expectations? The answer was through protecting the rights of minorities, be they sectional, religious, or linguistic, among others. The Senate was purposely designed to secure that protection, especially in the provisions to guarantee the independence of its members.

How can senators be independent when they are appointed and when that appointment is enveloped in a partisan cloud? The answer rests in 'the qualifications of senator' (s. 23, *Constitution Act, 1867*) as well as the conditions of the position once an individual is appointed. Of the first, the most important are the minimum age requirement (thirty) and the four thousand dollar property qualification in the province for which he or she is appointed (or in Quebec, in the electoral division, of which there are twenty-four, for which he or she is appointed). While it may be argued that property holding of this amount in 1867 limited the selection of senators to an economic elite, there is another interpretation to be made of this requirement and other features of Senate

appointments. Individuals with such financial security were less dependent on sessional indemnities than those who sat in the Commons and less obligated to political parties, if only in the latter case because they were there for life, or after *Constitution Act, 1965*, until age 75.

The argument for independence as a fundamental feature of the upper house assumes added strength when other characteristics of the Senate are recalled. First, its members, originally appointed for life, had as a consequence no political future. Certainly, when compared to bicameral legislatures where elections prevail in each chamber, and where career paths of individuals and the fortunes of political parties become intertwined, the Senate of Canada stood apart from the lower house of Parliament. A continuous legislative body, as opposed to the Commons which had terms, the Senate had less than half the membership of the Commons (in 2012, less than one-third). While partisanship was the organizing principle of the lower chamber, as evident in the tenor of debate and in the volatility of committee personnel, it was more muted because it was less needed in the upper chamber, whose functions, as Macdonald once described them, were to control and regulate, but not to initiate (*PD*, 35).

Second, the most distinctive feature of the Senate of Canada was that its membership was allocated among senatorial divisions, some of which were single provinces, some composed of several. In either case each was limited to twenty-four senators. While s. 26 permits the addition of four or eight (originally, three or six) senators to overcome resistance within the chamber, as happened for the first and only time in 1990 in order to pass the Goods and Services Tax bill, the additional senators must 'represent equally the Four Divisions of Canada.' In other words, balance among 'Divisions' is a fundamental feature of the provisions of the Constitution as they affect the Senate. In this regard, s. 26 is quite unlike any feature of the House of Lords, where in 1832 and in 1910 government swamping or threats of swamping of the Lords by the appointment

of additional peers constituted seminal moments in the history of the British parliament. In fact, at the London conference J.M. Johnson of New Brunswick noted that the Colonial Office was opposed to the 'cast-iron rule' of fixed numbers agreed upon by the Fathers of Confederation (Pope, 118). Sir Charles Tupper's defence of the Canadians' rigidity in the matter points to the importance of balance: 'If an increase can be made by the Crown, it might disturb the relative proportions' (Pope, 118). Hector-Louis Langevin agreed and drew the appropriate conclusion: 'If you gave power to swamp the Legislative Council then you destroy its utility' (Pope, 119). An opinion in which Macdonald concurred: 'No ministry can in future do what they have done in Canada before, -they cannot ...attempt to overrule the independent opinion of the Upper House by filling it with a number of its partisans' (*PD*, 36)

The contrast between official positions in the mother country and Canada in the 1860s on the matter of fixed membership in second chambers says more about societal differences between them than it does about procedural preferences. In the former, the argument for swamping was that it kept the Lords under Commons (that is, government) control, thereby assuring the triumph of the popular will: public opinion revealed at the ballot box must not be thwarted. In the new federation, the practice was rejected for the same reason: majority opinion would drown out other opinion, especially that of minorities. The Senate's responsibility was to see that this did not happen. Contrary to what is often said today, Parliament's main task is to mobilize assent to legislation rather than to represent opinion. The Senate's contribution is to articulate the opinion of minorities not heard in the House of Commons and to afford them protection in relation to the enactment of legislation. Of this assignment, Joseph-Edouard Cauchon said: '[The Senate] will have but one part to play, that of maturing legislation in the interests of the people' (*PD*, 701).

Third, the Senate never was, nor considered itself to be, a confidence chamber. Its self-image was that of the Lords in relation to the Commons at Westminster, which by the 1867, the year of the second Reform Bill, which enfranchised a large portion of Great Britain's middle class males, was unquestionably that of a secondary body. Unlike the Lords in many respects, in its relations with Canada's Commons the Senate was the same: it saw itself as a chamber of the people but not a representative body. Representation implied accountability; but senators were accountable to no one, or at most, to themselves. The Senate spoke with a national voice, a characteristic Australia's federation fathers in the 1890s confirmed when, after comparing the Canadian and American federations, they concluded that Canada's was 'a unified community,' (*Official Report of the National Australasian Convention Debates* (Sydney), 1891 (Adelaide), 253). Evidence to support that interpretation included institutions such as the Senate and in particular selection of its members through Crown appointment on advice of the prime minister.

In its advisory opinion on the Senate in 1980, the Supreme Court of Canada stated that 'one of its primary purposes was to afford protection to the various sectional interests in Canada *in relation to the enactment of legislation*' (*Reference re: Legislative Authority... Upper House* [1980] 1 SCR 54, at 56, emphasis added). It is important to understand the complexion of those interests, for unlike the Commons and its members, who, elected by voters, responded readily to the supplication of individuals, the interests the Senate heard were more usually those of groups --identified, for instance, with sectional, regional, linguistic, and educational minority communities. The public has responded to the two Houses of Parliament in a similar dichotomous way: the Commons seen as composed of individual MPs, the Senate as a collective, whose reputation is established by the behaviour of its least reputable member. In the last half century, the contrast has become more pronounced, as Commons constituencies have become increasingly defined by arithmetic

measures: for example, population standards that assign declining weight in the drawing of boundaries to factors, such as historic communities (*Rafiche v. Canada*), or campaign finance limitations. The compensatory role of the Senate, to give expression to voices not heard in the Commons, either in support or opposition to legislation is in fact growing in importance as the principle of rep-by-pop is increasingly realized in the Commons.

It is worth observing that notwithstanding significant changes to the federation--the establishment of Alberta and Saskatchewan in 1905, the addition of territory to Ontario, Quebec, and Manitoba in 1912, rather than the formation of additional new provinces, and the creation in 1915 of a western senatorial region made up of the four western provinces--the Senate formula continued unaltered and unopposed. In 1949, when Newfoundland entered Confederation, the six senators it received (anticipated originally as four in s. 147 *Constitution Act, 1867* but as six in s. 1 *Constitution Act, 1915*), just as senators from the territories after 1885, were considered outside the divisional categories. Section 2, the only other section of the *Constitution Act, 1915*, guaranteed that 'a province shall always be entitled to a number of members in the House of Commons not less than the number of senators representing such province.' This so-called 'senatorial floor' protected the smaller provinces in the lower house at the same time that it required the House of Commons to increase in membership if the provinces experiencing population growth were to receive additional MPs. An inelastic Senate and an infinitely expandable Commons provided the frame for Canada's only bicameral legislature.

The result is a Parliament where change characterizes the lower chamber, not only in its increasing size—ten per cent this year alone following enactment of Bill C-20, the *Fair Representation Act*, which added seats to the fast growing provinces of Canada, Ontario, Alberta, and British Columbia, as well as providing three more seats to Quebec—but also in its tradition of high turnover

of members from one Parliament to another. In contrast, concern for balance, equality, local and sectional rights, and independence from dictation by the lower house reigns in the upper chamber. In the Confederation Debates, Alexander Campbell accurately prophesied the way of the future Senate: 'It was essential that the security which a fixed representation in the Council afforded be acceded to' because 'the principle of election kept alive a germ of doubt as to the security of the Lower Provinces' (PD, 22).

Sometimes constitutions are oblique in meaning. Then, says Laurence Tribe, a scholar of the United States Constitution, 'the relevant inquiry is not what the original drafters...expected the concept they wrote into the Constitution would come to require, but ... *what that concept, rightly understood, had come to demand*' (Tribe, 68-9, emphasis in original). In the twenty-first century security-independence by another name --requires of the Senate still what it required at Confederation--balance, equality, and continuity.

Summoning of the Senators

The unifying feature of the Senate evident from the moment an individual is nominated, through appointment, and subsequent conduct in the chamber, is independence. The prime minister, as first advisor to the Governor General, is free to canvass potential candidates for nomination, weigh their respective strengths and weaknesses, and then propose to the Governor General the person the prime minister determines best qualified for consideration for appointment to the Senate. The Governor General in turn is free to weigh the recommendation received. The chance that he or she might refuse advice is very small, but it cannot be altogether excluded. Nor, as constitutional scholar Eugene Forsey approvingly observed in another context, is it possible or desirable to 'enumerate or anticipate all the cases which might arise justifying the exercise of this special [discretion] power' (Forsey, 52). The constitutional convention is that the Governor General usually—not always --accepts a

recommendation in the matter of appointments. His or her freedom must be unimpaired. The cumulative effect of Bill C-7—a statute --would be to constrain the Governor General of the freedom to exercise constitutionally entrenched power (s. 24) to an extent that may be considered an impingement on the powers of the office.

In so far as the choosing of senators is concerned, the Act will drastically alter, in practice if not in specific language, the existing method of selection. To begin with, the nomination will in effect be made by voters in a provincial, or territorial, or municipal election. Although s. 3 of the Act says that 'the Prime Minister, in recommending Senate nominees to the Governor General, must consider names from the most current list of Senate nominees selected for that province or territory,' it does not say that the prime minister will propose the winner of an election. Still, s. 2 of the Schedule 'Framework for the Selection of Senators' states, without qualification, that 'the list of Senate nominees for a province or territory is to be determined by an election held in the province or territory.' The Preamble is more precise in giving context to this sentiment, speaking of 'representative institutions, including the Senate, continuing to evolve in accordance with the principles of modern democracy,' of the need for the Senate 'to reflect the democratic values of Canadians,' and of the appropriateness of 'those whose names are submitted to the Queen's Privy Council for Canada for summons to the Senate [being] determined by democratic election' by the people of the province or territory that a senator is to represent.'

The spirit of the Act is to establish popular election as the basis for the upper chamber of Canada's Parliament. An election, it needs emphasizing, called not at the request of the prime minister, who as leader of the government in the lower chamber of Parliament is first advisor to the Governor General, but of a provincial or territorial premier, who requests of a lieutenant governor (or

territorial commissioner) the dissolution of the respective legislature (or, alternatively, as the Act also allows, a senatorial campaign may be held in conjunction with a municipal election, whose date is statutorily set). A ramification of this last instance would be the following: 'Election officials who oversee the conduct of municipal elections would be the election officials responsible for the conduct of the Senate nominee elections (section 42 of the Act)' (Spano, 11). In place of autonomy and independence, prerogative and discretion, there is direction and a blurring of jurisdictional competences—thirteen provincial and territorial electoral and campaign finance regimes determining the selection of members of one chamber of the national Parliament. In place of a confidential canvass of qualified candidates for appointment, there is an election with its attendant publicity and announced winner. Like the Sovereign he or she represents, the Governor General historically has been viewed as an ally of the people. The nomination process provided for in Bill C-7 would have the people as voters direct the Governor General in the exercise of his or her appointment power. Discretion will have evaporated.

Nor is that prediction falsified by language that speaks of the prime minister being 'required to consider names from a list of nominees ... determined by an election.' The integrity of the office of Governor General would be impugned were the Governor General, who is the protector of Canada's constitutional democracy, advised to appoint an individual other than the winner of a senatorial election held in conformity with the terms set out in Bill C-7. Moreover, there is the matter of gubernatorial consistency. Bill C-7 is not directed to a particular circumstance—that is, to a single senatorial contest --but to contests in multiple provinces and territories for the foreseeable future. Were the purpose of Bill C-7 to be realized, it would constitute an inversion of Macdonald's prediction that 'we shall have a strong and lasting government under which we can work out constitutional liberty as opposed to democracy, and be able to protect the

minority by having a powerful central government' (Pope, 55). In its results if not its declared purpose, Bill C-7 recalls an earlier trespass on Crown prerogative, Manitoba's *Initiative and Referendum Act*, found in 1919 by the Judicial Committee of the Privy Council to be ultra vires that province's legislature. Particularly memorable are the following words from that opinion: 'The analogy of the British Constitution is that on which the entire scheme is founded, and that analogy points to the impropriety, in the absence of clear and unmistakable language, of ... permitting [or in the case of Bill C-7, encouraging the perception of] the abrogation of any power which the Crown possesses through a person who directly represents it' (*In Re Initiative and Referendum Act [1919]*, 935, at 943).

Compared to existing practice, the magnitude of change in constitutional relationships that would flow from the procedures introduced by Bill C-7 qualifies as an amendment to the Constitution of Canada in relation to the office of Governor General, and therefore requires recourse to paragraph 41(a) of the Constitution Act, 1982.

The Senate and elections

The Fathers of Confederation specifically rejected election. Nova Scotia and New Brunswick had never had elected houses, and the Province of United Canada, which had been in the process of moving toward election, changed course on its desirability. Cost, the logistical difficulties of very large constituencies (although smaller than the single provincial constituencies, which will result under C-7, unless provinces act otherwise), along with the difficulty of finding qualified candidates and not at same time exhausting the pool of prospective candidates for the Legislative Assembly, were factors that influenced Canadian sentiment on the issue. Running through all of the debate, however, was concern about a blurring of distinction between the competencies

and responsibilities of the two chambers of Parliament which came with election of its two houses.

Similarly, Bill C-7 contributes to ambiguity, this time from a jurisdictional perspective. According to s. 7(1) of the 'Framework for the Selection of Senators,' 'the chief electoral officer and other officials of the province or territory in which an election to select Senate nominees is to be held are the election officials for the purposes of the election;' under s. 24 'the laws applying to appeals and recounts in a general provincial or territorial election apply ... in relation to the election of Senate nominees ...and are to be heard by the appropriate court of the province or territory;' s. 27 states that 'the laws of the province or territory that govern campaign funding apply...to the election of Senate nominees;' while according to s. 32, 'the list of electors compiled and revised under the laws of the province or territory governing the election of members of the legislative assembly is the list of electors for the election of Senate nominees in the province or territory.'

If there is one constitutional difficulty in Bill C-7 that comes from looking to provincial electorates as a solution to the problem of Senate reform, there is another that comes from the Bill's failure to look in the other direction—specifically at s. 22 of the Constitution Act, 1867, which opens with the following words: 'In relation to the Constitution of the Senate Canada shall be deemed to consist of *Four* [originally Three] Divisions.' Nowhere in Bill C-7 does the word 'division' appear. One consequence of this omission is the further omission of reference to the appointment of additional senators, as set out in ss. 26 and 27. The so-called 'extra senators' constituted the mechanism for breaking deadlock in the upper chamber, a mechanism insisted upon by the British officials present at the London Conference and reluctantly agreed to by the British North Americans. The stringent terms of ss. 26 and 27 reflect Canadian concern for keeping the future Senate independent from manipulation by future

governments of the day. For example, Senators selected under s. 26 were to be chosen 'representing equally the Four Divisions of Canada;' while, according to s. 27, 'in the case of such Addition being at any Time made, the Governor General shall not summon any Person to the Senate, except on a further like Direction by the Queen on the like Recommendation, to represent one of the Four Divisions until such Division is represented by Twenty-four Senators and no more.' The 'division calculus,' so to speak, was inserted to protect regional and sectional interests. Canada is a double federation—of provinces and of cultures. In this regard, senatorial divisions are an essential and necessary part of the federal equation. The requirement that 'each of the Twenty-four Senators representing [Quebec] shall be appointed for One of the Twenty-four Electoral Divisions of Lower Canada' possessed a similar rationale. Because it provincializes the Senate, Bill C-7 ignores both that dimension and rationale.

At the same time, Bill C-7 formally partisanizes the Senate by specifying *inter alia* the following conditions: 'a person must be nominated by a registered provincial or territorial political party...or declare himself or herself to be an independent candidate' (Schedule s. 3.1); 'the nomination papers of a person who wishes to be elected as a Senate nominee must be signed by at least 100 electors in the case of a province, and 50 electors in the case of a territory' (Schedule s. 9.1); 'the signatures of the electors nominating a candidate must be witnessed by another elector who must complete an affidavit or declaration' (Schedule s.9.2); 'the candidate's official agent must be an elector' (Schedule s.11.1); 'the name of the registered provincial or territorial political party for which the candidate is a candidate' must be on ballot (s.19.2a), unless the candidate stands as an independent candidate, in which case the word 'independent' must appear (s.19.2.b); 'the nomination papers for a candidate are not valid unless [among other requirements]... they are accompanied by a deposit of \$4000' (s. 12.1.g). As set down originally and as obtains still today, Canadian senators are in a position to be independent of provincial

governments, of the people of the province from which they come, and of public opinion in that province and in the country generally. In debate, senators address one another; MPs address electors. That distinction would disappear under Bill C-7, because an elected senator, even an elected 'independent' senator, would have a constituency to represent.

If Members of Parliament or members of legislative assemblies are a guide, constituency duties become the predominant preoccupation of the legislator, certainly when compared to their duties in the House of Commons or Legislative Assembly. Constituency trumps Commons because party discipline is less constraining when the matter at hand is the problems of individual voters. More than that, it is satisfying. Loyalty in the House, evident through adhering to the party whip, is a necessary but not a sufficient condition for political advancement. In an elected Senate, would a similar hierarchy of duties, responsibilities, and obligations to others replace the independence senators now possess? If that were the case, then how well would the Senate do what it does now—speak on behalf of minority and sectional interests; again, how would minorities make their interests heard in an electoral world where majorities rule?

To what extent would the public make a distinction between elected members of the upper from those of the lower chamber? It is commonly said now by MPs and MLAs in Canada that the public experiences difficulty distinguishing between the work and responsibilities of federal and provincial legislators. To what degree would an elected upper chamber affect the work of the historic and institutionalized critic of government in the lower chamber—the opposition? Would not an elected upper chamber, or at least a portion of its members, act in opposition to the government seated in the lower chamber, and thus compete with rather complement the House of Commons? Because no one seeks elected office in order to be mute or passive, elections bring with them the demand for

power. Because senators will now have a political future, they themselves will have an 'interest,' if not in the Senate where they will be limited to one term then outside, perhaps in the Commons. If the Senate remains subordinate to the Commons, it is inevitable that politicians will see the Senate as a stepping stone to the Commons. If the Senate is seen as an equal to the Commons, then the career paths of each set of politicians will be different. In either case, the Senate as a preserve of independence will disappear.

That the upper chamber would be partisan rather than independent in composition is inevitable too, for reasons advanced most succinctly long ago by James Madison in *Federalist Paper No. 10* : 'Liberty is to faction what air is to fire...causes [of faction] cannot be removed but their effects may be controlled' (*Selections* 10 and 12). Yet Bill C-7 provides no controls for predictable inter-chamber rivalry. Not only would entry into the Senate become partisan, because the characteristics of individuals who compete for office are different from those who allow their names to go forward for appointment and who know they will very likely be appointed, but so too would the Senate's work. The investigative, sober-second-thought approach to Senate responsibilities would decline, and with it the contribution of sequential decision making to the formation of public policy. The constitutional conventions that have surrounded relations between the elected Commons and unelected Senate would atrophy once there were two elected chambers. It is not an exaggeration to speculate, as Alexander Campbell did in the Confederation Debates, that if there were an elected Senate 'the time might come when the people of [populous] Upper Canada would fancy themselves entitled to an increased representation in the [elected] Council' (*PD*, 22). Security of the Senate in its relations with the Commons will disappear. Nor is this hypothetical speculation: while such questions may be difficult to answer in the abstract, the change proposed by Bill C-7—an elected Senate --is not abstract but concrete. Bill C-7 will lead to profound alteration in the relationship of the two chambers, and yet it addresses none of these matters

nor does it acknowledge the changed condition of bicameralism its terms introduce. It ignores the fact that the present Senate is a fully integrated component of the Canadian political system and any effort to modify it will affect other segments of government machinery.

C-7 with regard to the fundamental features and role of the Senate

It is not accurate to say that the legislation is saved because it does not trespass on Governor General's prerogative. That would be true only if the legislation did not accomplish what the spirit of the exercise requires: the nomination of the person who won the election, held under provincial or territorial laws. If in fact the outcome of Bill C-7 is to recommend the winner to the Governor General, then most assuredly there will be a change in the fundamental features of the Senate: no longer appointed, no longer continuous, no longer characterized by security of long-term tenure, and no longer the reservoir of political experience. Senators are to be elected for only one term-- of nine years, although it might be noted for a term longer than that of the Governor General who appoints them. In theory there are two parts to democratic elections: first, selection by voters and second, accountability to them at the end of the mandate. Bill C-7 provides only for the first, since senators selected under its terms never present themselves to the electorate to explain actions taken while in the legislature. For this reason were C-7 to become law, Canada's elected upper chamber would be as distinctive among its contemporaries in federal legislatures as the unelected upper chamber is at the present time.

The Senate will no longer be one part of a compound answer to the challenge of representation in a double federation--of provinces and cultures. By embedding the Senate and senators in the provinces, Bill C-7 unbalances the federation. Such a change should only be pursued through the formal input of the provinces, as provided by Part V. When in 1982 provincial legislatures were incorporated into the assent process for amendments secured under sections

38, 41, and 42 of the Constitution Act, 1982, the Senate's role in approval was reduced to a suspensive veto of 180 days in the passage of the resolution in question. In the words of Marc Audcent, Law Clerk and Parliamentary Counsel:

The logic of this constitutional structure is impeccable. The House of Commons speaks for the Canadian people. The Senate speaks for the regions. But the provinces are the regions. In these circumstances, the Senate should not be able to veto an amendment that has been agreed to by the House of Commons and the affected provinces.

By contrast, if a constitutional amendment does not involve the provinces, but is a solely federal matter to be made by Act of Parliament, it is the Senate that speaks for the regions. And it retains its veto to do so (Audcent, 23).

The prospect of election presents a special challenge to Canada's federation of cultures. In a study commissioned by the Office of the Commissioner of Official Languages (2007), political scientist Louis Massicotte concluded that 'official language minorities will have little to gain but much to lose if the selection process for senators is amended' (Massicotte, 16). He noted that 'official language minority communities are proportionately *better represented* [emphasis in original] in the Senate than the House of Commons.' Two reasons explain the contrast between the chambers. First, senators are appointed on the recommendation of prime ministers who, whether Liberal or Conservative, have treated the appointment of French-speaking senators (and not only from Quebec) as important—consider the French in the West and the Acadians in the Maritime provinces. Second, MPs are elected, and in the absence of a territorial concentration of French-speaking voters—as occurs in New Brunswick and

parts of Ontario and Manitoba --it is unlikely that French-speaking candidates will be elected.

The same result will occur with an elected Senate, perhaps in an even more pronounced fashion since the senatorial districts would be larger than those for the House. It is possible that district boundaries might be drawn in a manner to facilitate the election of French-speaking candidates (for instance, New Brunswick's Bill 64, *An Act Respecting the Selection of Senator Nominees*, introduced in June 2012, divides that bilingual province into five senatorial districts), though this would be difficult in a province where the French-speaking population is small and dispersed. More than that, the rationale for doing so would seem to vitiate introducing the elective principle in the first place. To those who suggest adopting a list system of proportional representation as a solution to the quandary, that would place the onus back where it began—with the nominating procedures of political parties --and the result would resemble the dual or multimember provincial constituencies that at one time prevailed in the Maritime provinces. The rationale for them lay in linguistic and religious divisions that demanded acknowledgment by Liberals and Conservatives when their parties nominated candidates.

One consequence of an elected Senate, says Massicotte, would be that 'the French fact in Canada will depend on the senators in Quebec (Massicotte, 21). The implication of that outcome for the policy of bilingualism—of which, according to the Annual Report (2007-8) of the Commissioner of Official Languages, the Senate increasingly sees itself as 'protector' --scarcely requires elaboration (Canada, Office of the Commissioner of Official Languages).

The Senate has assumed a special role in protecting vulnerable linguistic and racial minorities, whose populations are dispersed, as well as in advancing the interests of women (a majority) who do not succeed in electoral contests for

Commons seats in proportion to their numbers. More than two decades ago in *Reference Re Provincial Electoral Boundaries (Sask.)*, [1991] 2 SCR 158, McLachlin J. (as she then was), writing for the majority of the Supreme Court of Canada, concluded that the purpose of the right to vote enshrined in section 3 of the Canadian Charter of Rights and Freedoms was the right to effective representation, and not merely parity of voting power. 'It is a practical fact,' she said, that 'effective representation often cannot be achieved without taking into account countervailing factors' (ibid., 184). Moreover, she continued, 'factors like geography, community history, community interests and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic.' Although the occasion for making this comment was the exercise of drawing electoral boundaries, the principle advanced has application for the countervailing role of the Senate in the matter of representation generally, an interpretation to which a passage from the judgment of the Federal Court in *Raïche v. Canada (Attorney General)* (FC) [2005] 1 FCR 93, offers further support: 'The [Supreme] Court [in the Saskatchewan reference] acknowledged that a minority group's fear that it will not be adequately represented by its member of Parliament was not without basis; the opposite is in fact true, because the reality in a democracy is that an elected representative who is faced with the conflicting interests of the majority and a minority will often have to choose to represent the interests of the majority' (ibid., 111).

The issue in *Raïche* was whether in drawing the boundaries of Acadie-Bathurst, the Federal Electoral Boundaries Commission for New Brunswick, established following the 2001 census, had given sufficient weight to community of interest as defined by the French language. The Commissioner of Official Languages intervened in the case on the grounds that in light of responsibilities set out under section 41 of the Official Languages Act the boundaries commission had failed in this regard. The details are not material to the concern of this paper on

Senate reform except in the following respect: for the past two decades effective representation has been the goal enunciated and sought in Canadian electoral jurisprudence. How would that goal be realized in Senate elections promoted under the auspices of Bill C-7? The question is crucial since the Bill assigns conduct of senatorial contests to the provinces and territories. Alberta's senatorial elections, for instance, are conducted 'at large' in the absence of constituencies, or districts, or ridings. In that arrangement, majorities prevail over minorities and conglomerations of urban and metropolitan populations swamp non-urban and non-metropolitan populations. By what standard may the effectiveness of representation be judged in at-large elections? Is there not an argument to be made that all elections—certainly for the two chambers of the same Parliament --have to be treated the same way? New Brunswick's proposed five senatorial districts present another, very different model. The pros and cons of the two approaches are open to discussion, but what is clear is that between them they allow enormous variance in popular influence, a permissiveness denied the independent federal electoral boundaries commissions, who except in unusual circumstances are instructed to design constituencies whose populations deviate no more than twenty-five per cent above or below the respective province's electoral quota, that is, its median constituency population. In fact, over time that variance has narrowed significantly, so much so that, for example, the populations of twelve of the fourteen constituencies proposed by the Saskatchewan commission following the 2011 census varied less than five per cent from the provincial quota, while the other two varied less than ten per cent (Electoral Districts, Saskatchewan 1-2).

An elected Senate would occasion a seismic shift in relations between the two chambers of Parliament, and especially for senators, who would be drawn out of their present, comparative isolation into the complex—and daily --world of constituency and electoral politics. The issues to come before them; the manner

in which these are presented and addressed; and the response the public expects from the senators will be transformed. What would an elected Senate look like: Would government influence in the Senate be more visible; would more (there could scarcely be fewer) senators sit in cabinet; would the role of the government leader in the Senate change; would appointment of the Senate speaker—if not the senators --still be made by the Governor General on the prime minister's recommendation? At present, the Senate is not a confidence chamber, nor has it ever acted as one; that will change because elected senators will not passively acquiesce in a subordinate role.

Even if the name of the successful candidate in the election is not put forward, the consequences of a Senate election are immense: the selection of candidates for the contest will rest in the hands of individuals, most likely officials of political parties, where currently it is not placed. In turn, sentiment in elections, unless these are uncontested, will be divided most probably among several candidates. But it changes in other ways by the details found in the Bill. Myriad provincial, territorial, and municipal laws and regulations will influence electoral organization, candidacy, campaign finance, voter registration, and the other complex apparatus associated with the conduct of elections. All of this to replace the present practice of selecting senators, in which the prime minister canvasses candidates to determine their suitability and availability, and then recommends one of them to the Governor General. The criteria associated with public as opposed to prime ministerial selection will be different, if only because the position sought will have changed, from appointment to mandatory retirement at age seventy-five to election for a single, nine-year term. Who seeks, who succeeds, and who stays in office will inevitably change.

The world of an elected Senate will be as fundamentally transformative for electors as for the elected. Would elected senators have constituency [sic] offices, and would voters be sufficiently informed to distinguish between the

responsibilities of senators and MPs? What indeed are the responsibilities of elected senators? Would voters articulate their vote, that is, vote consistently for the same party in elections for the House and the Senate? Since Parliament is the only bicameral legislature in the country, there are no Canadian precedents to suggest an answer. No one can predict these outcomes, but the questions they raise clearly illustrate the uncertainty and instability Bill C-7 will create. It seems crucial to consult all the members of the federation when such transformational changes are contemplated.

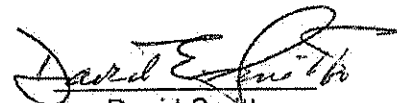
Nonetheless, it appears reasonable to presume that if there is consistency in voting between the two chambers, then closer involvement and less independence of the Senate from the House than currently is the practice will be the result. On the other hand, if there is little consistency then conflict not cooperation is the likely result, suggesting a very different relationship than now obtains between the House and Senate. The potential for conflict underlines the need for a mechanism to break deadlocks should they develop between the houses. As well, it draws attention to the absence of any such mechanism in Bill C-7. One reply might be that the Bill concerns selecting senators, not regulating relations between senators and MPs. Nonetheless, ss. 26 and 27 were placed in the Constitution Act, 1867, anticipating that if conflict were to occur there would be a device at hand to invoke to resolve the disagreement. As already noted, Bill C-7 says nothing about senatorial divisions, including the appointment of additional senators under s. 26. If ss. 26 and 27 continue unaltered, how do they fit with the spirit of Bill C-7, and especially, what are their implications for relations between the two chambers when the need arises, as is inevitable, to resolve conflict between them?

Conclusion

What are the arguments for an elected Senate? To make it more accountable: but not when senators may serve for only one term; to resolve problems that currently arise between the two Houses: but more not fewer conflicts will be precipitated when each chamber shares an electoral base; to make senators more provincial in perspective: but that threatens their role as advocates and protectors of minorities, who are not necessarily confined to one province; to make them more independent: that is scarcely possible since they will have constituencies to serve. Independence, the crucial characteristic sought and largely secured by the Fathers of Confederation as a result of their negotiations at Quebec, will disappear once senators have constituencies to represent. At present, the Senate is consciously based on representing not people so much as 'something else'—broader, specialized communities. It is this distinctive variation on the idea of representation that informed the purpose of the Senate as set down in the Constitution Act, 1867.

The foregoing questions touch issues so fundamental to the object and practice of parliamentary government in the Canadian federation that institutional change affecting them must be deemed constitutional in nature and, as such, be implemented using the requisite amending procedure found in the relevant sections of Part V of the Constitution Act, 1982. To recapitulate, these issues include *inter alia* the following: the independence of the Senate; the capacity of the Senate, in consequence of introducing term limits and in the absence of the legislative experience traditionally acquired, to provide sober second thought 'in relation to the enactment of legislation'; the potential an elected second chamber has to rival the popular chamber and therefore check the will of the people expressed in the House of Commons; the failure to provide in Bill C-7 a mechanism to break deadlocks that must inevitably arise between two elected chambers of one Parliament; and the threat an elected Senate, authenticated by

use of the Crown's power of appointment, presents for the constitutional integrity of the office of Governor General and the freedom that office must have to play its proper role. A parliamentary statute opposed both in spirit and principle to key elements of Canada's original constitutional settlement is insufficient to accomplish its stated purpose.



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