

A Means to Many Ends: Why Iterative Reform of the Senate is So Difficult

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ABSTRACT

Proposals for reforming the Canadian Senate abound. A majority focus on reforming one aspect or another, such as method of selection or term.

The Senate was designed for the most part in the 16 day period of the Quebec Conference 1864. It was used as a means to many ends: regional balance against representation by population, protection of sectional, linguistic and religious minorities, and to act as a check on the Executive. It was also designed to provide a complementary legislative body to the House of Commons that, while not threatening responsible government, would be capable of augmenting the legislative process.

This thesis concludes that the essential elements of the Senate's design – means of selection, tenure, qualifications and powers - are so intertwined with its essential characteristics, those of the federation and Canada's Parliament as to make iterative reform an impossibility without significant unintended corollary effects.

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INTRODUCTION

Canada is approaching its 150th anniversary of Confederation in 2017. The 150th anniversary of the Quebec Conference is upon us. The work done by the delegates from the colonies of British North America at the Quebec Conference laid the foundation of Confederation's design to be subsequently drafted into the *British North America Act, 1867*. The Senate was a key component of the deal negotiated during the Quebec Conference and without the major features eventually agreed respecting the Senate – regional representation, the appointive principle of selection over the elective, property and age qualifications, tenure and near-equal powers – Confederation might never have happened.

However, after 'sober second thought', perhaps the next most often repeated remark by anyone writing about the Senate is to observe that reform of the Senate has been a part of the national political debate in Canada practically since Confederation. The CCF, succeeded by the NDP, have, between them, advocated abolition of the Senate since 1933.¹ Senate reform was an important dimension to the formulation of the Meech Lake and Charlottetown accords. Furthermore, Senate reform has been a key modern electoral plank and objective since the advent of the Reform Party, even as it evolved and eventually culminated in the merged Conservative Party of Canada. Recently, public calls for the Senate's abolition have been loudly championed by the NDP Roll up the Red

¹ The Regina Manifesto (1933) Co-operative Commonwealth Federation Programme, as cited in <http://www.socialisthistory.ca/Docs/CCF/ReginaManifesto.htm>

Carpet Campaign², an opportunistic effort capitalizing on media reports of questionable expense claims by some senators for living allowances and questions over residency. The subsequent allegations of interference by the Prime Minister's Office in the work of the Senate committee looking into the files of the senators involved have added to the furor and to strong appeals for the Senate to be divorced from partisan connections.

Senate reform pressures may also be due to the effect of how Canadians' self-perception has changed. Rocher and Smith conclude that Canada, with the patriation of the Constitution, the introduction of nationalizing policies and the Charter of Rights and Freedoms, has evolved into a country of various and variable political identities, focused on a rights-based agenda.³ From dualism to nationalism, from pan-Canadianism to provincial/regionalism, from Aboriginal or gender identification to multicultural identities, Canadians are looking at themselves, their federation and their institutions through a kaleidoscope of perspectives. Watts notes that "nation-states have become too remote from individual citizens to provide a sense of direct democratic control and to respond clearly to the specific concerns and preferences of their citizens."⁴ In this context of splintered identity and conflicting views about the nature of the federation, changes to foundational conceptions can be expected to have a collateral impact on other related institutions of our parliamentary governance.

It is clear from the sometimes confused and often passionate approaches to Senate reform in the last three decades or more that these issues and perspectives are influencing

² <http://rolluptheredcarpet.ca/>

³ Rocher, Francois and Smith, Miriam, "The Four Dimensions of Canadian Federalism", in Rocher and Smith eds., *New Trends in Canadian Federalism*, 2nd edition, Broadview Press, 2003, pp 38-40

⁴ Watt, Ronald L., "Models of Federal-Power Sharing", *Background Papers*, Forum of Federations: International Conference on Federalism, 1999, pg 1

the shape and content of the debate and proposals for reform. The fact that iterative, piece-meal reforms to the Senate are seen as better than nothing would suggest that there is, as yet, no consensus as to what Canadians see as the role of fundamental institutions of governance in their lives as citizens of this country and how they should reflect how Canadians see themselves, while also underscoring deep seated frustrations with those same institutions.

By way of contrast, 150 years ago at the Quebec Conference delegates had a core, overarching objective they wished to achieve with respect to the nature of governance and democracy; they had a solid understanding of what second chambers can do to offset democratic deficiencies of majoritarian government; of how a second chamber can reflect a different perspective of citizenship other than local community based representation; of whether all communities are properly represented or how we define that; and of the nature of the relationship between provinces and the federal government and their respective jurisdictional powers. In comparison, modern efforts to address particular features or perceived weaknesses or deficits are similar to treating a patient's symptoms individually, rather than addressing the core disease.

Nonetheless, extended constitutional negotiations in the 70s and 80s to patriate the Constitution and the failed extended efforts to reconcile Quebec's grievances with the Federation in the Meech and Charlottetown accords have exhausted the public will and political patience with "mega-constitutional" rounds of talks among the federal and provincial governments. As a result, reforming the Senate has been largely relegated to proposals for incremental changes, changes from within and any other form of reform that can be achieved without resort to the constitutional amending formula.

The most recent scholarship on the Senate appears to be under this spell. David Smith and the collected contributors to Serge Joyal and Jennifer Smith's respective edited works either explicitly or implicitly bow to the fatigue factor, limiting reform proposals to non-constitutional means and/or incremental steps. The latest actual project to reform the Senate, the legislation proposed by the government to impose term limits and to create the conditions for consultative elections of individuals to pools of eligible candidates, from which a Prime Minister could choose to nominate senators, also was deliberately formulated to avoid constitutional negotiations.

However, by avoiding constitutional discussions, anyone with an ambition to reform the Senate is also avoiding a very real truth: the reason the Senate has proven to be so difficult to reform is that it is so deeply involved in how our federation was achieved and conceived. Seemingly irreconcilable sectional differences and dilemmas of representation were resolved in part through the institutional design flexibility afforded by second chambers. As will be demonstrated, the actual design of the federal and provincial parliaments and how they were intended to work makes it almost impossible that any single change to one of its key features to not have implications for how the federation was designed or how the federal Parliament works.

Despite the degree of interest and political attention the topic has generated, Senate reform has been largely unsuccessful as a deliberate exercise. The only formal changes to the Senate have been the imposition of a retirement age of 75 years, in place of the life service term established originally in the *British North America Act, 1867*, the addition of seats upon the creation of new provinces and territories, and the

implementation of limitations on its ability to veto certain changes to the constitution, achieved during the process of patriating the constitution in 1982.

Nonetheless, efforts to reform the Senate in more meaningful ways have been escalating since 1867. Senate reform proposals over the years, from models of better regional/provincial representation, to intra-state considerations and national unity concerns to democratic selection and accountability, have acted as barometers of pressures within Confederation and the changing nature of how the public sees itself in relation to its public institutions.

Little of the most recent debate surrounding Senate reform following the Meech and Charlottetown rounds has incorporated any thought about the many frustrations Canadians have generally with representational politics and parliamentary governance in Canada. Modern reform projects have largely centered on forms of selection and length of term and very little of the wider debate has touched on or explored issues such as the state of the Federation, political identity, regional grievances or real or perceived electoral deficiencies. Neither has there been any discussion about the fundamental roles and responsibilities of a second chamber - within a Westminster style parliamentary model as well as within a federal context – or how it can be shaped to meet Canada's unique needs and modern society.

Almost eight years since the CPC assumed power, its efforts to achieve a more direct form of democratic selection and a limit on terms for senators have been unsuccessful. An initial attempt was blocked by a Senate committee with a Liberal majority, which recommended not proceeding further until such time as it was referred to the Supreme Court of Canada with respect to its compliance with the amending formula.

A subsequent bill was appealed by the Province of Quebec to the Quebec Appeals Court. Finally, the Minister of Democratic Reform, on February 1, 2013, announced the federal government's intention to refer the constitutionality of its bill, C-7, and a number of other questions related to reforming or abolishing the Senate to the Supreme Court of Canada. Factums were filed by most of the provinces and territories, as well as two sitting senators, and oral arguments were heard November 25 and 26, 2013.

The outcome of the reference to the Supreme Court was finally revealed on April 25, 2014. In a unanimous opinion, the Court declared that the federal government could not proceed unilaterally with its legislation, which included provisions for consultative elections and term limits for senators. According to the Court's opinion, these provisions would require the consent of at least seven provinces comprising at least 50% of the population of Canada. Abolition of the Senate would require unanimous consent of the provinces.⁵

Contemporary reform projects have been designed specifically to avoid constitutional solutions, and intended to address various perceived symptoms of deficiency in the institution, or as parts of a larger political horse trading exercise, where certain aspects of reform were required in return for support for an unrelated issue. As a result, growing tensions in the federation, in the way Canadians see themselves – or in the case of Aboriginals and other identifiable demographic groups, fail to see themselves as far as representation goes – and in the increasingly complex range of governance issues are not being addressed. Meanwhile, iterative reforms have been pursued that can be argued might actually exacerbate other deficiencies rather than solving them. For

⁵ Supreme Court of Canada, *Reference re Senate Reform*, 2014 SCC 32, April 25, 2014

example, it will be seen that an isolated reform to elect senators now, might impede reforms to seat distribution in the Senate.

The perspective and scope of objectives on the part of the Fathers of Confederation led to eventual success. In the light of historical perspective, the Speaker of the Senate, the Honourable Noel A. Kinsella, frequently points out to international visitors and throngs of young Canadians visiting as part of the Forum for Young Canadians program the importance and role of the Senate. As the Senate was in the throes of media coverage and political commentary provoked by allegations of spending improprieties, Speaker Kinsella initiated a debate in the Senate about its legacy, noting that Canada has enjoyed for over 147 years “...a vibrant, free and democratic society, where respect for diversity and the protection of minority and linguistic rights is the envy of the world. The high quality of liberty in Canada leads me to say that maybe, just maybe, there is something right about our system of governance.”⁶ For all the hand-wringing about the Senate, he implies, the results have been extremely positive.

Objective

The objective of this thesis is to establish that the original design of Confederation generally, and the Senate particularly, benefited from the adaptability a second chamber allows constitutional framers in addressing tensions, balancing perspectives and enhancing the democratic dimensions of governance. Because of the complex issues to be resolved, and the integral role of the Senate in resolving those issues, designing the Senate was the single most detailed aspect of the Quebec Conference in 1864. Therefore,

⁶ Hon. Noel A. Kinsella, *Debates of the Senate*, 40-1, Vol 148, Number 176, June 18, 2013, pg. 4354

it will be demonstrated that Senate reform should be approached from a much higher plane of consideration than iterative or incremental reform allows. The decision of the Supreme Court makes a constitutional amendment process a necessity if changes to how senators are selected, the length of their term in office, and the nature of the institution are to take place. According to the constitutional amending formula, the provinces must be involved, and 7 provinces representing at least 50% of the population must agree. The history of our country's evolution, its many unresolved issues and the investment of the people's faith in the institutions of governance make an even more compelling case.

This thesis will demonstrate that the best way to conceive of a constitutional amendment process in pursuit of a reformed Senate has to be at the level of a national debate, involving at least the federal and provincial governments. To be successful, it must be aware of the degree to which the Senate is implicated the current design of the federation, in responsible government and, therefore, in how the House of Commons is structured, and in how bicameralism enhances democratic principles. The debate must take place in light of the range of roles and responsibilities that are to be performed by the second chamber and the nature and needs of the federation. The features of what should be included in the debate on comprehensive reform must be properly understood, ordered and considered. It is also possible to conceive of significant unintended consequences of iterative reform measures that may complicate even further the prospect of more extensive reform.

This project is largely an interpretive effort. It draws chiefly on available literature, primary historical documents and reports, parliamentary debates and decisions of the courts. By way of foundation, the literature review will survey and review recent

publications on the Canadian Senate and establish the theoretical and comparative features of bicameralism.

An historical outline will establish and examine the background to the challenges and imperatives that confronted the founding fathers 150 years ago. Regional population imbalances, shifting power bases, and linguistic and religious factions made reconciling sectional interests extremely difficult. Challenges confronting putative shapers of parliamentary governance in Canada today face equally complex challenges, some old, some new: regional tensions over economic issues, a far more diverse ethnic and religious population, ongoing grievances from Quebec, a significantly different conception of provinces in from that of 1867, and an unresolved place for First Nations in our governance model, among them.

Institutional design issues will inform certain aspects of the paper as form and function are inextricably linked to the thesis. The function and role of the Senate is intrinsically woven into the fabric of the function and role of the House of Commons, responsible government, and the federation itself. Without understanding and addressing this reality, isolated reform proposals run the risk of impacting on core principles of the Canadian form of parliamentary governance.

Context is also an important factor in determining the expectations of political institutions. The next section of the paper will document the evolution of the Canadian federation over time, including a demonstration of how social and economic pressures changed and shaped the jurisdictional powers of the federal and provincial partners and their relationships. At the same time, Senate reform proposals have originated from various sources over the years, perhaps acting as a barometer of how the federation's

evolution was affecting the national mood. An analysis of how these dynamics relate to the underpinnings of the foundational considerations in designing Canadian governance may suggest ways in which related pressures and aspirations find potential for expression in Senate reform.

The final section of the paper will demonstrate that a contemporary Quebec Conference of federal and provincial political leaders must approach Senate reform as a holistic exercise. It will position itself in the federal/provincial context within which the federation is currently working. In light of the opinion released by the Supreme Court, cooperation and collaboration among the provinces and federal government is the only means by which meaningful constitutional Senate reform can be accomplished.

A modern Quebec Conference is an opportunity to address other issues of particular relevance to the common functions of second chambers. Democracy, identity and how electoral politics act as a bridge between the people and government is another evolving contextual consideration. An analysis of how the changing concepts of representation and the related lacunae in the Canadian federal parliamentary model in linking civil society to government will provide some of the modern functional challenges facing modern Founding Fathers and how these dynamics might impact on expectations for a reformed Senate. Also important will be contemporary views of the strengths and weakness of the Senate; while it is important to prioritize normative objectives for a reformed Senate, it is critical to acknowledge its attributes and failings before embarking on a reform project.

CHAPTER ONE: LITERATURE REVIEW

To put Senate reform in proper context, it is useful to consider recent scholarship on the Senate generally, and its reform in particular, in light of contemporary study of second chambers and theories of bicameralism. In summary, an understanding of the Senate's role and value can be achieved from these works, but modern reform proposals appear to be hobbled by a conscious or subconscious adherence to non-constitutional reform. Indeed, authors looking at reform often reference the extremely unlikely nature of constitutional reform and deliberately look at incremental or iterative proposals.

Modern Canadian Senate and its Reform

So far as comprehensive analysis of the Canadian Senate goes, no academics have made it the focus of a sustained body of work and involvement to the same degree that Meg Russell has contributed to the understanding of the House of Lords in the United Kingdom. Nonetheless, the last decade or so have produced three significant works of domestic interest: *Protecting Canadian Democracy: the Senate You Never Knew*, edited by Serge Joyal and published in 2003; *The Senate in Bicameral Perspective*, by David Smith, also published in 2003; and *The Democratic Dilemma: Reforming the Canadian Senate*, edited by Jennifer Smith, published in 2009.

Protecting Canadian Democracy, 2003, is a collection of essays solicited and edited by Serge Joyal, a Canadian senator and former cabinet minister under Pierre Elliott Trudeau. The collection serves as an important frame of reference for understanding the Senate and its history of performance as well as reform initiatives since Confederation and proposals for non-constitutional reform. The collected articles survey the origins of the Senate, its underlying roles and its purpose. It looks at bicameralism in federal

parliamentary systems and at the history of reform attempts. Other chapters explore the legitimate successes of the Senate and, conversely, legitimate criticisms. Of particular relevance are two chapters by Gil Rémillard and Andrew Turner, and another by David Smith, which look at reforming the Senate.

In these latter two chapters, the authors, and by extension the book, confine their reform initiatives to ways in which non-constitutional reform can be implemented. In the case of Rémillard and Turner, the focus is on identifying the Senate's main characteristics – independence, long term perspective, continuity, professional and life experience, and regional equality within Confederation⁷ – and reflecting on ways certain of these features could be enhanced. In particular, the authors reflect on selection criteria and obstacles to party influence on senators to enhance independence and credibility, and parliamentary functions the Senate could perform, such as *prima facie* constitutionality of legislation opinions and review of legislation delegating powers to Ministers, to enhance their operational effectiveness.⁸ Overall, the proposed reforms serve to enhance the Senate *status quo*, not to alter its inherent features.

David Smith takes a more holistic view of reform in this collection, but also within non-constitutional means. His recipe includes a set of eight principles governing reform proposals, intended to ensure that the institutional strengths and weaknesses are either enhanced or addressed. His range of suggested reforms is limited to ways in which roles and responsibilities, selection, powers and accountability can be enhanced.

⁷ Rémillard and Turner, “Senate Reform: Back to Basics”, *Protecting Canadian Democracy: The Senate You Never Knew*, Joyal, ed., McGill-Queen’s University Press, 2003

⁸ *Ibid*, pp 122-125

David Smith's *The Canadian Senate in Bicameral Perspective*, 2003, was published in the same year as Joyal's collection. As a part of what has become an extensive body of work by Smith on governance in Canada, spanning the Crown in Canada, the Senate, the House of Commons, the nature of opposition in Canadian politics and federalism in Canada, this work reviews the Senate, not surprisingly, from the perspective of bicameralism. It is a theoretical – to the extent possible, in a field where theory is so ill-advanced – and comparative review of bicameralism in the USA, Australia and Germany and it is an examination of the Canadian Senate's unique features.

In contemplating reform, Smith outlines the core of the reform questions relevant to Canada: the lack of consensus on its role(s), desirable characteristics, and what reform of the Senate might do to the House of Commons. Smith hints in this rhetorical section at the thesis of this paper: meaningful reform of the Senate involves intertwined institutional design questions of the elements of Parliament and the federation and cannot be achieved in isolation or without the involvement of the federal and provincial governments.

“Unless there is a logic to compensatory adjustments, as there was in the distribution of seats by senatorial region in 1867 coupled to representation in the lower chamber, then institutional redesign will not happen.”⁹ However, he chooses to explore non-constitutional reform “...to do something in order to enhance the upper house and thereby make it a constructive element of Parliament within current constitutional arrangements.”¹⁰ Perhaps this is a reflection of just how strongly it was felt, still, in the aftermath of Meech and Charlottetown, that constitutional rounds of negotiation were not a realistic proposal.

⁹ Smith, David, *The Senate in Bicameral Perspective*, University of Toronto Press, 2003, pg 157

¹⁰ *Ibid*, pg 157

Smith's non-constitutional proposals and approach are similar here to those outlined in his chapter in Joyal. His logic for this approach is that constitutional reform is made extraordinarily difficult not only by the stringent requirements of the constitutional amending formula, but also by the difficulty in answering the question: what is the Senate's role? He suggests that Canada itself is both a fiscal and a linguistic federation that reconciles two nations and has struggled with doing so with First Nations. Moreover, it practices both executive federalism and representational federalism.¹¹

In the interim, until an agreement about the Senate's role within not only the federation but also the federal parliament can be resolved, Smith looks at features of the Senate and whether they can be usefully reformed without resorting to the constitutional amending formula. He dismisses any hope of changing the role and function of the institution, its powers or its composition as being too linked to fundamental aspects of the institution and its place in the federation and Parliament. However, he does look to the selection process as an area that may be possible to improve. He notes that the 1980 Supreme Court opinion made it clear that any change must not alter the fundamental nature of the Senate. The recent opinion of the Court has reinforced that consideration and declared that elective processes would have that effect. At the time of writing, Smith's opinion on this appears to have anticipated the probability of this outcome. However, he also posits that tenure could be changed to a suggested 15 years – the average length of appointment – so as to fix an average into a set tenure, eliminating age limits.¹² No particular effect is forecast by Smith beyond normalizing tenure. The Court, meanwhile, has determined that tenure does have material relevance to the fundamental

¹¹ *Ibid*, pp 151-155

¹² *Ibid*, pp 167-168

nature of the institution. While not defining an acceptable tenure, the Court noted the current nature as ensuring that a senator had security of term through to the end of any normal career. Smith does not explore, for example, the possibility that even a 15-year term might be used to appoint young, inexperienced party faithful to train them for later elective politics, as opposed to senior, established and proven candidates. No other means of informing a candidate screening process before presenting a Prime Minister with a vetted list, or particular criteria are suggested beyond mentioning that the Justice Minister and Prime Minister use an advisory committee to fill judicial appointments.¹³

Smith underscores accountability as an area where the Senate can do more internally to restore confidence in its capacity to manage public resources responsibly and be seen to be attending to public business with assiduity. This section, in particular, mirrors the recommendations he made in Joyal's work. The problem is, in hindsight, the specific recommendations he made 10 years ago have been largely followed.

There are many examples of good work being done in the Senate being diminished or overwhelmed by relatively minor scandals that are similar in nature and amplitude to any that come up from time to time in a typical legislative assembly. These belie any hope that a coherent and well communicated set of principles could build up immunity to public cynicism as wishful thinking. The Senate has, since 2001, published detailed accounts of its work on an annual basis.¹⁴ Descriptions of the attributes of the Senate as currently constituted abound in these reports and in other material available online and in printed format, with examples tied to work in committee and the Chamber. The Senate has enhanced its presence on the Parliamentary Internet Site and has

¹³ *Ibid*, pg 169

¹⁴ <http://sen.parl.gc.ca/portal/annual-reports-e.htm>

published accessible information about its origins and roles and responsibilities in such publications as *The Senate Today*.¹⁵ As of June, 2014, it had almost 20,000 followers of its Twitter feed @SenateCA/@SenatCA,¹⁶ which it uses to inform about committee meetings, travel and reports, chamber business and the art, architecture and heritage of the Senate. Smith's suggestions designed to enhance awareness of the work of the Senate and its committees, while of value in being accountable, transparent and informative, do not appear to have had much traction with the general public, his principle audience for these reforms.

In both cases, what is absent is a forum and mechanism for the ideas and processes of contemplation and decision Smith explores. No body or institution or collection of representatives is identified for determining the larger questions of role, representation, powers, composition or accountability he discusses. Is it the Senate itself who should pose and answer these questions? Without an agreed consensus among political elite and citizens alike, no internally derived vision and plan for the Senate will hold any traction. Detailing and calling attention to the good work it does will do the Senate no good so long as its public credibility is settled.

Finally, among the academic works specifically touching on the Senate, Jennifer Smith has a more recent collection of articles solicited on the topic of reform entitled *The Democratic Dilemma: Reforming the Canadian Senate*, 2009. Also including chapters on the origins and intentions for the Senate, this is largely an examination of Prime Minister Harper's government's legislative reform approach in the form of consultative elections and term limits.

¹⁵ <http://sen.parl.gc.ca/portal/about-senate-e.htm>

¹⁶ <https://twitter.com/SenateCA>

The bills are examined in detail, and speculation about their constitutionality with respect to the amending formula is now answered. Of note is Senator Hugh Segal's chapter on the motion he has unsuccessfully promoted in the Senate to urge the government to hold a referendum on the abolition of the Senate. In this, he suggests a partial answer to a question posed at the conclusion of this paper: who should be consulted on the Senate, on what questions and how? His answer is a national debate followed by a referendum on the fate of the Senate by all electors. His conditions are that if 50%+1 nationally vote for abolition, the federal government should be prepared to sign off. Respectively, so should each provincial government if the same threshold were met in its jurisdiction.¹⁷

As a defender of the Senate, and in faith that the outcome would be in favour of keeping the Senate, Segal suggests that this affirmation would kick start a renewed process of reform. While his own priority would be for a more direct role in selection of senators by the people, Segal's focus is more on a process to focus national attention and intention on reforming the Senate than it is on specific reforms. Noting the same obstacles to engaging the respective federal and provincial executives and the people solely on the issue of Senate reform,¹⁸ Segal believes that this referendum would either provide incentive for focusing on reform, or in eliminating the body altogether.

This body of academic work provides solid insight into the choices made and implemented in 1867. From the perspective of how little of a similar scope had been

¹⁷ Hon. Hugh Segal, "Senate Reform and Democratic Legitimacy: Beyond Stasis", in Smith J., ed, *The Democratic Dilemma: Reforming the Canadian Senate*, Institute of Intergovernmental Relations, Queen's-McGill University Press, 2009, pg 176

¹⁸ *Ibid*, pg 175

written in the previous decades,¹⁹ it is a virtual tsunami of considered academic study of the Senate. However it is limited in its ambitions for Senate reform by the inhibitions of the period following the mega constitutional rounds of the 70s, 80s and early 90s. The following section looks at second chambers on a more general level, theoretically and comparatively.

Bicameralism

Ajzenstat refers to evidence that the work of political philosophers, such as John Stuart Mill, was well read amongst many of the Founding Fathers. However, there is actually very little in the way of a concerted, focused or exhaustive body of theoretical or comparative work on the subject of second chambers, either in 1864 or today. In the following section, we look briefly at both the 19th century and modern understandings of bicameralism and the role of second chambers. From the rhetoric of those who champion the abolition of the Senate to those who feel that an unelected legislative body cannot possibly contribute to democracy, any future round of Senate reform negotiations should be conducted with a solid understanding of the democratic attributes and options for roles and responsibilities a second chamber can play.

¹⁹ F.A Kunz's *The Modern Senate of Canada, 1923-1963*, and MacKay's *The Unreformed Senate of Canada*, from 1926, being the major works previous to the turn of the century.

Theory

The study of bicameralism in theoretical perspective is, according to Patterson and Mughan, a relatively poorly explored area of political science.²⁰ Indeed, they argue that bicameralism is essentially an evolutionary byproduct of medieval practices in Europe where identifiable segments of society – nobility, both upper and lower, the clergy and townspeople, for example - would be assembled in order to find revenues to support the sovereign.²¹ These societal segments, or estates, they argue, eventually became the popularly elected House of Commons and the hereditary House of Lords that forms the historical base of the Westminster form of parliamentary governance. Without conscious design, this model nonetheless was overwhelmingly influential not only in the established governance structures of Europe, but also in the emergent New World.²² It follows, then, that much of the theory that may exist reflects common features among second chambers and to explain ways in which they serve governance. These comparative characteristics will be surveyed, but what of a more philosophical/theoretical approach?

Jeremy Bentham, an early mentor of Mill, had actively supported unicameral over bicameral institutions, arguing against their use with his French contemporaries. Mill, whose general view of second chambers was not enthusiastic, argued that their existence was a secondary or default consideration in comparison to a properly constituted

²⁰ Patterson, Samuel C., “Foreword”, in Patterson and Mughan, eds., *Senates: Bicameralism in the Contemporary World*, 1991, Ohio State University Press, Columbus, pg. x

²¹ Patterson, Samuel C., and Mughan, Anthony, “Senates and the Theory of Bicameralism”, in Patterson and Mughan, eds., *Senates: Bicameralism in the Contemporary World*, op. cit., pg. 2

²² *Ibid*, pg. 3

constitutional democracy.²³ Mill's preoccupation, with respect to legislative assemblies, was with the appropriate representative structure. A proponent of Thomas Hare's scheme for proportional representation, Mill was focused on the more perfect structure of voting systems and the need to create a more representative democratic government "...of the whole people, by the whole people, equally represented."²⁴ Of particular concern to Mill was the effect of most contemporary democratic electoral systems that were based on a more limited understanding of democracy resulting in "...government of the whole people by a mere majority of the people, exclusively represented."²⁵ Consequently, rather than all people having a voice, only the majority have an effective voice, to the exclusion, - or "disenfranchisement" - of the minorities.²⁶

In the absence, however, of a properly contrived unicameral body, providing an effective voice to all, second chambers were seen by Mill as having useful features that countered the deficiencies of the (un)representative house. For example, second chambers represented a very real check on "...the evil effect produced upon the mind of any holder of power, whether an individual or an assembly, by the consciousness of having only themselves to consult."²⁷ From *On Liberty*, we know that Mill believed strongly in the individual's right to freedom from society's undue intrusion on his or her rights.²⁸ Any system that lent itself to despotic tendencies would, therefore, be an affront to fundamental rights and freedoms.

²³ Mill, John Stuart, *Utilitarianism, Liberty, and Representative Government*, J.M. Dent and Sons, London, 1936, pg. 324

²⁴ *Ibid*, pg. 256

²⁵ *Ibid*, pg. 256

²⁶ *Ibid*, pg. 257

²⁷ *Ibid*, pg. 325

²⁸ Mill, John Stuart, *On Liberty*, Watts and Co, London, 1948, pp. 92-93

A legislature, then, that lacked the necessary democratic features of minority representation such as might be provided by a proportional representation scheme and which was unchecked by any other source of constitutional control, according to Mill, “...easily becomes despotic and overweening, if released from the necessity of considering whether its acts will be concurred in by another duly constituted authority.”²⁹

Mill also identified a feature inherent to having two Houses that he found beneficial to the democratic governance of the whole people: conciliation. The dynamic of two Houses coming together over issues of dispute would involve, he argued, a degree of compromise, “... a willingness to concede...and to shape good measures so as to be as little offensive as possible to persons of opposite views...”³⁰

Of the House of Lords, Mill’s opinion was that its natural base of power - the aristocracy - had long eroded from being real, to being perceived and, in time, once democracy had taken hold of the national psyche, would be further degraded to mere symbolism. However, he valued its potential for enhancing the possibility of negotiation and compromise for excluded groups. In his view, if two Houses, unequal in power, were to align in open and direct confrontation, the less powerful House would necessarily lose. However, if the less powerful House were to align itself with groups within society, it could create the environment necessary to effect change or compromise on the part of the more powerful House. In his words, “...taking a position among, rather than in opposition to, the crowd, and drawing to itself the elements most capable of allying

²⁹ Mill, *Utilitarianism*, op. cit., pg. 325

³⁰ *Ibid*, pg 326. Interestingly, the Canadian experience with this dynamic has proven the assertion. In every single instance where the Canadian Senate and House of Commons have joined in what are known as parliamentary conferences – joint ad hoc committees delegated with the authority to negotiate the resolution of an impasse over legislation – the Senate position has always been sustained. See Armitage, Blair, “Parliamentary Conferences”, *Canadian Parliamentary Review*, Vol. 13, No, 2, 1990. Perhaps this is why they haven’t been used in Canada since 1947.

themselves with it on any given point...”³¹ In short, Mill held that a democratically deficient second chamber, unequal to the more powerful, democratic chamber, would necessarily have to find ways to influence, rather than to oppose; to become in practice, if not form, equally democratic. If successful, the second chamber could then “...content itself with correcting the accidental oversights of the more popular branch of the legislature, or competing with it in popular measures.”³²

Mill did not see the second chamber, however, as an effective check on the majority in the popular house. Returning to his preference for a more perfectly democratically composed popular house, Mill reflected on the supposition of the Hare model that a good proportion of those elected by voters who perceive themselves to be in the minority would, therefore, naturally select preeminent, proven individuals of prodigious intellect and moral standing from at large to populate the representative House. As a result of this natural authority, collectively, and the ability to recognize and correct the errors and mistaken inclinations that inevitably would emanate from a body made up of the majority class of society, the weight of this minority’s inherent virtues would more than make up for its numerical disadvantage.³³ Failing the Hare mode, however, Mill argued a second chamber comprising individuals who were in possession of these attributes would, “...without being open to the imputation of class interests [presumably such as those of the aristocracy] adverse to the majority, would incline it to

³¹ *Ibid*, pg. 326

³² *Ibid*, pg. 327

³³ *Ibid*, pp. 327-8

oppose itself to the class interests of the majority, and qualify it to raise its voice with authority against their errors and weaknesses.”³⁴

In summary, Mill was not an advocate, necessarily, of bicameralism, but within the bicameral system he ascribed to second chambers certain virtues: acting as a check, by forcing the executive to reflect on considerations other than its own, due to the existence of another body with the authority and wherewithal to review, revise or reject its proposals; acting as a voice for interests other than the majority; providing a forum for reconciling differing interests; and, although not the popular house, it could identify and ally itself with popular feeling in order to influence the government.

The benefit of Mill’s reflections is that they are philosophically considered, based on observation of behavioral tendencies and theoretical analysis as well as direct observation of the operations of the House of Lords in concert with the House of Commons at Westminster. There are limitations, however, with respect to the application of Mill’s insights to the Canadian Senate and its reform: the contemporary House of Lords with which Mill was familiar was still based on an aristocracy that mattered, Britain was not a federation and did not have the need to accommodate two official languages. Moreover, Mill’s assumption that deference to eminence – whether of birth or achievement – in any respect would sustain itself naturally. This notion would be largely rejected out of hand today.

In 1886, in part of a collection of essays on governance, Sir Henry Maine built upon Mill’s belief that a second chamber is an important dimension to democratic governance. It is worth quoting him at length:

³⁴ *Ibid*, pg 327

Second Chambers(s) are founded on a denial or a doubt of the proposition that the voice of the people is the voice of God. They express the revolt of a great mass of human common sense against it. They are the fruit of the agnosticism of the political understanding. Their authors and advocates do not assert that the decisions of a popularly elected Chamber are always or generally wrong. These decisions are very often right. And the more the difficulties of multitudinous government are probed, and the more carefully the influences acting upon it are examined, the stronger grows the doubt of the infallibility of popularly elected legislatures. What, then, is expected from a well-constituted Second Chamber is not a rival infallibility, but an additional security. It is hardly too much to say that, in this view, almost any Second Chamber is better than none. No such Chamber can be so completely un-satisfactory that its concurrence does not add some weight to a presumption that the First Chamber is in the right; but doubtless Upper Houses may be so constituted, and their discussions so conducted, that their concurrence would render this presumption virtually conclusive. The conception of an Upper House as a mere revising body, trusted with the privilege of dotting i's and crossing t's in measures sent up by the other Chamber, seems to me as irrational as it is poor. What is wanted from an Upper House is the security of its concurrence, after full examination of the measures concurred in.³⁵

³⁵ Maine, Sir Henry, *Popular Government: Four Essays*, Henry Holt and Company, New York, 1886, pp 179-180

In this conclusion on the structure of governance, Maine was confronting the premise that second chambers are superfluous and an affront to the will of the people. He proposed that this argument is based on an assertion that, despite the demonstrable imperfections in the way in which popular houses reflect a true representation of the entire community – the principal preoccupation of Mill – popular houses tend towards the claim to represent the people as a whole. As a consequence, they tend towards assuming “an air of divinity” with respect to their role.³⁶ This is a clear mirroring of Mill’s worry about despotic tendencies in a government not needing to heed anything other than its own counsel. It adds, however, to a more sophisticated appreciation of democracy being more than simply majority rule - the crudest understanding possible - but as a complex, layered conception of those represented and the best way to balance majority rule with minority rights.

An Australian collection of essays from 2008, *Restraining Elective Dictatorships: The Upper House Solution*, provides not only a useful view from another Westminster style jurisdiction, it also has theoretical/philosophical reflections from a modern perspective and essays by two prominent Canadian academics to provide international perspective to the Australian focus from Canada. The collection was specifically designed from the perspective of Queensland, the only unicameral jurisdiction in Australia. It explores the merits of re-introducing a second chamber from normative and practical perspectives.

In its introduction, the editors reflect on the fact that so many of the extra-parliamentary accountability tools available are vulnerable to executive influence, even

³⁶ *Ibid*, pg 179

control. Through powers of appointment, superior communications and message creation resources, collective weight, and prerogative powers over such matters as prorogation, the authors argue that executives can, at the very least, influence unduly those institutions and individuals, such as the courts, media and officers of parliament, intended to act as added layers of checks and accountability.³⁷

Moreover, according to the authors, checks from within parliament itself are of importance so that extra-parliamentary institutions are not the only line of defence against majority power. In light of the executive's capacity to also dominate parliament from within, the authors argue that "... a durable regime of scrutiny, investigation and accountability..." is vital and that "[g]eneral experience and notably experience in the period since the Second World War, the era of government intervention in the economy and the welfare state, shows conclusively that bicameralism has provided the most likely conditions for restraining the executive."³⁸ They conclude that the chief benefit of bicameralism, over all others, is its capacity to counteract Lord Acton's dictum about the corruption inherent to unchecked power.³⁹

The first section of the collection is composed of three separate perspectives on bicameralism and its theoretical merits. In the first, John Uhr looks at the institutional design dimension. Uhr argues that the institutional design merits of bicameralism lie in theories of redundancy and the state of tension created. Opponents to second chambers, in addition to saying they are redundant, note the diminution of accountability (much as

³⁷ Aroney, Prasser and Nethercote, "Upper Houses and the Problem of Elective Dictatorship", *Restraining Elective Dictatorship: The Upper House Solution*, Aroney, Prasser and Nethercote, eds., University of Western Australia Press, 2008, pg 3

³⁸ *Ibid*, pp 3-4

³⁹ *Ibid*, pg 6

will be observed later about federations themselves when jurisdictions become blurred) when members of the two houses shift blame for decisions, or lack of decisions or action on one house or the other. Proponents of second chambers point out that redundancy is an important engineering concept designed to ensure outcomes are reinforced (echoes of Sir Henry Maine) or as safeguards against failures.⁴⁰

Secondly, Uhr presents the concept of balance from an institutional design perspective. It sounds very familiar to those who follow the debate around the Canadian Senate; balance simply means that having a duplicate part of an institution that does not vary or complement the other part in a meaningful way is inefficient and ineffective. This would support the rhetorical question often posed when contemplating an elected Senate: why create a mirror image of what is down the hall? “Each chamber or house captures a distinctive view of political representation. The implication is that decisions by a bicameral political assembly require a convergence or merging of perspective to provide final policy and legal focus.”⁴¹ The Supreme Court underscored that the complementary nature of the Senate was a deliberate and conscious objective of the Fathers.⁴²

Nicholas Aroney’s chapter deals with democracy and bicameralism. The primary critique of second chambers is that they are inherently conservative in nature, tending to be a brake on the will of the people. The main argument in favour, on the other hand, is that second chambers weaken the grip of the executive on the legislative branch and,

⁴⁰ Uhr, J, “Bicameralism and Democratic Deliberation”, *Restraining Elective Dictatorship: The Upper House Solution*, op. cit., pp 14-15

⁴¹ *Ibid*, pg 16

⁴² Supreme Court of Canada, *Reference re Senate Reform*, op. cit., para 54-60, for example

therefore, on unfettered rule.⁴³ In looking at three inherent attributes of democratic construction, Aroney demonstrates the flaws in common assumptions that develop within democracies. The first is that the people, or *demos*, are unitary in perspective. If a people are homogenous, it follows that a second chamber is redundant in the superfluous meaning of the word. If, however, we accept that demographic or territorial features fragment the people, then society comprises heterogeneous complexions and can be expressed in a variety of ways.⁴⁴

Secondly, Aroney examines the notion of democracy as being simply the majority speaking collectively on behalf of the whole (Mill's "...government of the whole people by a mere majority of the people, exclusively represented..."). Aroney contrasts this model with the consensus model described by Lijpart as being the difference between decisions taken by a simple majority versus among as many people as possible.⁴⁵ He notes that on the Lijpart scale, unicameral bodies dominated by a majority party like Canadian provinces - are on the extreme end of majoritarian democracy. By providing a different representational perspective and by creating more time and space for debate and deliberation, second chambers move democracies much further along the spectrum towards consensus democracy,⁴⁶ and closer to Mill's ideal of democracy being "...of the whole people, by the whole people, equally represented."

Finally, Aroney examines the effectiveness of majority rule. In other words, if a simple majority is democratic, how well are electoral systems creating majorities? In his

⁴³ Aroney, N, "Bicameralism and representations of Democracy", *Restraining Elective Dictatorship: The Upper House Solution*, op. cit., pp 28-31

⁴⁴ *Ibid*, pp31-32

⁴⁵ *Ibid*, pp 33-34

⁴⁶ *Ibid*, pg 34

view, not very. From first past the post to proportional representation variations, the capacity of electoral systems to properly reflect policy options held amongst a heterogeneous people is limited. Moreover, any system that allocates seats by preferential basis is creating manufactured majorities that are anything but.⁴⁷

Accordingly, Aroney concludes that second chambers are a useful way in which these deficiencies in democracy can be addressed. In light of the many ways in which unicameral bodies can fall short of higher expressions of democracy, second chambers can certainly be used to compensate for those deficiencies.⁴⁸

In the final article of this section, Geoffrey Brennan explores rational actor theory or public choice theory and how an analysis of democracy's major issues – coming to an expression of public policy that accurately reflects the multi-dimensional range of policy options and their distribution among parties versus expressive voting problems resulting from a successful expression of the people's voting preferences, but which produces 'wrong' policy outcomes for the public interest – might be affected by bicameralism. Using transfer theory, he analyses whether bicameralism would be a positive, negative or neutral influence.

Through the use of transfer games to illustrate his logic, Brennan concludes that simple majority democracy does not effectively maximize coherent policy positions out of a multi-dimensional population. He argues that bicameralism can have a positive effect on improving the breadth of the policy outcome. In other words, it will encompass a greater spectrum of opinion amongst the electorate. Where the second chamber has different party complexions in the two houses, Brennan believes it will improve the

⁴⁷ *Ibid*, pg 35

⁴⁸ *Ibid*, pp 39-40

overall outcome of policy choice and curb “...the dictatorial power of decisive majorities.”⁴⁹

Brennan then addresses the issue of expressive voting, or voting outcomes that result in policy choice that runs counter to “...the grain of the ‘public’ interest more independently conceived.”⁵⁰ In other words, a majority of the people, driven by short term self-interest, or other such considerations, may drive public policy choices that are not wise. According to Brennan, a second chamber can counter these developments, provided they enjoy a degree of legitimacy or credibility in standing, but should have a different character to them from the other house. Preferably, in his opinion, a character that is more bi-partisan and independent in spirit.⁵¹

A final chapter of particular interest to Canada in the collection is one by David Docherty, author of *Legislatures* for the Canadian Democratic Audit series, which reviews the legislatures of the Canadian jurisdictions for their democratic features. In “Upper Houses in the Canadian Provinces,” he examines the question of how it is that the provinces in Canada came to be entirely unicameral, despite the history of having upper chambers in the original provinces. Docherty applies his experience in examining legislative assemblies’ democratic features to the case of unicameral versus bicameral provincial assemblies in a Westminster system.

Docherty’s history of provincial second chambers in Canada informs us that 6 provinces had second chambers in the period following Confederation, and that another,

⁴⁹ Brennan, G, “The Logic of Bicameralism: A Rational Actor Account”, *Restraining Elective Dictatorship: The Upper House Solution*, op. cit., pp 61-62

⁵⁰ *Ibid*, pg 62

⁵¹ *Ibid*, pg 62

Ontario, chose to forego a second chamber in 1867.⁵² No insight is provided as to why some provinces had second chambers and decided to do away with them or why other provinces chose to never have one on the first place. On the other hand, he does note that the primary policy fields within their jurisdiction are social, health and education, and that these fields became far more important in the latter part of the 20th century.⁵³ This point will be expanded upon and its importance examined later in this thesis.

Reflecting on the essentials of the Westminster model of responsible government, Docherty presents it as having the merits, generally, of being both responsive and accessible in its simplicity. Yet, in his view, in order for the model to work particular conditions must be in effect, for without them responsible government is compromised.⁵⁴

The method of selection of members by the single member plurality or first past the post uniformly followed in Canada affects the outcomes and dynamics of an assembly. The most common result in Canadian provinces is two party dominance and frequent bouts of lengthy rule by one party. Distortions of representation (for example, *per* Docherty, New Brunswick returning 0 Conservative members with 28% of the vote), unfamiliarity of new governing parties with bureaucracy or the practice of governing, and access to equal resources for minority parties not meeting thresholds set by the incumbents are among the deficiencies that can occur and which affect accountability. In all instances, he notes, regardless of how selected or designed, a second house at the very

⁵² Docherty, D, "Upper Houses in the Canadian Provinces", *Restraining Elective Dictatorship: The Upper House Solution*, op. cit., pg 145, Table 1

⁵³ *Ibid*, pg 146

⁵⁴ *Ibid*, pg 147

least provides an alternative opportunity to scrutinize and debate the actions and ambitions of the government.⁵⁵

Secondly, Docherty looks at the extraordinarily strong degree of party discipline found in Canada, and its effects on accountability. Noting the general reluctance in Canadian jurisdictions to criticize one's own party or policy or leader, due to party control over ambitions for career advancement, assignments, support in elections and other blandishments available, Docherty looks at the effect of second chambers on leader dominance and scrutiny. Depending on selection and configuration, Docherty notes the relative independence of the current Canadian Senate, its relative lack of expectation for political career advancement and its inability to initiate confidence questions. He concludes that its existence "[a]t the very least...institutionalize[s] a more transparent accountability mechanism from within."⁵⁶

Looking at scrutiny and the tools available, Docherty observes that the use of question period in the respective jurisdictions varies, but is generally thought to be at least an available tool, regardless of how well used, and that the addition of a second chamber does not have obvious benefits that would enhance scrutiny.⁵⁷ Committees, however, are another story. Their use to scrutinize legislation and public policy is noted as a positive tool. Yet few of the jurisdictions, especially those with small or decreasing numbers, can fully and adequately do a full range of committee review. The Senate, he notes, with less emphasis on holding the government directly to account, and with a complementary role, not a governing role, has more time and resources to devote to

⁵⁵ *Ibid*, pp 147-150

⁵⁶ *Ibid*, pp 151-152

⁵⁷ *Ibid*, pg 152

legislative and policy scrutiny. According to Docherty, committee work is the real stand out performance of the Canadian Senate, where it is recognized for the detailed, less partisan approach it takes.⁵⁸

While upper chambers would provide greater accountability, a greater check on the executive and provide improved scrutiny for these model examples of Lijphart's majoritarian democracies, Docherty is doubtful of a public appetite to add more politicians to the scene.⁵⁹ He notes that attempts to address the poor democratic representativeness of provincial assemblies through electoral reform has failed three separate attempts, leaving them significantly in deficit with respect to democratic features.⁶⁰

It will be explained later in this thesis that it can be argued that provinces, as conceived in 1867, were so reduced in scope and importance of stature as to obviate the need for a second chamber. As little more than municipal governments, the depth of impact on society was not seen to be so great as to require protection for minorities through an upper chamber that could be afforded by the federal Senate. However, as will also be argued, the nature of Confederation and its watertight jurisdictional compartments, and the substance and scope of provincial powers have changed so significantly that the merits of upper chambers in the provinces may be a valuable project of extended study in its own right.

⁵⁸ *Ibid*, pg 155

⁵⁹ *Ibid*, pg 157

⁶⁰ *Ibid*, pg 158

Comparative Analysis

Patterson and Mughan offer that second chambers serve two overarching roles: an alternative perspective for influencing policy and as a democratic enhancement in the form of a tempering influence on majoritarian-based governments.⁶¹ The latter is largely a distillation of Mill's work as outlined above. Comparative studies reveal characteristics common to bicameral governance structures that suggest a range of practical roles second chambers can play, as well as some of the inherent challenges related to their roles in governance.

As a starting point, Patterson and Mughan identify a number of features that generally distinguish contemporary second chambers in parliamentary systems. The first is that senates tend to be unequal in stature to the popular house. Whether their formal powers are essentially equal or not, parliamentary upper houses find themselves wanting in terms of public perception and public influence.⁶² The authors conclude on this point that there appears to be a public appetite for upper houses to be moderating, conciliatory influences and sources of policy insight, not sources of political competition.⁶³

The second characteristic common to second houses is that they tend to be a disputed feature of their respective systems. The authors argue that, in particular in parliamentary systems, which are founded on a majoritarian principle, the minority protection role played by second houses frequently puts them in contention with the popular house. Even while playing practical roles such as regional, territorial or cultural representation, second chambers fundamentally challenge the core of a government based

⁶¹ Patterson and Mughan, *op. cit.*, pg 337

⁶² *Ibid*, pg 338

⁶³ *Ibid*, pg 338

on sustaining the support of a majority of followers.⁶⁴ The solutions, say the authors, present their own challenges: direct election of second chamber members results in coequal political power; coequal powers result in legislative inefficiency and greater difficulty in passing legislation.⁶⁵

Patterson and Mughan then proceed to make a bifurcated point on the observation that “Senates Matter.” In the first of these two points, they argue that the representative role second houses play must clearly matter, or there wouldn’t be nearly the amount of political strife over their existence and role. Regardless of constituency, or lack thereof, senates play a real and consequential role, often in the partisan arena, and when the senates are not allied politically with the representative house, they can be influential if only out of inherent competition.⁶⁶

On the second of these two points, senates matter due to the redundancy they bring to the parliamentary process and that, on the evidence, they have an impact on the eventual outcomes respecting public policy. Although they are frequently not recognized for this impact, it is clear that in many countries with second chambers, their mere presence, their attempts at negotiation and, sometimes, outright public confrontations with government, all have varying degrees of influence on public policy.⁶⁷

In a final note, the authors point to the growing importance of senates, citing their influence on public policy development. In certain instances, they contend this is due to a willingness on the part of senates to assert themselves, despite no changes being made to the relative constitutional relationship they have to the representative house or

⁶⁴ *Ibid*, pg 339

⁶⁵ *Ibid*, pp 339-340

⁶⁶ *Ibid*, pp 341-342

⁶⁷ *Ibid*, pp 342-343

government.⁶⁸ The authors attribute such assertiveness to three factors: party politics, where upper house parties in opposition to or competition with the governing party use their positions to counteract political gambits by their opponents; re-establishing respect, in situations where the upper house is held in contempt or not accorded institutional comity by the other house or the government; and philosophical considerations (such as those discussed above with respect to holding governments to account and acting as a check on the tyranny of the majority) that allow them to rebuff the suggestion that their lack of democratic legitimacy compels them to acquiesce quietly in the face of the government's wishes.⁶⁹

In a paper for the Hansard Society, Meg Russell asks *What Are Second Chambers For?* Her approach includes Patterson and Mughan's points about representation and redundancy, the exercise of a degree of independence, as a veto player, and as a way of managing the parliamentary workload.⁷⁰

As a representative body, Russell, too, notes the origins of aristocratic bodies in relation to the commons, but she also opens up a range of other representative roles that can be played by upper houses. In addition to territorial considerations, such as the constitutionally-designed role of the Canadian Senate to balance representation of the regions, Russell also identifies territorial, linguistic and ethnic minorities as usual groups targeted for representation and adds party-political minorities.⁷¹ In addition to reasons of workload efficiency, Russell argues that countries with size, population and significant divisions appear, from comparative analysis, to benefit from having a second chamber

⁶⁸ *Ibid*, pg 343

⁶⁹ *Ibid*, pg 346

⁷⁰ Russell, Meg, "What Are Second Chambers For?", *Parliamentary Affairs*, 2001, 54, pp 442-3

⁷¹ *Ibid*, pp 443-4

that provides an alternative perspective on representation, particularly in federations.⁷² She notes, however, that the ultimate benefit to minorities, regardless of their nature, is often disputed. In the end, she argues the independence of and relative power of the second chamber is the single largest defining characteristic of its relative effectiveness.⁷³

Enjoying a degree of independence from the Executive means that party control is less prevalent, allowing for an avenue of improved cross-party understanding. This is enhanced by the prevalence of higher minimum entrance ages, the rarity of cabinet ministers being routinely sourced from the second chamber and the smaller size of most⁷⁴ second chambers.⁷⁵

Of particular interest in Russell's summary is the idea of complementary roles falling to the Upper Chamber. Attributes familiar to defenders of the Canadian Senate include having the time and inclination, due to lack of a direct political constituency and greater length of service to perform more rigorous review of legislation.⁷⁶ In addition, certain jurisdictions use the second chamber to perform specialist reviews of legislation; the House of Lords, for example, reviews the delegation of powers through legislation to ministers and others.⁷⁷ As will be seen later, there are parliamentary functions that have been identified as worthwhile or that are seen to be under-performed. Depending on the nature of those functions, reform can be an opportunity to address them, or the pressure to include those functions can prove to be political obstacles.

⁷² *Ibid*, pp 444

⁷³ *Ibid*, pp 446-7

⁷⁴ With, of course, the obvious exception of the House of Lords

⁷⁵ Russell, *PA 2001*, op. cit., pp 448-9

⁷⁶ *Ibid*, pp 451-1

⁷⁷ *Ibid*, pg 452

Twelve years later, Russell's insights into second chambers have evolved through her intensive study of the reform of the House of Lords. In *The Contemporary House of Lords*, Russell builds on her analyses of second chambers and what makes them work. Her extensive comparative study of second chambers in presidential and parliamentary systems details their relative methods of selection and legislative powers in detailed charts.⁷⁸

Russell concludes that second chambers tend to be less directly engaged with the citizenry, that even elected second chambers are more likely to be elected through indirect means or for a much larger constituency than those of the popular house.⁷⁹ Secondly, second chambers tend to have weaker formal powers than those afforded the popular house.⁸⁰

Russell argues that these two features lead to a relative popular obscurity for most second chambers, which, in turn, leads to longer terms, greater continuity, and being far more familiar with one's colleagues. They also tend to be older than their popular counterparts, even in those second chambers that are elected. In turn, when these features are present, they tend to lead to a politer, more mature and reserved chamber, with a perspective on matters that extends over a longer time horizon.⁸¹ Of course, there are exceptions where the second chamber does actively compete for political attention and objectives with the popular house and it is often in direct dispute with government. In these instances, the second chamber is more likely to enjoy greater political legitimacy

⁷⁸ Russell, Meg, *The Contemporary House of Lords*, Oxford University Press, Oxford, 2013 see especially Tables 3.1, pp 51-52, and 3.2. pg 54

⁷⁹ *Ibid*, pg 58

⁸⁰ *Ibid*, pg 58

⁸¹ *Ibid*, pp 58-59

and relatively robust powers.⁸² Russell concludes that while these identified tendencies exist, there remains a high degree of variance among second chambers with respect to selection methods, degree of veto/obstructive power they possess and the nature of their representational profile – territorial, elite social group or vocation.⁸³ Therefore, she argues, a singular profile of second chambers is not feasible.

Due to the fair degree of internal variance in second chamber models, Russell suggests that the real question is which model is preferred? This question, in the Canadian context, was shaped not only by the functions the second chamber was to perform, but also by the compromises it was meant to abet.

In his conclusion, David Smith says much the same thing as Russell: “...it is misleading to suppose an inherent class of second chambers exists in some unchangeable form. Even among parliamentary systems that follow the Westminster model, variation rather than sameness is the norm.”⁸⁴ Of particular value to Smith are the democratic features a Senate provides, regardless of how it is selected. Where the House of Commons is passionate, adversarial, dramatic and volatile, the Senate provides a more deliberate, contemplative, collegial and temperate dynamics.⁸⁵ In a majority-driven House of Commons, where immediate electoral concerns can drive a swift, cursory review, the Senate provides smaller voices time and space to be heard and, in addition, even serves to drive consensus on contentious issues.⁸⁶

⁸² *Ibid*, pg 59

⁸³ *Ibid*, pp 41-61

⁸⁴ Smith, David *The Senate in Bicameral Perspective*, op. cit., pg 176

⁸⁵ *Ibid*, pg 159

⁸⁶ *Ibid*, pg 135

Conclusion: The characteristics of bicameralism

All told, second chambers bring several attributes to parliamentary governance, based on philosophical and comparative analysis: their democratic qualities, regardless of manner of selection, include the dimensions of time and space for debate; the protection and consideration of minority views; the detailed revision of legislation; alternative profiles of representation that can be based on territorial, linguistic, gender, occupation, ethnic, religious and political characteristics, among others; and the provision of an obstacle to unchecked majority power.

The functional attributes include complementary legislative, investigative and accountability chores, thereby spreading parliamentary workload; redundancy improves legislation not only in democratic terms but also in technical terms; and providing a political forum for conciliation of partisan inter-party dispute. The second chamber is adaptable, has many possible variations and can be used to address a variety of perceived needs. No wonder it was so important to resolving seemingly intractable dilemmas. Second chambers are a means to many ends.

For all of its detractors, for all of the criticism it attracts, the Canadian Senate has made meaningful contributions to the parliamentary process. A connection between the attributes of the Senate peculiar to it can be made with the positive observations made about it. Age, experience, expertise, tenure and lack of immediate accountability are identified frequently as positive features of the appointed Senate.⁸⁷ From them have come meaningful contributions to public policy that might never have otherwise have been made. Franks details a selection of

⁸⁷ Franks, C.E.S., "Modern Times", *Protecting Canadian Democracy: The Senate You Never Knew*, op. cit., pg 151, for example.

instances in his chapter in Joyal's book, and recalls Senator Davey's remarks about the Senate being less expensive and more effective than Royal Commissions.⁸⁸ The merits of having a national institution that can look into sensitive, emotionally charged issues such as mental health, illegal drugs, palliative care, the health care system, or cyberbullying in a forum that can inform the national debate, without the debate threatening to become government policy and/or law overnight are difficult to replace, if the nature of the institution changes. It is the senators' respective and collective distance from actual governance, their complementary and independent nature, and their detachment from direct electoral considerations that allows them to provide this perspective.

Reform, particularly in favour of the elective principle, involves the Senate's relationship to the House of Commons and the Executive. The Supreme Court, in its decision, repeatedly categorizes the Senate as a "complementary legislative body of sober second thought."⁸⁹ Should there be a greater tolerance for the idea of political gridlock critics argue will come with greater legitimacy? Are there ways to balance responsible government while ensuring a legitimate second chamber is not left toothless?

From the perspective of the provinces, national economic power being placed in the hands of the federal government can be seen as a risk or a blessing. It certainly was attractive when they entered into partnerships on social aid programs. How effective has the Senate been in protecting regional interests when they are directly threatened by the

⁸⁸ *Ibid*, pg 154 and pp 177-185

⁸⁹ *2014 SCC 32*, op. cit., para 52, for example

federal government? As one of the few instances in history, the National Energy Program would suggest: not very much.

There were five senators from Alberta in the Senate at the time the National Energy Program and related legislation were debated: Bielish, Cameron, Hastings, Manning and Olsen. All were Liberal, apart from Manning, and Olsen was the Minister of State for Economic Development. Of the four Liberals, only Olson is listed in the indexes as having spoken in the entire four-year period comprising the First Session of the 32nd Parliament on the subject of the National Energy Program. He spoke in defence of the government position, in response to questions posed by the opposition in Question Period.⁹⁰ The other four, including Manning, are not listed as having spoken to the program at all. Related legislation on Canada Oil and Gas (2 bills) attracted defence from Olson and a total of three interventions by Manning. With a strong majority, the Liberal government faced little to no meaningful scrutiny of this significant initiative that had such a significant impact regionally.

Does the Senate even have an intrastate role to play in the context of the modern federal parliament? Provincial premiers are significant political figures in their own right. The courts have solidified the provinces' place in a more decentralized power dynamic that is completely at odds with the original intentions of the Founding Fathers. Even when the provinces were supposedly weaker, the Senate was never perceived as having that role, and federal-provincial conferences were invented to fill the vacuum.

⁹⁰ Hon. H. A. Olson, PC, Senate Debates, 32-1, pp 3975-78

In the National Energy Program example, it is even arguable that provinces would have more leverage now to claim such an intrusion on their interests was unconstitutional and stop it there, rather than in the Senate.

It remains as unclear now as it was in 1867 just how a second chamber could realistically play an effective intergovernmental role. The Senate was constructed in a deliberate manner to not be a political competitor, but to be a complementary chamber, debating matters of a national nature, and is appointed not by a provincial authority but a national authority. What is clear, however, is that the evidence on the official record indicates Albertan senators did little to articulate regional or provincial perspectives or actively attempting to delay, hold up for scrutiny or question related legislation, in order that those minority or regional voices were better heard. These issues will be explored in more detail.

CHAPTER TWO: THE CANADIAN SENATE AND CONFEDERATION

So how does the Senate as conceived compare to the identifiable benefits of having a second chamber? And first, what factors contributed to the choices made by the founding fathers? Historical treatments of the Senate's origins most often consist of summary descriptions of conditions in the 1860s and how the Quebec Conference addressed them, but a more comprehensive summary of the evolution of responsible government in Canada and the underlying political and economic conditions that were active at the time more fully underscores how important they were to the final model agreed.

The road to responsible government and Confederation in Canada

The primary objective of the delegates to the Quebec Conference in 1864 was to achieve responsible government for the combined colonies of British North America, in a meaningful and effective form. This preoccupation strongly influenced their decisions on how the federal Parliament was structured. A detailed summary of how responsible government evolved in Canada and the related political tensions inherent to the former colonies of British North America were resolved, serves to underscore just how complex and emotionally charged the issues that faced the Quebec Conference delegates were.

It is arguable that the evolution of representative democracy in the Canadian colonies differs significantly, and meaningfully, from that of Great Britain and the United States in the manner in which it was won. In Great Britain, representative rights were largely achieved in a gradual manner, over centuries, as a result of the direct, sometimes armed conflict among the Crown, the aristocracy and the people. The people won the

right to represent themselves to the Crown and, eventually, control of the chief advisory role to and subjugation of the Crown. The United States rebelled entirely against the Crown, replacing it with an extraordinary notion that put 'The People' at the apex. In Canada, first representation, then responsible government and, eventually, independence were granted to it either by a prerogative declaration of the Crown, or through Act of Parliament at Westminster.

The *Constitutional Act*, which came into effect in December of 1791, was the first step in granting formal structured representative governance in the form of a Governor, advised by an executive, a legislative council and an assembly. In contradiction of the advice and opinion of the two previous governors, Carleton and Haldimand, the Act was intended to assimilate the French of Quebec by fitting them to British institutions, and to mollify merchants' complaints about the lack of British institutions in Quebec. The *Constitutional Act* was a small step forwards.⁹¹

The result, however, was neither a step forwards to responsible government, nor was it at all successful in assimilating Quebec into British ways. The extremely cautious elements of the *Constitutional Act* were a tepid nod to representation, but with little consequence. The Governor, his Executive and Legislative Councils were all so strongly in hand that the assemblies were of little effect in a system where Governors were appointed by and from Great Britain, the Executive was appointed by the Governor, and largely supported by an appointed Legislative Council, with no reluctance to overturn decisions of an Assembly with no meaningful means of leverage.⁹² The authorities in

⁹¹ Reesor, Bayard, *The Canadian Constitution in Historical Perspective*, Prentice-Hall Canada, 1992, pp 13-16

⁹² *Ibid*, pp 16-17

Great Britain did not default to a model of self-governance for the colonies when they were clearly administrative outposts, not sovereign entities.⁹³

Moreover, the Act had created two provinces, Upper and Lower Canada, that merchants felt stifled the public works they required to profit from the riches to which they had rights but limited access, and to interprovincial trade, by entrenching a French majority in one.⁹⁴ It also had the consequence of re-firing old French-English resentments.⁹⁵

Perhaps of equal or greater consequence, however, was the same yearning for responsible government enjoyed in Great Britain and so recently claimed in the United States. The growth of the liberal sensibilities of the rights of freeborn Englishmen⁹⁶ to representative, responsible government were also a part of the underlying foment that led to the rebellions in Upper and Lower Canada in 1837. In the words of Lord Durham, “It is difficult to understand how any English statesman could have imagined that representative and irresponsible government could be successfully combined.”⁹⁷

The underlying religious, political and economic interests of French and English Canadians were so different, that failure to accommodate them led inevitably to strife in the two provinces. Increasingly, minority linguistic and religious groups - mirror images of English protestants in Upper Canada and French Catholics in Lower Canada –

⁹³ Robert, Charles, “The American Revolution seen as the Vindication of the Rights of Freeborn Englishmen: A lecture in the Wilson Series presented to the Congressional Fellows in Washington, DC, January 24, 2014

⁹⁴ Careless, J.M.S., *The Union of the Two Canadas: The Growth of Canadian Institutions*, McClelland and Stewart, Toronto, 1977, pp 1-3

⁹⁵ *Ibid*, pp 3-4

⁹⁶ Robert, Charles, “The Role of the Crown in Parliament: A Question of Form and Substance”, A lecture given at the CSPG Conference on The Crown and Parliament in Ottawa, May 23, 2014

⁹⁷ Lord Durham, *Report on the Affairs of British North America*, House of Commons, London, February 11, 1839, pg 35

struggled with establishment compacts controlling their respective governors, frustrations over competing interests of farmer/settlers versus merchants insisting on public works over local roads and schools. Underlying this tension was the success of the governors and their executives to manage control over public funds and their disposition, usually in favour of the established compacts' interests.⁹⁸

In Lower Canada, canny leaders such as Papineau recognized the benefit of responsible government to the preservation of French interests. Exercising even limited control of the purse had achieved some success in this direction, but outside funding allowed the Governor and Chateau Clique to circumvent his tactics of denying votes of money for government expenditures.⁹⁹ Adding to frustration, the Ninety-two Resolutions detailing desired solutions to grievances and complaints were largely ignored. Uprisings in protest followed and were severely dealt with by the military.

In Upper Canada, Reformers under Mackenzie briefly managed to form a majority. They similarly produced a report on grievances and noted the need in particular of responsible government. The Governor refused to accept the advice of his elected executive and their subsequent resignation and a non-confidence motion led to an election where the Governor openly advocated the election of the Compact party of Tories, which was successful.¹⁰⁰ Frustrated in their efforts to achieve responsible government, chafing under oligarchic control, the reformers also engaged in minor

⁹⁸ Reesor, pg 18

⁹⁹ *Ibid*, pg 20

¹⁰⁰ *Ibid*, pg 22

uprisings, significantly less severe than those in Lower Canada, due to far less widespread popular support, and were relatively easily suppressed.¹⁰¹

Lord Durham was dispatched for a tour of Upper and Lower Canada to report back on the most advisable course forward, given the obvious state of upheaval. His reflections included the observation that there was more of a struggle between two races – French and English – than a dispute between the government and its people: “I found a struggle, not of principles, but of races; and I found it would be idle to attempt any amelioration of laws or institutions until we could first succeed in terminating the deadly animosity that now separates the inhabitants of Lower Canada into the hostile divisions of French and English.”¹⁰² His further comments included deeply insulting and disparaging opinions of the intelligence of the French and their jealousy of the natural intellectual and social superiority of the English. Nonetheless, his deep belief in liberal philosophies of the freeborn English men and in their superiority to the French both informed and distorted his recommendations.¹⁰³

Lord Durham recommended a legislative union of Upper and Lower Canada, hoping it would create the conditions necessary to eventually lead to a larger union.¹⁰⁴ Durham also recommended a modified form of responsible government that managed to differentiate between the local administration of more domestic matters through control of the purse, while still freeing the Governor to act freely on issues related to the running of the Empire: “...were the Colonial Governor to be instructed to secure the co-operation of the Assembly in his policy, by entrusting its administration to such men as could

¹⁰¹ *Ibid*, pg 22

¹⁰² Lord Durham, op. cit., pg 7

¹⁰³ *Ibid*, pp 10-11

¹⁰⁴ *Ibid*, pp 147-148

command a majority; and if he were given to understand that he need count on no aid from home in any difference with the Assembly, that should not directly involve the relations between mother country and the Colony.”¹⁰⁵

The *Union Act* followed upon the work of Governor Thomson, who was charged with achieving a union. Great Britain did not agree with Durham regarding responsible government, unable to reconcile self-government and British interests as easily as he. Thomson was merely urged in his instructions to ensure that his policy and actions be in “utmost possible harmony” with the legislature. Colonial Secretary, Lord Russell, specifically instructed Thomson that the principle of responsible government was not on the table.¹⁰⁶

The *Union Act* of 1840 created the united Province of Canada, with a legislative branch using the bicameral model. The assembly was based on equal representation of both former provinces in contradiction of Durham’s recommendation and in the face of Upper Canada’s fast-growing, largely English speaking, population. It was Durham’s belief that this would accelerate the process of assimilation of the French and obviate the constant warring between the two nations.¹⁰⁷

Led by Baldwin and LaFontaine, and featuring Governors Sydenham, Bagot, Metcalfe and Elgin, “[t]he decade of the 1840s was characterized in the Province of Canada by a struggle for responsible government.”¹⁰⁸ The first two Governors, while not actively working in favour of responsible government, took actions that softened the way

¹⁰⁵ *Ibid*, pg 150

¹⁰⁶ Lord Russell, *Statutes, Treaties and Documents of the Canadian Constitution 1713-1929*, 2nd edition, Kennedy, W.P.M., editor, Oxford University Press, 1930, Document CV, pp 382-3

¹⁰⁷ Careless, *op. cit.*, pg 3

¹⁰⁸ Reesor, *op.cit.*, pg 29

forward for reformers. Lord Sydenham (former Governor Thomson, elevated in recognition of his work in uniting the two Canadas) stuck to his instructions, but introduced departments linked to members of his executive.¹⁰⁹ Sir Charles Bagot's chief contribution in this time was to promote French and reform members to his ministry. His commitment to avoiding a test of his belief in his ministry, in the form of a difference of policy, did not come before his term came to an end for health reasons.¹¹⁰

Sir Charles Metcalfe, however, in succeeding Bagot, bridled at the notion of being bound solely to the whims of his council. Shortly into his term, a disagreement over the distribution of patronage led to their resignation, a subsequent vote of confidence in them by the assembly and an abrupt dissolution by Metcalfe. Metcalfe actively campaigned and won a narrow victory in an election notably marked by violence and corruption.¹¹¹ In Reesor's estimation, Metcalfe, who had returned to England as a result of poor health, not only left an inflamed population, bitter and divided by an emotional campaign, he also exacerbated the constitutional question of responsible government and perhaps underscored it as a principle more heavily than it might have been understood before.¹¹²

Lord Grey succeeded Lord Stanley as Colonial Secretary and his liberal political philosophy led him to provide very clear instructions, first to Lieutenant Governor Harvey of Nova Scotia, and subsequently to Lord Elgin, who replaced Metcalfe, to adhere as closely as possible to the principles of responsible government, to avoid

¹⁰⁹ *Ibid*, pg 30

¹¹⁰ *Ibid*, pp 30-31

¹¹¹ *Ibid*, pg 31

¹¹² *Ibid*, pg 31

appearing biased in favour of one political party over others, and to act as a broker among the leaders of said parties.¹¹³

The Baldwin-LaFontaine ministry, formed in 1848, enjoyed majority support in both French and English Canada (Canada East and West, respectively) and promoted a reform agenda. Early on, Elgin assented to a bill to pay reparations to those who suffered property damages in the 1837 Rebellion. He did not believe it wise, it provoked a great deal of dissent, but as it was, in his opinion, a "purely local matter," he did not believe he could do anything but accept his ministry's advice.¹¹⁴

Nonetheless, a political crisis developed that was created, in part, by flaws in the Union's structures. The *Union Act* was a legislative union with quasi-federal elements and conventions, such as dual leadership, dual ministers and dual cultural and legal distinctions.¹¹⁵ However, the growing English population relative to the French population led to measures being voted by predominantly Lower Canada – or Canada East – members but affecting only Upper Canada – or Canada West – residents, giving increased rise to calls for representation by population.¹¹⁶

Political alignments evolved as well. The two traditional parties, the Tories and the Reformers, solidified in their respective opposition to and fight for responsible government, began to lose that stability once responsible government was achieved. The Reformers devolved into a small radical group of Rouges in Canada East and a majority group of Grits in Canada West, eventually led by the redoubtable George Brown. The Tories eventually devolved into Bleus from Canada East who were liberal reformers, but

¹¹³ Lord Russell, op. cit., Document CXLIII, pg 495

¹¹⁴ *Ibid*, pg 33

¹¹⁵ *Ibid*, pg 40

¹¹⁶ *Ibid*, pg 40

whose ambitions in that respect were to advance or protect the interests of conservative minded French who wanted to protect their agrarian way of life without paying for the public works to advance the interests of Compact merchants. By compromising on the latter and insisting on benefiting as well from those public works, the Bleus became allied with former Tories who, in turn, accepted the inevitability of an enduring French reality.¹¹⁷

The instability of the alliances, and the relative equality in overall balance between the two major opposing alliances, led to increasing acrimony and deadlock. By the late 1850s, issues surrounding expansion of railways, French versus English, representation by population versus protection of French interests, the opening of the Northwest all tore at the old alliances. “By the end of 1857, the election results indeed showed how far sectional forces had gone in the union of the Canadas, for the reform forces had gained a decisive majority in Upper Canada, the liberal-conservative in Lower. Not since 1841 had the provinces been so clearly divided, so embattled in society and politics.”¹¹⁸

Subsequently, “...[f]ollowing three government defeats in two years between May of 1862 and March of 1864, the assembly ground to a halt. Although the two political parties were not cohesive enough to provide stability they were sufficiently strong that the few loose fish* held the balance of power.”¹¹⁹

¹¹⁷ Careless, op. cit., pp 166-8

¹¹⁸ Careless, op. cit., pg 208

¹¹⁹ Reesor, pg 44 (*‘loose fish’ of course, referring to Sir John A. Macdonald’s description of members not strongly allied with one party or the other, and who made political accommodations and calculations all but impossible)

J.M.S. Careless, in summing up the state of matters, observed that while all sides recognized the inherent sense of the two entities going forward together, and that many quasi-federal aspects of the Union were desirable, it was the fact of sectional, or local, interests in one jurisdiction being decided by majorities from the other that led to the most agitation and were the least reconcilable within a Union that had equal representation.¹²⁰

In the end, the political deadlocks proved too much to overcome and Governor Lord Monck called upon the leaders of the factions most amenable – Macdonald, Cartier and Brown – to find common cause in forging a federal union. Dorion of the Rouges was set against it.¹²¹ The obstacles and differences to overcome were monumental. English and French, agrarian and mercantile/industrial, Catholic and Protestant, liberal and conservative, the tensions and contradictions were interwoven among the linguistic, cultural, economic, social and geographic cleavages. Nonetheless, despite the significant divides, the principals from among the British North America colonies were able to come together and devise ways in which certain core principles could be achieved, while the very real and relevant concerns of the different parties could be reconciled. To the largest degree, the greater part of the work in the achievement of these laudable aims was done at the Quebec Conference of 1864.

Quebec Conference 1864, and the Canadian Senate

While the concept of a legislative union, with the country operating under one unitary legislative power, was the preferred outcome for many in general, and to John A.

¹²⁰ Careless, op. cit., pp 210-11

¹²¹ Reesor, op. cit., pg 44

Macdonald in particular, it was never a viable consideration, given its failure to accommodate sectional interests and since the delegate provinces all had their reasons for keeping a local identity. In the Union of the Canadas, it was axiomatic that Canada West, or Upper Canada, would insist on representation by population to remain in the union, while Canada East, or Lower Canada, and the Maritime provinces, could not remain in the union with it.¹²² Only a federal union preserving their separate identities would be able to reconcile their entrenched positions.¹²³ For the Maritime delegates, already concerned about being swamped by a union with the much larger Canadian provinces, it was equally unlikely that a legislative union would be acceptable.¹²⁴

The Senate preoccupied the Quebec Conference in 1864; for almost all of six out of the fourteen days the conference was held were devoted to its role, composition and method of selection.¹²⁵ For many, the Senate was either a deal-breaker or a deal-maker. The Atlantic provinces feared that the representation by population principle in the lower house would see their provinces “reduced to quasi-colonial status by this arrangement; they would be mere appendages of the central provinces.”¹²⁶ The reformers and those other delegates devoted to the principle of responsible government were dedicated to creating a federal parliament that rooted its political power in the people’s chamber.¹²⁷

¹²² Sir Charles Tupper, “Minutes of the Charlottetown Conference, 1864”, in *Documents of the Confederation of British North America*, Edited by G.P. Browne, McGill-Queen’s University Press, 2009, Doc 21. Pp 38-40

¹²³ Moore, Christopher, *1867: How the Fathers Made a Deal*, McClelland and Stewart, Inc., 1997, pg 102

¹²⁴ *Ibid*, pg 102

¹²⁵ MacKay, Robert A., *The Unreformed Senate of Canada*, revised and reprinted, Toronto: McClelland and Stewart, 1963, p. 37

¹²⁶ Ajzenstat, Janet, “Bicameralism and Canada’s Founders”, in Joyal, ed., *Protecting Canadian Democracy: The Senate You Never Knew*, McGill-Queen’s University Press, 2003, pg 15

¹²⁷ Moore, op cit. pg 110

Of importance to the perspective of this study, however, is that the delegates to the conference were demonstrably well read in the political philosophy of the time and were experienced practitioners in, and followers of, the Westminster model.¹²⁸ They understood the interplay of the three branches of parliamentary democracy: Cabinet, an upper house and a lower house.¹²⁹ They understood that the Cabinet was to govern through the Crown, that the Lower House was to hold it to account and that the Senate was to act as the check within the system.

That is to say, the Senate “had the task of delaying or obstructing legislation when it appeared that a cabinet was attempting to use its majority in the Commons to silence dissent and suppress minorities.”¹³⁰ As will be explored later, this core dynamic, fundamental to the Senate’s role, also happens to be the most infuriating, confusing and controversial to its critics. This is partly due to a modern trend towards a limited interpretation of democracy associated in academic articles as neo-liberal bias towards members of parliament as delegates of citizens-as-taxpayers,¹³¹ but which could also be called the conundrum of a form of democracy grounded in Mill’s “government of the majority, exclusively represented” and Sir Henry’s “air of divinity” that appears to have gained some currency recently. According to those exploring the trend, neo-liberal attitudes towards the parliamentary process, in particular obstruction or opposition, “...is

¹²⁸ Ajzenstat, in Joyal, op cit., pg 4

¹²⁹ *Ibid*, pg 4. Based on her extensive reading of the debates and writing of the fathers before and during and following Confederation, Ajzenstat has determined that Burke, J.S. Mill, Hobbes, Locke, Montesque, Rousseau and the Federalist Papers were well known and referenced by the participants.

¹³⁰ *Ibid*, pg 4-6

¹³¹ Robert MacDermid, “Ontario Political Parties in the Neo-Liberal Age”, Paper presented at the Canadian Political Science Association Annual General Meeting, May 29, 2009 and accessed <http://www.cpsa-acsp.ca/papers-2009/macdermid.pdf> See also David Pond “Imposing a Neo-Liberal Theory of Representation on the Westminster Model: A Canadian Case” *Journal of Legislative Studies* 11:2 (Summer 2005)

the devaluing of politics which [may be understood] to be the achieving of collective goals through democratic processes and through the representation of needs by political parties.”¹³² Therefore, any argument favouring built-in delay and an additional forum for debate and potential requirements to compromise are looked upon with disdain.

It was an article of faith among the leading delegates that, in order to ensure a strong responsible government, its power must not be rivaled in Parliament; the Commons must ultimately prevail.¹³³ “[The delegates’] commitment to responsible government was such that no competing interest could induce them to create a rival power to the lower house. They could accept a chamber of sober second thought. They could welcome a source of legislative ideas and suggestions. But if they permitted the upper house to acquire...credible authority, they would undermine their deepest commitment: parliamentary democracy rooted in responsible government.”¹³⁴

Provincial rights considerations were sublimated by this dual preoccupation. Apart from the general strategic and entrenched philosophical positions outlined above, strong regional voices such as those belonging to George Brown of Upper Canada and Charles Tupper of Nova Scotia were more often found to be articulating a vision of small, inexpensive local governments that would not distract from the important work to be done by the federal government.¹³⁵ Indeed, Edward Cardwell, Secretary for the Colonies, wrote to reassure Lt. Governor Gordon, who had expressed considerable doubt that a strong central legislature could survive a federation of provinces, saying “Monck assures

¹³² *Ibid*, pg 2

¹³³ Moore, op cit. pg 110

¹³⁴ *Ibid*, pg 110

¹³⁵ *Ibid*, pg 103

me that there is no idea of that feeble Legislature you so justly object to: that they wish a strong central Legislature with subordinate Municipal Institutions.”¹³⁶

So, while provinces were clearly written into the new constitution and given distinct local governance jurisdictions, there was no evidence at the time that sovereign dominions were surrendering a degree of that sovereignty to create a greater whole, as happened in the formation of the United States of America. Under the direction of the Executive of Great Britain, Governors and Lt. Governors contrived through their own ministries to negotiate a new arrangement of affairs in British North America that eventually was implemented in the *British North America Act, 1867*, by Great Britain.

From the collected *Minutes of the Quebec Conference*, October 10-29, 1864, one gets a sense of priorities, if not the words necessarily, of the delegates. As noted above, close to six of the 14 working days were devoted largely or entirely to the development of a Legislative Council. The conference delegates spent the first few days in brief working sessions ironing out the procedures, numbers of votes and general aims of the conference. From the 13th to the 19th, delegates proposed, debated and disposed of 16 substantive motions or motions in amendment related to the composition and selection of what would become the Senate.¹³⁷

In contrast, creating what would become the House of Commons took one motion and vote to determine the composition and selection of its members. Of the 16 motions and amendments related to the Senate, 6 pertained to the distribution of seats among provinces/regions. The remainder touched on method of selection and qualifications. Of

¹³⁶ Edward Cardwell in *Documents of the Confederation of British North America*, Edited by G.P. Browne, McGill-Queen's University Press, 2009, Doc 29, pg 54

¹³⁷ *Ibid*, Doc 31, Hewitt Bernard, Secretary to the Conference, Minutes of Proceedings, pp 64-72

those 10 propositions, only one put forth the elective rather than appointive principle for selection. It was withdrawn by its proponent, Mr. McCully of Nova Scotia.¹³⁸ This supports Ajzenstat's contention, cited above, concerning just how conscious the delegates were of not creating a political competitor to the House of Commons that might destabilize responsible government.

On the question of representation for the new provinces, as reflected in seat distribution, the key to the compromise of representation by population, and equal representation within the federation was found. While Prince Edward Island was interested in a more equal approach to the number of seats allocated each province, there was a lack of concern about the possibility that PEI might not join Confederation should this principle not be adopted.¹³⁹ Nonetheless, Lower Canada and the Atlantic provinces were both concerned that the principle of representation by population would inevitably lead to the federation being dominated by Upper Canada. For delegates of both areas, having a counterweight to this dynamic was important. This led to the second principle, after the performance of a democratic check, behind the Senate's function: *regional* representation, as opposed to specifically provincial representation, "...thereby 'protecting' vulnerable constituencies,"¹⁴⁰ without offending the desire for representation in the popular house.

The American example was a model to which advocates of provincial equality pointed to buttress their argument. However, while it was felt that distribution on the basis of regions had a similar balancing effect in that while it over-emphasized the

¹³⁸ *Ibid*, pg 71

¹³⁹ *Ibid*, pp 106-107

¹⁴⁰ Ajzenstat, in Joyal, op cit., pg 14

provinces in relation to their respective populations, it was not quite so radical.¹⁴¹ Again, while sectional identities were being allowed to continue, the status of provinces as distinct sovereign entities was not one that was in evidence from the historic record, a distinction that weakened the case for individual provincial equality regardless of population. The final solution allocated 24 senators to each “region” – Lower Canada, Upper Canada and Atlantic Canada – with a further specific division of senators amongst the provinces of Atlantic Canada – 10, 10 and 4, respectively, among Nova Scotia, New Brunswick and PEI. Newfoundland was prospectively allocated four seats in addition to the 24 for the Atlantic provinces should it ever become a party to the federation. It is not clear that this specific additional allotment adhered to any principle other than political accommodation and a thought that they would be offset in the future by the process of adding the territories of the Northwest.¹⁴² As it turned out, when Newfoundland joined Confederation in 1949, it was allotted 6 senators.

As a part of the federal Parliament, the Senate was to provide a democratic check on the popularly elected House of Commons. As Ajzenstat explains it, simply by existing “...the second chamber promotes democracy and protects minority rights by curbing high-handedness and arrogance in Cabinet and Commons.”¹⁴³ However, as explained above, it was not to be at the expense of responsible government.

It was felt that a return to selection through appointment by the Crown would have the dual benefit of dampening the political power aspirations of the Senate, while at the same time the age and wealth qualifications were intended to ensure Senators would

¹⁴¹ *Ibid*, pg 15

¹⁴² Moore, *op cit.* pg 106

¹⁴³ Ajzenstat, in Joyal, *op cit.*, pg 4

be independent from the inducements and partisan considerations of the Cabinet and Commons. Macdonald's goal was to "ensure that the Upper House will be composed of persons of 'standing,' persons who have the weight and experience to oppose the people's representatives in the Commons, but who also have the prudence to defer to the Commons when deference is appropriate."¹⁴⁴

Experience to that point with elective legislative councils had also contributed to the preference for the appointive principle. It was recognized that the overall effect of migrating from an appointed to elected legislative council had resulted in the tendency towards younger, inexperienced but ambitious men seeking seats, at the expense of experienced men of standing and accomplishment, due to the extraordinary demands of contesting a much larger constituency and the cost of doing so.¹⁴⁵ Moreover, it was felt that the partisan element of contesting elections would necessarily result in a body that had much the same perspective as its counterpart, the same legitimacy and, therefore, the inclination to directly and routinely confound the people's government, an outcome completely unacceptable to the ambitions of the Fathers.¹⁴⁶

But who were senators to represent? Ajzenstat argues that the qualifications may have required senators to come from a landed, wealthy cohort, but that there was more depth to the Senate's representative role than the rhetorical wink implied by the old chestnut that, as a legislative body tasked with protecting minority interests, the Senate should be protecting that vulnerable group, the rich. David Smith takes great pains to point out that this sentiment, stemming from arguably facetious remarks by Sir John

¹⁴⁴ *Ibid*, pg 13

¹⁴⁵ *Ibid*, pp 12-13

¹⁴⁶ *Ibid*, pp 12-13

himself, "...disregards the contribution these characteristics make to the independence of members of the upper chamber."¹⁴⁷ Indeed, Ajzenstat references many of the participants, including Macdonald and George Brown, as explaining that the Fathers saw senators being 'of the people,' returning to their communities where they would, like members of the House of Commons, be subject to the influences of the people and groups to whom they belonged.¹⁴⁸

In the end, it is Canada the senators were meant to represent. With MPs elected from local constituencies by direct ballot, the people sent representatives from their communities to elect an Executive and hold it to account. The Senate was composed of senators selected for their status within their community as measured by their age and wealth.

The role of the Senate as a champion of regional or provincial rights was seen as modest at best. Ajzenstat summarizes the arguments of the founders as intending "...representation of the regions in a legislative and deliberative institution where the members would bring their knowledge of the regions into debates *on national issues* (emphasis added)."¹⁴⁹ Mackay reinforces the conclusion that the Senate was not intended as the primary champion of provincial rights, but that the "first great check on central government [as regards the provinces] would be in the federal nature of the Cabinet; the upper house would be only a last means of defence."¹⁵⁰ Modern arguments about the Senate's role as a representative of the provinces is a revisionist conception, not

¹⁴⁷ Smith, David, *The Senate in Bicameral Perspective*, op. cit., pg 77

¹⁴⁸ Ajzenstat, in Joyal, op cit., pp 9-11

¹⁴⁹ *Ibid*, pg 17

¹⁵⁰ MacKay, op cit., pg 44

historically based and is arguably inspired by how the federation has evolved. Quebec, however, might be viewed as an exception in this regard.

David Smith points out that Quebec chose to proceed with a bicameral legislature for itself and with important principles embedded in the existence of the federal Senate. First, the original Senate was one-third Quebec. Between its proportion and that of the Maritimes, the Senate was an effective check on Ontario. Secondly, Quebec's own senate, the Legislative Council as it was styled, and its proportion of the federal Senate were very specifically divided into identifiable constituencies designed to ensure not only a French reality in the federal Senate, but also an English reality in the Quebec Legislative Council. Fixed tenure, fixed limits on the size of the Senate and other provisions like equality of language and set jurisdictional powers protected Quebec against "...majoritarian surges..." that might overturn its situation.¹⁵¹

Certainly, nothing about the way in which the members of the Senate were to be selected suggested that there was to be a strong provincial orientation in their allegiances. After limited debate over alternatives, it was agreed that the Senate would be appointed by the Crown, not the provinces. This would tend, over time, to have an impact on the political identity of those selected, national as opposed to provincial or regional.

The emphasis on wealth and standing was intended to ensure the independence of its members, a virtue very much desired at the time. In the words of George Brown: "The desire was 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

¹⁵¹ Smith, David, *The Senate in Bicameral Perspective*, op. cit., pp 96-98

the public interests in opposition to hasty or partisan legislation.”¹⁵² Terms were considered, but Brown held that the discussion in Quebec concluded that the final years of a senator’s term might then be spent worrying about currying the favour of the executive, rather than remaining independent of it.¹⁵³

As is usual for a Westminster-style parliament, the authority to initiate spending and taxation was given to the House of Commons, but in all other respects the legislative powers of the Senate were equal to those of the House of Commons. Legislatively, then, the Senate was well equipped in terms of powers, but with an acknowledged and conscious hobble in the form of their perceived lack of democratic legitimacy. There were low expectations for it to do much more than provide the kind of stability and protections usually provided by a second chamber in a bicameral parliament and to act as a failsafe of Confederation.

In particular, no intra-state mechanism or role was proposed or written into the Constitution for the Senate; its sole formal means of exercising its responsibility to protect the regions’ perspectives would be through reviewing and revising legislation. And as MacKay observes, “rarely do threats against sectional interests come before the Senate by way of legislation, and when they do, it is usually in the form of money bills with which the Senate is normally hesitant to interfere.”¹⁵⁴

In 1867, then, the new Dominion of Canada addressed its future in the form of a federation, with a constitution delineating levels of government and their defined jurisdictions, with responsible government in a parliamentary bicameral model as its form

¹⁵² Brown, George, as cited in *Canada’s Founding Debates*, Ajzenstat, Romney, Gairdner, eds., University of Toronto Press, Toronto, 2003, pg 88

¹⁵³ *Ibid*, pg 88

¹⁵⁴ MacKay, op cit., pg 113

of federal governance. At the time, this was a bold and unprecedented innovation on the Westminster model, and only the third federation of any kind. Ajzenstat characterized it as “audacious” in its ambitions in light of the carnage being self-inflicted by the only other federation at the time,¹⁵⁵ and its upper house was more democratic by nature, considerably more grounded in the people and conscious of its role, than the aristocrats in the House of Lords.

Macdonald put it this way: “[T]he gentlemen who will be selected for the Legislative Council stand on a very different footing from the peers of England. They have not like them any ancestral associations or position derived from history. They have not that direct influence on the people themselves, or on the popular branch of the legislature, which peers of England exercise, from their great wealth, their vast territorial possessions, their numerous tenantry, and that prestige with which the exalted position of their class for centuries has invested them. The members of our upper house will be like those of the lower, men of the people, and from the people. The man put in the upper house is as much a man of the people the day after as the day before his elevation. Springing from the people, and one of them, he takes his seat at the council with all the sympathies and feelings of a man of the people, and when he returns home, at the end of the session, he mingles with them on equal terms and is influenced by the same feelings and associations, and events, as those which affect the mass around him.”¹⁵⁶ The Lockean underpinnings of this understanding of legislative power is underscored by the

¹⁵⁵ Ajzenstat, J, Introduction, *Documents of the Confederation of British North America*, Edited by G.P. Browne, McGill-Queen’s University Press, 2009, pp xxxi-xxxii

¹⁵⁶ Macdonald, Sir John A., as cited in *Canada’s Founding Debates*, op cit., pp 81-82

editors of these collected debates, noting the powerful significance of legislators being subject to, not above, the laws for which they are responsible.¹⁵⁷

The Canadian Senate, in summary, was expected to provide a check on the executive, thereby protecting minority rights, interests and perspectives. As was customary for upper houses, it was to perform a diligent role in revising legislation. By virtue of its age and property qualification requirements, its members were expected to be above personal political ambition or the blandishments and pressures of the executive and, therefore, to be independent and objective in their deliberations.

Its secondary role, to bring their regional upbringing, ties and experience to bear on debates at the national level, had little to do with provincial sovereignty rights and more to do with ensuring that the broader regional perspectives and the minorities particular to them were reflected in the legislative process which, at the time, was clearly and distinctly federal in jurisdiction. The Supreme Court of Canada repeatedly confirmed this in its decision, referring to "...the Senate's fundamental nature and role as a complementary legislative body of sober second thought..."¹⁵⁸

Deliberate decisions were taken to ensure that responsible government was not rivaled by a legislative body that could claim democratic legitimacy, but which was endowed with virtually equal powers to those of the House of Commons. The complementary functions, arguably, were largely taken from practice already established in the prior incarnations of the newly federated provinces and Westminster. Certainly they were not detailed in the *British North America Act, 1867*.

¹⁵⁷ Ajzenstat, J, *Canada's Founding Debates*, op cit., pg 82

¹⁵⁸ Supreme Court of Canada, *Reference re Senate Reform*, op. cit., para 52, for example

The Senate, therefore, had organic aspects of its design that respected the overriding objective of responsible government within a parliamentary governance framework. Simply by existing it fulfilled the theoretical benefits attributed to having a second chamber while respecting the political supremacy of the popular house. It provided men (a term used advisedly in light of the times) of independence and standing who had a stake in the welfare of the nation without being in thrall to patronage or ambition, who could add another perspective to legislation and useful advice on matters of policy. Finally, the Senate's configuration was integral to the political realities involved in accommodating the preoccupations of the provinces, the dominant linguistic and religious groups and the respective minority populations, and Great Britain and to resolve their misgivings in order to commit to this new configuration.

It is critical to recognize that not every one of these historic issues, important as they were to contriving Canada's own Great Compromise, has necessarily persisted into modern times. With the maturation of Canada as a country, with experience in the practical implications of this new form of governance, what new imperatives have arisen in the last 150 years since the Quebec Conference that are not adequately resolved by the *status quo* configuration? Which imperatives remain? Modern arguments about the current perceived deficiencies in the Senate's design need to address the reasons they were deliberately chosen over other options and accommodate those considerations in a modern context before a viable and comprehensive set of reforms can be properly proposed.

*The evolution of federal/provincial relations and jurisdictions and effects on
Senate reform proposals*

Confederation was in large part a culmination of an evolution in the realization of responsible government and early attempts to reconcile cleavages of a sectional, religious and, above all, cultural/linguistic nature. If Canada is to embark upon another period of reflection and creative nation building, the first step is to look at how the federation has fared since 1867. As will be seen, the merely municipal stature of the provinces and the supposedly watertight compartments of federal and provincial jurisdictions have changed significantly.

Post-Confederation

The first 50 years of Confederation marked the building of the nascent country and its efforts to organize its legal, economic and financial infrastructure. A survey of federal legislation in the early years¹⁵⁹ reveals a preponderance of bills respecting banks and banking, the Department of Finance, the collection and management of revenue, civil service superannuation, several railway bills, criminal law proceedings, the creation of harbours and the collection of fees, the creation of more provinces, the creation of the Supreme Court, etc... In other words, the country was preoccupied with the business of “peace, order and good government” as expected by section 91 of the *Constitution Act, 1867*, and the construction of an intercontinental railroad, as required by section 145.

Federal-provincial relations in this period were what one might have expected. After the Founding Fathers had concluded their business and celebrated their good work

¹⁵⁹ Statutes of Canada, 1870, 1875, 1880, 1885, 1890, 1895

with yet another ball,¹⁶⁰ the business of getting down to work would soon expose the gaps between what was dreamed and what was achieved. It would be normal to expect to find evidence of exactly what can be found: a post-honeymoon series of skirmishes testing the boundaries and principles to the advantage of one side over the other.

The David Mills motion of April 12, 1874 advanced a proposal barely raised and quickly dismissed in the Quebec Conference: the provincial selection of senators, with the potential of using elections to do so. While the proposal reflected the sentiments of Clear Grits, who wanted every public office from senator down to harbormaster elected,¹⁶¹ and while Ontario would have reveled in the power this would add to its already growing population base, the argument held no more attraction in 1874 than it did 10 years earlier in Quebec and his motion did not amount to anything beyond serving as an interesting, yet rarely elaborated anecdote used in most modern day papers on Senate reform as colour, but of little real significance at the time.¹⁶²

The strongest early champion of provincial interests post-Confederation was probably Oliver Mowat of Ontario. “As premier of Ontario from 1872 to 1896, Mowat would virtually set the mold for provincial premiers, and he would do it by declaring loudly that the provinces mattered. Far from being minor branches with no more than municipal duties, said Mowat, the provinces were sovereign powers within confederation.”¹⁶³ Macdonald hotly contested this interpretation as revisionist and entirely contrary not only to the spirit and letter of the resolutions debated and passed in

¹⁶⁰ Moore, *op cit.*, pp 129-130. Many delegates followed the Conference with travel among the Canadas and much celebration, both organized and self-directed.

¹⁶¹ *Ibid*, pg 110

¹⁶² Canada, House of Commons, *Journals*, April 12, 1874

¹⁶³ Moore, *op. cit.*, pg 116

Quebec, but also supporting evidence to be inferred from the federal powers of naming Lieutenant-Governors and of disallowance, the greater revenue-generating powers, and the power to legislate in unprovided cases.¹⁶⁴

In the early years of Confederation, there is little reason to think that there would have been much deep rooted concern about the senators' willingness to fulfill their provincial/regional roles in the early going. "The Senators initially appointed from Ontario and Quebec were all former members of the old Legislative Council of the Province of Canada, which produced a bipartisan, and quite representative group of senators, including several who had opposed Confederation."¹⁶⁵ In addition, the governments of New Brunswick and Nova Scotia were consulted by Macdonald and every one of the original senators summoned had been or were still provincial members.¹⁶⁶

Another early feature that reinforced the provincial orientation of senators came in the form of what has been called "double mandate." For a time it was the case that certain senators retained their seats in their respective legislative assemblies or councils, should they be in that position upon being summoned.¹⁶⁷ In 1873, just prior to Mills' motion to elect senators, eight were in the position of enjoying this "double mandate." However, by 1878 this number had dwindled to two¹⁶⁸ and it would appear that the merits of such an arrangement were not sufficiently apparent as to encourage their continued use.

¹⁶⁴ *Ibid*, pg 117

¹⁶⁵ Stevenson, Garth, "Intrastate Federalism in Nineteenth Century Canada", paper delivered to the 1992 Annual Meeting, Canadian Political Science Association, Charlottetown, Prince Edward Island, pg 4

¹⁶⁶ *Ibid*, pg 4

¹⁶⁷ *Ibid*, pg 5

¹⁶⁸ *Ibid*, pg 5

Notwithstanding this somewhat agreeable circumstance in the composition of the Senate, from a provincial point of view, there was obviously something lacking in the intergovernmental institutions and mechanisms of federalism in Canada. The Interprovincial Conference of 1887 was one example of extra-constitutional mechanisms being employed to address grievances. It was hosted by Quebec's Honoré Mercier, chaired by the voluble Mr. Mowat of Ontario, and attended by Nova Scotia, Manitoba and New Brunswick. The provinces PEI, BC and the federal government of Macdonald did not accept invitations.¹⁶⁹ Again, among other matters, the question of electing senators was raised and debated, but to no particular effect.

David Smith argues that the ongoing catalyst for this returning desire to elect senators was an unforeseen feature of Canadian party politics that became surprisingly frequent; Canada was being governed by one party for much longer than would have been credited by even Macdonald himself in 1864.¹⁷⁰ Indeed, over the course of Confederation, Prime Ministers Macdonald, Laurier, Borden, King, St. Laurent, Trudeau, Mulroney, Chrétien and now Harper have all had significant tenures in office, lasting at least two terms. In their respective turns nine Prime Ministers appointed enough senators to form a majority of their own making, not just of their own party: Macdonald recommended the appointment of 91 senators, Laurier 81, Borden 66, King 103, St. Laurent 55, Trudeau 81, Mulroney 57, Chrétien 75, and Harper 59.¹⁷¹

¹⁶⁹ White, Randall, *Voice of Region: The Long Journey to Senate Reform in Canada*, Dundurn Press, 1990, pg 113

¹⁷⁰ Smith, op cit., pg 77

¹⁷¹ http://www.parl.gc.ca/Parlinfo/Compilations/Senate/Senate_NominationByPM.aspx accessed June 13, 2014 Prime Minister Harper's nominations include 4 senators from the lists provided by provincial legislation in Alberta to generate candidates through their electoral process. Prime Minister Mulroney nominated one from this list from Alberta. Prime Minister Harper faces the possibility of appointing at least

The result was that, instead of a counter-pendulum effect in the Senate, where an outgoing party's nominees would act as a natural tempering agent over the immediate flush of victory on the part of a newly elected government, followed by a slow turning of the party tide, the Senate could become predominantly populated by adherents to the incumbent party. The so-called incumbent effect that acts as a counter to newly elected governments can have much longer reach than might have been anticipated.

It is arguable, however, that reforming the Senate, at that time and even recently, has had less to do with federalist dynamics between levels of power than it had to do with electoral strategy. A historian of this earlier era, Sir George Ross, published an examination of the Senate in 1914. On the subject of reforming the Senate, he hints at this conclusion, referring to the only agreed consensus that there is no constitutional method for “maintaining a *political equilibrium* (emphasis added) between the Senate and the House of Commons, or even within itself.”¹⁷² However, he also questions whether such a thing were even possible, and after examining a number of options, concludes that the history of elections to that date, using Australia as an example, had not had the desired effect.¹⁷³ As Smith observes, nowhere in Ross' book is there any discussion of regional or provincial representation as a concern.¹⁷⁴

Why is it that the debate around Senate reform in the early decades kept coming back to basically the same two questions: election and provincial input? We have just reviewed possible answers. The imperatives of party politics, in response to the

17 vacant Senate seats before the scheduled General Election of 2015. If he fulfills this responsibility, it would place him fifth in this list, one seat ahead of Chrétien.

¹⁷² Ross, Sir George, *The Senate of Canada: its Constitution, Powers and Authorities Historically Considered*, 1914, pg 97

¹⁷³ *Ibid*, pg 99

¹⁷⁴ Smith, op cit., pg 50

prolonged life of one party over the other, led parties to a search for ways to redress the imbalance, or lack of access to the spoils of patronage to keep their respective party in power, a perspective no longer countenanced by the people.¹⁷⁵ As well, there was a hangover in debate over the balance between the elective principle and the democratic principles chosen during the Quebec Conference. But why is it that there was no immediate concern over regional or provincial rights when it came to criticizing the Senate?

The answer might lie in the fact that, apart from the other primary and more effective institutions of the Cabinet and the Commons, constitutional and non-constitutional mechanisms for regional representation and protection of provincial rights also existed.¹⁷⁶ The Interprovincial Conference of 1887, was, according to White, the harbinger of institutionalized diplomacy between the federal government and the provinces.¹⁷⁷

While it was viewed by Macdonald as “an impotent gathering of Liberal malcontents from the provinces,”¹⁷⁸ the Interprovincial Conference may have formed the basis for Laurier’s 1906 federal-provincial conference which, in turn, was followed by another called by Borden in 1908, a third in 1927, followed by an ever increasing number over the years.¹⁷⁹ What this allowed was a full airing of regional issues among the responsible governing elites. This would appear to have been a far more effective forum for regional politicking than would an upper house where the only meaningful form of

¹⁷⁵ Smith, David, *The People’s House of Commons: Theories of Democracy in Contention*, University of Toronto Press, 2007, pg 27

¹⁷⁶ MacKay, op cit., pg 59. “In fact, however, the Senate has only been one line of defence among several, and that not the most important.”

¹⁷⁷ White, op cit., pg 113

¹⁷⁸ *Ibid*, pg 113

¹⁷⁹ *Ibid*, pg 114

expression in the field of provincial rights was to amend, delay or deny federal legislation.

Secondly, the provinces had recourse to the courts. The most profound influence affecting the federal-provincial power balance in the early years of Confederation was the Judicial Committee of the Privy Council (JCPC) in Britain, which until 1949 functioned as Canada's highest court.¹⁸⁰ "Privy Council interpretation seemed to establish firmly the legal autonomy of the provinces, and indeed to enlarge their field of legislative power beyond what was anticipated in 1867."¹⁸¹ This rather mild interpretation by MacKay is tame in comparison to such historians as Forsey, who railed that the JCPC had so utterly declawed the federal government's powers that the larger more powerful provinces could more than hold their own at the federal provincial conferences in protecting provincial and regional interests.¹⁸² Reesor puts it more temperately when he says "...[in the period from 1883-1932] the Privy Council was dominated by the views of Lord Watson and then Lord Haldane. These men moved our federal system toward what may be called the 'classical' model, which means that each order of government is considered sovereign within its own sphere of jurisdiction."¹⁸³

Regardless of the degree of emphasis or dismay expressed, the clear outcome over the period the JCPC interpreted federal-provincial powers was a distinct shift in power, status and recognition in the direction of the provinces clearly not envisaged or desired by the Fathers. This strong shift in favour of provincial sovereignty and power was

¹⁸⁰ Baier, Gerald, "The Law of federalism: Judicial review and the Division of Powers", in Rocher and Smith eds., *New Trends in Canadian Federalism*, 2nd edition, Broadview Press, 2003, pg 116

¹⁸¹ MacKay, op cit. pg 59

¹⁸² Forsey, Eugene, as cited by Ajzenstat, in Joyal, op cit. pg 17

¹⁸³ Reesor, op cit., pg 117

somewhat abated and balanced in the period of time following the establishment of the Supreme Court of Canada. By the time of the 1981 *Patriation Reference*, Reesor argues that there was readjustment back towards a stronger centralized national interest flavor.¹⁸⁴

Even the eventual creation of the Supreme Court itself may have had unintended side effects. Baier argues that a major consideration in using the Court was the political calculation of the implications of repeatedly exercising the powers of disallowance and reservation of provincial laws.¹⁸⁵ By deferring to the Court, the Cabinet became more distanced from the process of deciding on disallowance or reservation. As part of the so-called first line of defence in protecting provincial rights, abdicating their duties to this buffer between them and their provincial sensibilities had the effect of further weakening their provincial responsibilities.

The mingling of jurisdictions and the blurring of accountability:

Canada failed to come to an agreement on how the Constitution was to be amended in advance of the *Statute of Westminster, 1931*, which was intended to give the Dominions of the Commonwealth full powers of self-governance. Canada, in two federal-provincial efforts prior to its passage, could not agree how the two levels would be empowered to amend their own Constitution. It was left, therefore, that Canada would still have to appeal to Great Britain whenever it wanted to change the fundamental aspects of its Constitution.

The Great Depression had a profound impact on all of Canada, but certain regions were hit harder than others. R.B. Bennett used the federal-provincial conference

¹⁸⁴ *Ibid*, pg 120

¹⁸⁵ Baier, op cit., pg 115

mechanism to try to reconcile the tensions among provinces and to come to a solution to the deprivations being suffered. King also convened a Dominion-Provincial Conference for similar purposes. Provinces were threatening bankruptcy and the country was yet again going into war. King's special commission, the Rowell-Sirois Commission, recommended a system of relief programs in the form of National Assistance Grants that would not only involve the federal government firmly in what was clearly provincial jurisdiction, but also into the business of regional wealth redistribution.¹⁸⁶ Ontario's Mitch Hepburn had strong objections in reaction, on the part of the provinces, which ultimately killed the Commission's report but the effective impact of the report was seen in the way the federal government incrementally implemented, over time, many of its concepts.^{187,188}

Meekison, Telford and Lazar characterize the two decades that followed World War II as the genesis of co-operative federalism. "This was the period when many of the federal-provincial shared-cost social programs, as well as equalization, were introduced...[it] was characterized by considerable policy interdependence among governments with varying degrees of hierarchy, and the co-operation of the provinces was frequently secured by the lure of '50-cent dollars.'"¹⁸⁹ While the authors explain that the degree to which the levels of government were motivated to work willingly together

¹⁸⁶ White, op cit., pp 122-123

¹⁸⁷ *Ibid*, pg 123

¹⁸⁸ *Ibid*, pg 124

¹⁸⁹ Meekison, Peter, et al., "The Institutions of Federalism: Myths and Realities", Meekison et al., eds., *Canada: The State of the Federation 2002*, Montreal and Kingston: MQUP, pp 4-5

with respect to a given policy or program varied from case to case, the relative strength of the federal government's coffers greased the wheels.¹⁹⁰

The development of significance for the purposes of this paper is the considerable blurring of jurisdiction that necessarily occurred as the federal government responded to the exigencies of extreme hardship during the Depression, followed by the Second World War, which was then followed by an expansionist period with respect to the overall social welfare safety net. In the course of these periods, the federal government increasingly involved itself directly in such provincial jurisdictions as health, education, welfare and employment insurance, for example.

With respect to the federation, the very nature of the respective roles of federal versus provincial governments, as well as the relationship between the federal and provincial levels originally envisioned had changed profoundly. Such a significant foundational shift in dynamics could be expected to have related repercussions within the institutions of Confederation. In particular, it is argued that political and financial accountability for programs and spending were weakened significantly.

As noted earlier, Macdonald, among many, would have preferred a unitary state, or federal union, over a federal state with a division of powers. One of the arguments is that a legislative union "...unambiguously preserves parliamentary sovereignty and accountability."¹⁹¹ The watertight compartments of federal versus provincial jurisdictions had been breached. What effect has this had on accountability at the respective levels? Ajzenstat's summary of criticisms of the breach is stark: "...ambitious governments have

¹⁹⁰ *Ibid*, pg 4

¹⁹¹ Ajzenstat, J, Introduction, *Documents of the Confederation of British North America*, Op. Cit., pg xxx

found it relatively easy to breach the ‘compartments’, with the expected result: muddled lines of accountability and an impaired democracy.”¹⁹²

The new relationship between the federal and provincial levels of government did not come with new means or processes to ensure proper oversight or accountability. Perhaps not coincidentally, Stillborn identifies the 1960s as the decade in which Senate reform took on a renewed sense of urgency and earnest pursuit, after a relatively fallow period of noninterest.

In addition to the new role being played by provinces in concert with the federal government, added to the mix in the 1960s were the Quiet Revolution and its concomitant desire for greater autonomy and Western Canada’s complaints about Central Canada.¹⁹³ The common elements of reform proposals for the Senate at this time suggest a relationship to some of the underlying tensions implied by the above conditions.

According to Stillborn, during the 1960s and 1970s, the emphasis on Senate reform “was on the rehabilitation of the appointed Senate, by means of some degree of provincial involvement in the appointment of senators.”¹⁹⁴ Note that the modern emphasis on election was not yet in evidence, but the emphasis on an increased provincial complexion was.

Seidle¹⁹⁵ suggests reform proposals from 1969 to 1979 can be characterized as being focused on strengthening the provinces’ influence and profile at the federal parliamentary level. In 1969, at a First Ministers’ Conference, the concept of a Senate

¹⁹² *Ibid*, pg xxxi

¹⁹³ Stillborn, Jack, “Forty Years of Not Reforming the Senate”, in Joyal, op. cit., pg 32

¹⁹⁴ *Ibid*, pg 32

¹⁹⁵ As summarized in Gary O’Brien, *The Canadian Senate in Focus: 1867-2001*, <http://www.parl.gc.ca/information/about/process/senate/legisfocus/focus-e.htm> (accessed April 26, 2014)

selected by the provinces was promoted, with the method left undefined, having the aim of promoting unity and more direct avenues for provinces to express themselves. In 1972, a Special Joint Committee filled in the blanks by suggesting that the selection method be a 50/50 province-federal appointment. In 1978, a Trudeau White Paper posited a ‘House of the Federation’ of mixed provincial-federal proportional representation election, and BC added the wrinkle of a Provincial Cabinet Minister heading delegations from each province. Finally, in 1979, P  pin-Robarts came up with a similar scheme, calling it the ‘Council of the Federation’.

The common aim among the different proposals was to usurp wholly or in part the national perspective of nomination by the Prime Minister in favour of a provincial perspective. However, none of the proposals made a convincing case for how, exactly, a stronger provincial complexion would make a meaningful difference when so few examples existed of legislation directly negatively impacting on provincial interests. Instead, the proposals appeared to stake a lot of importance in these new methods of appointment to result in more influence over policy deliberations and choices. In effect, senators appointed through provincial means, rather than national, would be more narrowly focused on serving those interests and presumably would do so more independently of the Executive as they would not feel beholden to it for their appointments.

It bears repeating that the appointive principle was still very much accepted at this time. Indeed, Stillborn observes that the consensus still appeared to be that “election of the second chamber is incompatible with the parliamentary system, or would require

sacrifices outweighing the advantages gained.”¹⁹⁶ At the same time, Pépin-Robarts reflected on the Australian experience and, in addition to reinforcing the very concerns just articulated, the Task Force also worried about the fact that an elective principle, rather than promoting provincial interests, would have the effect, rather, of emphasizing the importance of political parties, thereby reducing independence and objectivity.¹⁹⁷

The common feature of these developments, though, is clear. Due to the increased interdependence of the provinces and the federal government, there was a desire to find a more visible presence on the part of the provinces within the institution and/or processes of the Canadian Parliament. The arguments are at once familiar historically, while importing recent experience. According to Stillborn, the classic liberal parliamentary democracy principles were still understood, respected and considered relevant: “An elected Senate, simply by virtue of being elected, would undermine the supremacy of the House of Commons and foster confusion. Two elected Houses would complicate the question of ultimate responsibility and thus undermine parliamentary government.”¹⁹⁸

The Patriation of the Constitution, Meech Lake, Charlottetown and the failure of negotiated Senate Reform

In the course of the federal-provincial obsession with national unity and the federation outlined above, Quebeckers rejected the Parti Québécois’ referendum proposal to negotiate sovereignty association with the rest of Canada. One of the commitments made by Prime Minister Trudeau prior to the referendum in 1980 was to renewed efforts

¹⁹⁶ Stillborn, in Joyal, op cit. Note 51, pg 33

¹⁹⁷ *Ibid*, pg 34

¹⁹⁸ *Ibid*, pg 34

to address outstanding constitutional issues, including language and culture concerns in Quebec.¹⁹⁹

To that date, a number of attempts were made at coming to an agreement on patriating the Constitution and an amending formula, among other objectives.²⁰⁰ In each instance, a mixture of unanimity and a ratio of provinces and population were involved, but all failed due, in part, to increasing provincial demands for the devolution of powers, and those demands increased in the course of the efforts of 1980, following the Quebec referendum.²⁰¹

In October 1980, Prime Minister Trudeau's government proposed a unilateral process that addressed patriating the Constitution, a formula for amending the Constitution and a Charter of Rights and Freedoms. On the heels of three provinces taking their objections to their respective provincial supreme courts – Manitoba, Quebec and Newfoundland – Trudeau appealed their varying rulings to the Supreme Court of Canada. In essence, the Court was asked if the federal government, by unilaterally acting on its resolution were affecting the federal-provincial relationship or were encroaching on provincial powers; if it were against convention for the federal government to ask Great Britain to amend the Constitution when such amendment would affect federal-provincial relations or provincial powers without provincial agreement; and if there were an explicit constitutional requirement or constitutional convention that required provincial agreement to amendments.²⁰²

¹⁹⁹ Hurley, James Ross, *The Canadian Constitutional Debate: From the Death of the Meech Lake Accord of 1987 to the 1992 Referendum*, Government of Canada, Privy Council Office, 1994 pg 10

²⁰⁰ Reesor, op. cit., pp 132-3

²⁰¹ *Ibid*, pg 136

²⁰² *Ibid*, pg 139

The Court ruled in a manner that permitted a way forward for the federal government, saying it was legal for it to act unilaterally, while reinforcing the desirability of reaching agreement with the provinces, who, the Court concluded, had a claim to political convention, but which could not be enforced by the Court. “In the opinion of Canada’s highest court, then, the Federal government’s proposed resolution was perfectly legal, but at the same time unconstitutional in the conventional sense. It [forced] each side to recognize the validity of the other’s claim.”²⁰³ Clearly, in a conventional sense at least, the provinces had firmly established a very compelling case for at least a partnership role in determining the future of the country.

In the end, the Constitution was patriated, an amending formula established and a new Charter of Rights and Freedoms created. It was achieved with compromises on the part of the Federal and provincial players and, importantly, over the objections of Quebec. It was the amending formula, ironically, that ended up being an important buttress of Quebec’s interests, as will be seen. It is also what ended up making meaningful progress on Senate reform so daunting.

²⁰³ *Ibid*, pg 141

CHAPTER THREE: THE MODERN ERA OF SENATE REFORM

In the 1980's, a profound shift in thinking began to occur with respect to the Senate and how it was selected. For the first time, serious consideration was being given to election of senators.²⁰⁴ The 1984 report of the Special Joint Committee on Senate Reform – co-chaired by Senator Molgat and Mr. Cosgrove, MP - came to the conclusion that the Senate “should be elected directly by the people of Canada.”²⁰⁵ Their argument was that the appointed version of the Senate “no longer meets the needs of the Canadian Federation. An elected Senate is the only kind of Senate that can adequately fill what we think should be its principal role – the role of regional representation.”²⁰⁶ It was an astonishing development. In an unheralded *volte face* for federal politicians, the Committee not only reversed an idea over a century in practice in Canada – that of a politically weakened but fully empowered check on the lower house – it also re-prioritized and revised the Senate's primary role as being that of regional representation.

The Committee, however, did not take this radical new direction in ignorance; it fully acknowledged the “large number” of witnesses who advocated an appointed Senate and their arguments about an elected Senate challenging the political power of the House of Commons and endangering responsible government.²⁰⁷ Nonetheless, the Committee did recommend the elective principle on the grounds that strengthening regional representation had become paramount over the traditional objections.²⁰⁸ It would be followed by the Canada West Foundation, the Reform Party and become an almost

²⁰⁴ *Ibid*, pg 34

²⁰⁵ Canada, Parliament, Senate/House of Commons, *Report of the Special Joint Committee on Senate Reform*, 1984, (hereafter referred to as Molgat-Cosgrove after the Committee Co-Chairs), pg 1

²⁰⁶ *Ibid*, pg 1

²⁰⁷ *Ibid*, pp 16-17

²⁰⁸ *Ibid*, pg 1

universally-held truism. What had happened to make such a fundamental change a possibility?

In part, one can point to similarly profound underlying shifts in the provincial-federal relationship on two fronts: with the West and with Quebec. As will be seen, those tensions arguably affected the political identities of the people involved and how they see themselves – or don't see themselves – represented in Ottawa.

In the West, resentment against Central Canada was an already palpable fact. From a history of festering resentment against Central Canada's proprietary attitude toward the resources of the West came a growing sense of frustration and defiance. In the 1950's, C.D. Howe announced to Alberta Premier E.C. Manning that Ottawa would not allow free trade of petroleum products to the United States until it was certain that supply necessary to Central Canadian industrial needs were assured.²⁰⁹

British Columbia and Alberta, together, were the West's "have" provinces, capitalizing on the booming post-war economy and the seemingly insatiable need for natural resources. White argues it was no surprise Alberta and British Columbia were among those who supported Ontario's strong reaction to the Rowell-Sirois Report recommendations, particularly the concept of wealth redistribution.²¹⁰ When the National Energy Program (NEP) was enacted in 1980, it capped off a bitter period during the economic downturn and oil shortages that followed the OPEC decisions to curtail distribution in the early 1970s.

The Trudeau decision to enact the NEP not only brought back the familiar complaint of the West – that the East was free to sell its cars to the United States while

²⁰⁹ White, op cit., pp 154-155

²¹⁰ *Ibid*, pg 151

the West couldn't freely sell its oil there²¹¹ - it exemplified a socialism and 'federal majoritarianism' that was anathema to the political history of the two provinces and their mutually strong provincial identities.²¹² It was at this point, prompted by a 1981 Canada West Foundation report and growing political voices of complaint, that Premier Loughheed agreed that the Senate would become the West's strategic focus for how it would approach Trudeau's call for a new constitution.²¹³

Of course, this growing dissatisfaction in the West was only part of the dysfunction in the Canadian family at this time. Following the election of the Parti Québécois, and the subsequent provincial referendum on separation in 1980, Canada's struggle with the nature of Quebec's place in the Federation and the claims it was making for powers it felt were necessary to realize its future as the home to French culture and interests came to the fore.

As McRoberts explains, part of the Trudeau strategy to counter Quebec nationalists was to introduce the concept of multiculturalism.²¹⁴ The goal was to dilute the argument of biculturalism/dualism by redefining Canada not as two founding peoples but as a patchwork of many different cultures of equal standing. And, it followed, if "all of Canada's cultures are of equal status, then its provinces are assuredly of equal status."²¹⁵ The fallout from this, McRoberts reveals, was a logical series of reactions that led to a confused, divided sense of what it meant to be Canadian. For the newly-enhanced

²¹¹ *Ibid*, pg 155

²¹² *Ibid*, pg 155

²¹³ *Ibid*, pg 156 White further cites W.A.C. Bennett as describing the degree of centralization in Ottawa as being "very, very dangerous in a country like ours. In the United States, where the Senate has power, you have two Senators from each State, but in Canada we do it by population. Central Canada has the population and so it dominates Canada."

²¹⁴ McRoberts, "Conceiving Diversity: Dualism, Multiculturalism and Multinationalism," in Rocher and Smith eds., *New Trends in Canadian Federalism*, 2nd edition, Broadview Press, 2003, pg 98

²¹⁵ *Ibid*, pg 99

peoples of cultures neither English nor French, it meant the prospect of equality of language status.²¹⁶ By discarding the two nations model, the very foundation of Confederation was open to reinterpretation: if Canada were not a pact between the English and the French, then it was simply about territory and Quebec's identity as cultural and linguistic champion of the French fact in Canada was unnecessary.²¹⁷ The net effect of this new direction was that many "Canadians rejected outright the dualist vision of Canada," and, accordingly, "[w]ithin their vision, there is no clear rationale for Canadian federalism." Significantly, "these divisions were played out in the constitutional debates that dominated the 1980s."²¹⁸ What invited the intense interest on the part of all involved was Trudeau's promise during the 1980 referendum debate to renew the Constitution.²¹⁹

The context, then, for the many different ways in which the federal structure of the country was reviewed in the 1980s and 1990s were grounded in this confused, antagonistic and historically revisionist environment. Further compounding the heightened personal emotions were the referendum held by Quebec in 1980, and the seemingly ever-present threat of another referendum that could be held at any time, as well as the historic grievances of the West being provoked by the National Energy Program.

When the Molgat-Cosgrove Committee released its report, it reflected these conclusions when it articulated its take on the Canadian views it found during public hearings: "Witnesses suggested that this concern [regional interests] has its foundations

²¹⁶ *Ibid*, pg 99

²¹⁷ *Ibid*, pg 99

²¹⁸ *Ibid*, pg 100 See coming section on the Reform Party reform project

²¹⁹ White, op cit., pg 191

in the emergence of regional pressures which, while not new, have become particularly acute... It is the perception of many people who live in the western provinces, and of some who live in the eastern provinces, that their views are not given sufficient weight in the decisions of the national government. The principal complaint the Committee encountered was that federal institutions as they are now constructed are unable to express and mediate regional concerns.”²²⁰

Quebec’s particular concerns were not a primary feature of the Committee, despite its work following the patriation of the Constitution, and being in the wake of Quebec’s anger with the federal government’s willingness to do so without Quebec’s signature,. Indeed, the only related remarks were to say that “...a special voting procedure on linguistic matters should be established to give added protection to the French-speaking people of Canada.”²²¹ The two nation concept is nowhere in evidence or explored.

The Molgat-Cosgrove Committee was followed in 1985 by the Alberta Select Committee, also in 1985 by the MacDonald Commission, in 1992 by the Beaudoin-Dobbie Committee (The Special Joint Committee of the Senate and House of Commons on a Renewed Canada) and the Charlottetown Accord. All recommended a form of election for Senators, all aiming to strengthen regional voices through a more direct relationship with and responsibility to their respective provinces.²²² Another key similarity to their recommendations was that all seat distribution and constituency conceptions were based on provincial orientations and population variations and not on

²²⁰ Molgat-Cosgrove, op. cit., pg 9

²²¹ *Ibid*, pg 12

²²² Stillborn, op cit. Note 51, pg 33

sectional or regional numbering.²²³ This, at least, would preserve a variation on perspective from local community representation and avoid complete duplication of result and complexion.

With this era, it would appear that the original conception of the Senate – an appointed body designed to operate nationally with a regional conscience, but in final deference to the clear wish of the people – had given way to a belief in an elected, more provincially-oriented institution that would somehow respond to Canadians’ desire to see themselves more directly reflected in the federal Parliament and which would do more to mitigate the relations between the federal and provincial levels of government.

What the proposals failed to do, in Stillborn’s opinion, was reconcile Canadians’ seemingly conflicted views on an elected Senate: on the one hand, that the Senate has to be elected in order to give it the legitimacy it requires, while on the other hand, distrusting parties and the effects of party discipline on individual members’ ability to represent local interests.²²⁴ Elections, particularly at a constituency level as large as an entire province, require resources and coordination that would be beyond the means of independent individuals. Parties can deliver those requirements, but they typically come at the cost of obligation to the party, not independence from it. This is one of the major challenges facing proponents of elected second chambers, in addition to the risk associated with responsible government. No proposals have yet been made that reconcile this paradox.

²²³ *Ibid*, pp 36-39

²²⁴ *Ibid*, pg 40

Meech Lake, Charlottetown and the failure of negotiated Senate Reform

The Meech Lake Accord was the result of a series of negotiations initiated by Prime Minister Mulroney to reconcile Quebec within the Confederation following its withdrawal from the process to patriate the Constitution and the establishment of the Charter of Rights and Freedoms in 1981. While not an initial objective, Senate reform became one of the core elements of the deal in order to bring the western provinces on board. In the final document, reforming the Senate took the form of an interim commitment by the federal government to choose "...from among persons whose names have been submitted by the Government of the province to which the vacancy relates and must be acceptable to the Queen's Privy Council for Canada."²²⁵ Further, the Accord provided for annual First Ministers Conferences to focus on reforming the Senate.²²⁶

Senate reform's inclusion in the negotiations was initially vague, but was insisted upon by Alberta Premier Don Getty and was included in the basis for discussion from the start.²²⁷ In the course of the negotiations, agreement on how amending national institutions evolved from 7/20 to 7/80 to give Quebec and Ontario a veto, which led to all provinces being given a veto; unanimity.²²⁸ There was general agreement that a reformed Senate would be built on the principles of a modified Triple-E model with details to be ironed out. While the bones of the understanding included election and effective powers, equality of representation was reduced to "more equitable" representation and even had provisions for meaningful changes in seat distribution with some provinces, such as New

²²⁵ 1987 Constitutional Accord, accessed at <http://www.solon.org/Constitutions/Canada/English/Proposals/MeechLake.html>

²²⁶ *Ibid*, Section 50(2)(a)

²²⁷ Seidle, Leslie, "Senate Reform and the Constitutional Agenda" in *Canadian Constitutionalism: 1791-1991*, J. Ajzenstat, ed., Canadian Study of Parliament Group, 1991, pg 104

²²⁸ *Ibid*, pg 105

Brunswick, Nova Scotia and Ontario giving up seats and the western provinces and Newfoundland gaining.²²⁹

In the end, the Meech Lake process failed. The period for the provinces to ratify the Accord lapsed with Manitoba and Newfoundland failing to meet the deadline. Reasons for the failure are many, with elections at the provincial level injecting new players into the negotiations with new demands or positions or objections. However, despite the agreements in principle reached regarding the Senate, there was an ongoing lack of certainty about them and, in particular, the unanimity required to actually reform the institution.²³⁰

While this round of negotiations was focused on resolving Quebec's outstanding constitutional issues, as a measure of *quid pro quo* for the western provinces to willingly participate, the Senate's composition, method of selection and powers were all in play. Behind its failures, beyond details found in the accord or expectations arising out of it, lay criticisms of process. Aboriginal groups felt left out of the process altogether, and Manitoban MLA Elijah Harper expressed their frustration in effectively killing the deal through the use of procedural delays.²³¹ Even some of the principal players felt the idea of 11 men meeting behind closed doors and emerging with a new constitution was a bit too exclusionary.²³²

The Charlottetown Accord was negotiated in an effort to resurrect what had been so close to fruition in the Meech Lake Accord. On the face of it, lessons about

²²⁹ *Ibid*, pg 113-4

²³⁰ *Ibid*, pg 114

²³¹ Cohen, Andrew, *A Deal Undone: The making and Breaking of the Meech Lake Accord*, Douglas and McIntyre, Vancouver, 1990, pp 258-259

²³² *Ibid*, pg 271

exclusionary practices followed in Meech were addressed and First Nations were consulted and included. A referendum at the conclusion was held in order to involve Canadians. However, a combination of the waning personal popularity of Mulroney, and growing lack of interest among voters combined with too many objections to particular aspects of an agreement that had too many different elements ultimately led to the proposal being defeated in the popular referendum.

The First Ministers proposed that the Senate be composed of 6 senators from each province, and one each for the territories; that it be elected either by the people or the legislative assemblies of each province or territory; that it have a range of altered powers and responsibilities, some of them enhanced and expanded; and that First Nations have a distinct number of senators in addition to those representing provinces and territories, to be determined in a separate meeting.²³³ According to Stillborn, no explanation was provided for the formula or for the two approaches to selection – directly by the people or the legislative assembly of the province – beyond the fact that legislative assembly option was included to secure Quebec’s concurrence.²³⁴ As a result, there is no explanation either for this contradictory representative role: the people directly or the legislative assembly on behalf of the people.

The provisions dealing with disputes over bills between the two Houses were quite unbalanced, purportedly in support of the confidence convention. In fact, not only did the proposed rules neuter the Senate in the manner described earlier respecting the levers of time and veto, the proposals were quite detailed, yet lacking in actual final

²³³ Consensus Report on the Constitution, Charlottetown, August 28, 1992, Section II.A.7 accessed <http://www.solon.org/Constitutions/Canada/English/Proposals/CharlottetownConsensus.html>

²³⁴ Stillborn, Jack, *op. cit.*, pg 35

clarity. These new, elected senators would have 30 sitting days following the passage of a bill to “dispose of” the measure. 30 calendar days for revenue and expenditure bills.²³⁵ Except for bills that involve fundamental changes to tax policy, which could be defeated outright.²³⁶ Except changes to fundamental tax policy aren’t identified as one of the categories of bills defined, those are to be fundamental changes to tax policy on *natural resources*.²³⁷ The two provisions are either the same thing or two different matters. The report is not clear.

Bills that affected French language or culture were another category of legislation. Those required a double majority of not only those senators voting but also francophone senators voting. A great deal of detail was then expended on who could claim to be a francophone, how disputes over such a designation could be resolved and who could designate a bill to be covered by the provisions and how to appeal that designation or lack of designation.²³⁸ A complicated set of requirements had the Speaker of the House of Commons being the determining authority on the designation of categories for bills, in consultation with the Speaker of the Senate, except for bills affecting French language or culture, which would be the responsibility of the Senate Speaker. The report is silent on any requirement there might be for the Senate Speaker to consult the House of Commons Speaker.²³⁹

In other words, elements that might be considered constitutionally critical to francophones would be left to rules that are subject to change by a simple majority of one

²³⁵ Consensus Report on the Constitution, Charlottetown, op.cit., section 12.

²³⁶ *Ibid*, section 12

²³⁷ *Ibid*, section 11

²³⁸ *Ibid*, sections 11 and 14

²³⁹ *Ibid*, section 11 and 14

legislative house, and the subjective interpretation of a Speaker whose position was not changed by the report: he or she would have continued to be appointed by the Governor General on the advice of the Prime Minister and therefore subject to whatever political influence might exist in that relationship. Moreover, the provisions betray a fundamental lack of understanding of the centuries of institutional independence between the upper and lower houses as practiced in the UK and emulated in Canada.

These two constitutional rounds can each be said to have approached Senate reform from a perspective consistent with that being advocated by this thesis. The Senate was looked at more holistically within the federation and in respect to its relationship with the House of Commons. The inclusion of First Nations in both proposals, the use of the Senate to protect francophone rights and balancing elective principles with changes to powers demonstrated the kind of thinking required. However, in both instances the Senate was either a horse trading exercise or a part of a grab bag approach. In neither case does it appear that there was any considered thought put into some of the fundamental questions being treated here or, like the case of the Alberta Special Committee on Senate Reform to be treated next, the details of the parliamentary relationship between the Senate and the House of Commons were faulty and poorly thought through.

The Reform Party and Triple-E

With the failure of the Charlottetown Accord in 1992, this era of institutionalized executive Senate reform exploration ended. The field had not, however, been completely abandoned. The Canada West Foundation report of 1981, which informed the underlying

thinking in the above-mentioned institutionalized forays,²⁴⁰ also fuelled the thinking of at least one political party: the Reform Party of Canada.²⁴¹ A “Senate which is Elected by the people, with Equal representation from each Province, and which is fully Effective in safeguarding regional interests,”²⁴² was the stated goal of the Reform Party.

While it would be tempting to dismiss the Triple-E concept as contrived, as being simplistic packaging with appealing imagery evoking a rancher’s branding iron searing the flesh of the nation with a mark indelibly Western, it would be wrong to do so. The Triple-E Senate came from a well of deep seated Western estrangement that informed a coherent ideological response, ultimately articulated in the Reform Party’s projects for change. In fact, it is the closest a reform project for the Senate has come to looking at the question from an appropriate perspective.

This link to the Reform Party is important. The Conservative Party of Canada, based as it is on the evolution of the Reform Party into the Canadian Alliance and its eventual merger with the former Progressive Conservative Party of Canada, has carried with it a priority focus on Senate reform that has been actively played out in the parliamentary and electoral arenas, and has largely driven some of the more serious iterative attempts at reform.

At the provincial level, Reform championed and inspired elections of putative Senators in Alberta.²⁴³ In 1990, Prime Minister Mulroney appointed Stan Waters as the first elected Senator.²⁴⁴ However, with the collapse of Meech Lake, Mulroney appointed

²⁴⁰ White, op cit., pg 156

²⁴¹ *Ibid*, pg 156

²⁴² Reform Party of Canada, *Principles and Policies: The Blue Book*, (1991), pg 1

²⁴³ Smith, op cit. pg 106

²⁴⁴ *Ibid*, pg 106

no other elected Senators, and Prime Minister Chrétien never made an effort to follow the example of Waters.²⁴⁵ No other provinces have followed through on Alberta's lead and the effort as a provincially-inspired attempt to influence the federal level in the appointment of Senators has a tenuous hold, even though Prime Minister Harper has underscored his commitment to the scheme by only appointing Alberta senators from the list established by elections organized under Alberta's provincial election laws.

At the federal level, this modest ghost of Reform's legacy lives on. Prime Minister Harper made an historic appearance before a Special Senate Committee on Senate Reform on September 7, 2006, the first time a sitting Prime Minister has made such an appearance in the Senate.²⁴⁶ He made the appearance in support of Bill S-4, which was an attempt to amend the term limits of Senators to eight years, from the current regime of terms being limited only by the attainment of 75 years of age. The bill had been stalled in the Senate, where a committee report had been adopted recommending that all proceedings on the bill be held in abeyance until such time as the Government had received an opinion from the Supreme Court as to its constitutional validity.

In concert with Bill C-43, which introduced a process of provincially-administered elections to populate a list from among which the Governor General, on the advice of the Prime Minister, would summon new Senators to the Senate, the federal government consciously adopted an incremental approach to Senate reform as an

²⁴⁵ Smith, *op cit.*, pg 104

²⁴⁶ Canada, Parliament, Senate, Special Committee on Senate Reform, Issue no. 2, September 7, 2006, pg 6 (Hereafter Senate Reform Committee)

alternative to what Harper termed “mega-constitutional negotiations.”²⁴⁷ There were predictions that such an approach might fail, due to some arguments that the reforms envisioned may require the mega-constitutional approach Harper was trying to avoid.²⁴⁸ Eventually, the Supreme Court confirmed this view.

This approach, however, was a watered down version compared to what the old Reform Party really wanted: directly-elected Senators, representing the provinces in equal numbers to each other and with the necessary powers to achieve their role. But what was that role? Was the role based on an accurate vision of the federation and its needs? Did the Reform Party proposal take sufficient account of the other institutions of governance? Did the proposed structure both meet the ambitions the Reform Party had set for it and work within the framework of the other institutions? Finally, did proposed model abandon valuable aspects of the old Senate that would be left without a home?

As noted above, individual grievances had grown to an cumulative point where western resentment had become a seemingly amorphous but very real dark mass of resentment. The Reform Party’s motto, “The West Wants In,” spoke to the alienation and sense of having been spurned that was the face of the movement. But there was more to the Party’s plans than a reactionary lashing out at the rest of Canada. Indeed, Laycock argues that there was a coherent ideology behind the proposals.²⁴⁹

The Triple-E model received a boost in the 1985 Report of the Alberta Select Committee on Upper House Reform, *Strengthening Canada*. It is on the basis of this

²⁴⁷ *Ibid*, pg 10

²⁴⁸ *Ibid*, pg 12

²⁴⁹ Laycock, David, “Reforming Canadian Democracy? Institutions and Ideology in the Reform Party Project”, *Canadian Journal of Political Science*, XXVII:2 1994

report that the Reform Party developed its own policies on Senate reform.²⁵⁰ Since this is a foundational document for the Triple-E vision, it is important to review its key recommendations and the stated rationale for the recommendations.

On the purpose of the Senate, the report recommends that the Senate should “...maintain as its primary purpose the objective established by the Fathers of Confederation, namely to represent the regions in the federal decision-making process.”²⁵¹ It also said that the sober second thought role should continue and that the Senate should no longer perform its other original purpose, to represent property owners.²⁵² In its “rationale” section, the committee simply makes the assertion that the Senate represents the provinces first and foremost, with no justification.²⁵³ They state that the sober second thought applied to legislation by the Senate is “...a valuable mechanism in the federal system...[and]...is often highly constructive.”²⁵⁴ Noting the property qualifications for senators, the report claims that this “...is a holdover from the past when property holders were singled out as a group to be specially represented in government.”²⁵⁵

No evidence is cited, no authorities quoted and no developed logic is displayed that would help one to understand where these assertions might come from. In comparison, the academics cited earlier concluded that the primary role of the Senate, in the minds of the Fathers, was to act as a check on government (the sober second thought

²⁵⁰ White, op cit., pg 230

²⁵¹ Alberta, Legislative Assembly, Special Committee on Senate Reform, *Strengthening Canada*, 1985, pg 4 (In footnote, the report clarifies that ‘region’ should be taken to mean ‘province’ due to evolution of provinces)

²⁵² *Ibid*, pg 4

²⁵³ *Ibid*, pg 14

²⁵⁴ *Ibid*, pg 14

²⁵⁵ *Ibid*, pg 14

role) and that the regional representation role, while important, was actually confided more directly and more meaningfully in Cabinet. Finally, their intent was that property was not an estate to be represented but a necessary part of an equation that the Fathers used to create an independent but complementary Upper House. These profoundly different understandings clearly have an effect on how one sees the Senate and, consequently, how one would conclude an analysis of its construction and composition.

On the membership of the Senate, the committee recommendations were that it be composed of 6 senators from each province and 2 from each territory, resulting in a total of 64; that they be elected, using the first past the post method using the entire province as a constituency; and that their qualifications be no different than those of MPs.²⁵⁶ By way of consideration, the committee noted the growing institutional electoral sentiment of the early 80s and an “...overwhelming majority of Albertans who came forward...” and the “momentum” of support generally in Alberta.²⁵⁷ After spending a sentence on the fear that an elected Senate could “...become an extremely powerful body...” and a worry that elections might cost Canadians a lot of money, the committee concluded that “...an elected Senate for Canada is essential for a necessary balance in the system of government.”²⁵⁸ There was no reference in the report to any of the original debates or experiences in Canada with elected legislative councils or substantive explanation of how an elected Senate would impact on responsible government or legislative gridlock and no elaboration on substantive arguments.

²⁵⁶ *Ibid*, pg 5

²⁵⁷ *Ibid*, pg 23

²⁵⁸ *Ibid*, pg 24

The committee did, however, address Stillborn's paradox of Canadians' desire for elected Senators but distrust of parties. Their solution was to have Senators sit in the Senate not along party lines, but as provincial caucuses, with one of the number chosen to represent them on a Senate Executive Council. In addition, they recommended that no Senator be allowed to sit in Cabinet.²⁵⁹ In this respect some analysis was done by the committee of how internal dynamics might be affected by a change in the organization of the Senate. They felt that these conditions would require greater provincial orientation of the Senators, would not reinforce the role of party in its operation and power structures, and would take a carrot away from the government in the form of a cabinet post in exchange for cooperation. On the other hand, they also did not then account for or consider the degree to which the Executive Council would become its own power base and the competitive role it might develop in relation to the real Cabinet.

In order to make the Senate effective, the report recommendations include a list of *status quo* powers over legislation, some tweaks of the spending and taxing powers of the Senate and House of Commons, but handcuffing these tweaks with a qualified override provision for the House of Commons over any Senate amendment or veto and a special double majority provision on language issues.²⁶⁰ The committee reasoned that the current Senate "...possesses power but does not exercise it because Members and non-members regard it as lacking credibility."²⁶¹ As a result, the committee argues the sober second thought function simply is not being performed. How they come to this conclusion is not detailed, although the National Energy Program is an obvious example, and it contradicts

²⁵⁹ *Ibid*, pg 7

²⁶⁰ *Ibid*, pg 6-7

²⁶¹ *Ibid*, pg 32

their own observation above about how its work is “often valuable.” It could be argued that their understanding of the complementary, sober second thought role was too robust in comparison to the original vision for it, or it could be argued that it is a symptom of the flooding of the once watertight jurisdictional compartments between the federal and provincial levels and the related loss of accountability and responsibility.

The report loses its way on the subject of veto power. After creating an elected Senate to be more effective, it takes away the one tool guaranteed to get a government’s attention – control of the purse. The Senate cannot initiate or raise public spending, or initiate or raise taxes. However, it claims the power to reduce either. Moreover, the report takes away time as a tool by introducing time limits on deliberations. On regular legislation, a qualified majority can override a Senate amendment or veto. The vision the committee had for the dynamics of a bicameral institution was extremely confused and not very penetrating. It also underscores the delicate balance necessary for creating an effective second chamber between power and mode of selection. On the one hand, the more legitimacy that is conferred by mode of selection makes it more likely the second chamber will use its powers and will end in conflict with the responsible legislative body; too many limits on those powers makes a farce of the new selection process.

The current Senate uses the potential of amendment and delays – which carries time, political and logistical penalties for the government in handling its return to the House – to gain concessions on legislation. This is an observable phenomenon each December and May/June as lengthy adjournments loom and the government is eager to mark them with political successes. To take away these elements would neuter the current Senate. Taking it away from an elected Senate that one wants to be effective is confusing.

It is recognition of the very problem of deadlock and competition raised by the Fathers so many years ago, highlighting the central problem of an elected Senate, and compromises the ambition of effectiveness.

The rationale for election of representatives at a province wide level is not explored in depth by the report or subsequently by the Blue Book. Presumably it is to emphasize the provincial representation role being played by the elected senator. However, the corollary effects of a provincial selection process are not explored. One might be the role parties play in recruiting, supporting and promoting candidates and the underlying dependence that places candidates in with respect to their respective parties. While it might be argued that provincial parties are frequently not in lock step with their federal cousins, the consideration must be taken into account. Province wide elections might also lead to a tendency to a less diversified outcome. In other words, without other balancing requirements or mechanisms, successful candidates might end up being more homogenous in demographic profile than would be desirable when considering the opportunity a second chamber presents for rectifying forms of identity that are other than territorial or ideological, the primary focus of identity in the House of Commons where candidates compete for a tightly localized constituency on the basis of how best to run the country.

This brief critique of the *Strengthening Canada* report demonstrates that the foundation for the Reform Party's approach to this key federal institution may not have been based on a full appreciation of the historic rationale for certain features or of the full consequences certain features of their proposal might have. The actual functional/operational considerations were historically questionable in some respects and

contradictory in approach. As White asks, “What is the point of expending enormous energy and considerable expense to create an elected Senate that can only, in effect, delay legislation [for] a couple of months?”²⁶² White’s own conclusion is that if Canadians truly want a Triple-E Senate, they will “...have to be prepared to take a leap of faith and join Australia on the road to some more fundamental reassessment of the old “Westminster convention” about the absolute supremacy of the lower house.”²⁶³ In other words, a familiar dilemma in this reform project: abandon the very ideal the Fathers cherished of a government directly accountable to the people’s house and not to two masters, in favour of injecting greater democratic input into the selection process for membership in the second chamber. On the other hand, how else to accommodate the fundamental change in the provinces’ constitutional status and the blurring of democratic accountability for confused jurisdictional responsibilities?

The Reform Party adapted the report: 10 Senators per province and review of Supreme Court appointments and of crown corporation chairs. In addition, changes were made to the specifics of legislative powers that would be somewhat stronger than those envisioned by the Legislative Assembly of Alberta.²⁶⁴ Asked about the prospect of deadlock, Manning replied “...it’s probably a good thing,” arguing that such a deadlock would demonstrate a need to rethink a given piece of legislation.²⁶⁵ While Manning at least had an open mind on this and appeared to be tolerant of political discord, his comments do not directly address the wisdom of having two politically charged houses in

²⁶² White, op cit., pp 240-241

²⁶³ *Ibid*, pg 241

²⁶⁴ Weatherbe, Steve, “The Reform Party’s Train of Thought”, *Alberta Report*, May 30, 1988, pg 9

²⁶⁵ Fisher, Matthew, “Western Party Proposes Senate Reform Plan”, *Globe and Mail*, April 27, 1988

competition with one another and the impact it would have on the responsibility principle.

Laycock attributes motivations to the Reform Party that have their roots not only in the events described above, but also that more closely resemble political organization principles that are not discernible in the *Strengthening Canada* report. In particular, Laycock notes that "...the major thrust of the Reform Party is to redefine Canadian public life by substantially contracting political – and often democratic – modes of decision making in policy spheres that deal with distributional issues. We need to acknowledge that the Reform critique of the deficit and patterns of government spending expresses a politically compelling account of welfare state failure. Central to this is an insistence on the futility of state intervention in civil society."²⁶⁶ In addition, Laycock identifies a second theme that belies a mistrust of parties and "...our mechanisms for translating public concerns into public policy have serious democratic shortcomings."²⁶⁷

Central planners, welfare state program leaders, and 'special interests' – feminists, aboriginals, unions, ethnic, linguistic groups – were all seen by Reform as skewing the natural market place of not only public spending but also public policy.²⁶⁸ In effect, Reformers argued, these groups represented a defeat of majoritarian democracy by a vociferous minority.²⁶⁹ Laycock also details how the Reform movement tapped into an anti-politician sentiment against elite power brokers and saw Manning "...as a bribe-proof leader, uniquely able to avoid the blandishments of special interests."²⁷⁰ While the

²⁶⁶ Laycock, op cit., pg 214

²⁶⁷ *Ibid*, pg 215

²⁶⁸ *Ibid*, pg 217

²⁶⁹ *Ibid*, pg 218

²⁷⁰ *Ibid*, pg 220

reasons why supporters felt Manning was immune against being co-opted is not detailed, there is an interesting parallel of thought with the property qualifications and the distance that was seen as necessary for Senators from influence.

Economically, Laycock describes Reform's concerns about how the federal government had favoured Quebec and Ontario disproportionately in order to capitalize on their voting power as having not only been unfair but also actively disadvantaging the West in favour of Central Canada.²⁷¹ This is reinforced by earlier comments and views cited from White earlier in the paper. Decentralization, then, was desirable in order to locate decision making at the point where it could be most directly assessed by the people affected.²⁷² The degree to which this is in opposition to the ambitions of the framers of the original *British North America Act* is significant.

Based on the influential political commentary published by notable Reform supporters, Laycock determines that the proposed reform projects of the Meech Lake and Charlottetown accord "...would not have prevented parties and governments...from introducing things like bilingualism, metrification, the GST, the NEP, new national programmes like day-care, or constitutional reform packages that confer special status on Quebec."²⁷³ The obvious conclusion is that when Reform looked at reforming Parliament, it was looking for a way to weaken the dynamics required to create a centralized locus of power. It wanted to recalibrate the power equation between the federal level and the provinces in such a way that was not only different from that originally envisaged at

²⁷¹ *Ibid*, pg 227

²⁷² *Ibid*, pg 227

²⁷³ *Ibid*, pg 232

Confederation, but also significantly stronger than the evolved relationship described up to and after the patriation of the Constitution.

In his preface to the 1991 *Blue Book*, the Reform Party's platform document, Manning, referring to Lord Durham's Canada, originally defined as "...an equal partnership between two founding races languages and cultures,"²⁷⁴ states that Reformers, on the other hand, "...believe that New Canada must be a federation of provinces, not a federation of founding races or ethnic groups."²⁷⁵ Laycock suspects the Reform project's representation models as being subtle efforts to defeat representation by population in the above-noted areas of special interest.²⁷⁶ Indeed, it leads to a contradictory paradox and he asks "can 'tyranny of the minorities' (a *Blue Book* citation) really be the major problem facing Canada at the same time as majoritarianism in Parliament prevents legitimate interests, groups or regions from receiving their due?"²⁷⁷

In short, according to Laycock, the Reform philosophy rendered political identity to a point where "...all citizen identities beyond region are illegitimate."²⁷⁸ So while arguing on the one hand for a greater democratic participation, the Reform Party appeared to be actually trying to deny political identities based on non-territorial factors.

To sum up, growing complexities of political identity, executive federalism excluding the individual from direct involvement in policy development, and legitimate regional grievances were the core governance themes for the Reform Party reform project. It is easy to see where the Senate can become a fixture for those looking to

²⁷⁴ *Blue Book*, op cit., pg iv

²⁷⁵ *Ibid*, pg v

²⁷⁶ Laycock, op cit., pg 232

²⁷⁷ *Ibid*, pg 233

²⁷⁸ *Ibid*, pg 233

remedy these issues. But Laycock demonstrates that the complex motivations behind the Reform Party's principles may actually run counter to demographic political identity.

In turn, little attention or discussion was given to the balance equation of the House of Commons and how the Senate would see itself in comparison. Instead of a complementary body adding an alternative perception to legislation and offering minority voices a forum to once more be heard, the Reform Party proposal was intent on an institution that would be a direct competitor to the people's house on a political identity level that will essentially turn on yet another facet of an otherwise majoritarian representation, rather than on alternative, more personal identities.

It is also not clear what role, considering the importance the party was placing on provincial identity for senators, the Senate would play in intergovernmental matters. Recalling Ajzenstat's descriptions of the original view of senators coming from the regions, debating issues that were national in scope, what, exactly, would be the net effect of this reinforced provincial identity if very little of the legislation that passes through the federal parliament either directly targets or affects a particular region or province? And if it did, who is better suited to represent the interests of that province or region – its senators or its premiers? Certainly its senators would have a reinforced voice, but they would still be numerically outnumbered in the Senate.

Time passed as the Reform Party eventually evolved into the Canadian Alliance and then merged with the Progressive Conservative Party to become the Conservative Party of Canada. The new party's ambitions for reform were equally merged with and changed by the morphing of the party until the electoral platform became one of incremental, iterative reform on a more modest level. In the context of federal legislation

described above, aimed at an incremental reform of certain aspects of the Senate, the Canada West Foundation published in the summer of 2006 a full edition of its “Dialogue” series devoted to Senate reform. Academics, politicians and journalists were among the assembled authors. Revealing observations were made that hinted that the important considerations that ought to be in play were once again coming out for debate.

In this publication, readers were reminded by Ajzenstat of the philosophical reasoning behind the democratic values inherent to the Senate, warning that “[a]utocracy blooms in the guise of populist democracy.”²⁷⁹ Seidle mused about the potential for *lost* representation inherent to direct election, when he reflected on the increased importance of cultural identity being reflected in our institutions. He also noted that the urgency for regional representation in Parliament had noticeably dropped and that he was not as certain it remained as a key priority with respect to Senate reform.²⁸⁰ Crowley suggested that provinces like Alberta and British Columbia, which had been looking for equal representation, may want to revisit the notion, as their demographic and economic numbers continue to grow and where provincial equality may actually entrench power in the hands of have not provinces.²⁸¹ He also argued that the incremental approach, if successful, could lead to a newly-empowered Senate unreformed and - arguably - unreformable in view of its seat imbalance, due to its renewed legitimacy and the respective provinces’ newly-enhanced influence.²⁸² Thomas concluded that the “regional problem” is overblown with respect to required Senate reforms and that any reforms in

²⁷⁹ Ajzenstat, Janet, “The Canadian Senate”, *Dialogues: Senate Reform*, Volume 2, Issue 3, Canada West Foundation 2006, pg 7

²⁸⁰ Seidle, F. Leslie, “A Reformed Senate: To What End?”, *Dialogues: Senate Reform*, Volume 2, Issue 3, Canada West Foundation 2006, pg 17

²⁸¹ Crowley, Brian Lee, “Canada’s New Political Geometry”, *Dialogues: Senate Reform*, Volume 2, Issue 3, Canada West Foundation 2006, pg 18

²⁸² *Ibid*, pg 18

this area should be measured and moderate.²⁸³ In short, there appeared to be some flexibility towards re-entering the national debate on the subject of Senate reform. Ironically, this cooling of passion and the indication of reflection might even serve as a metaphor for the “sober second thought” principle, seen as such a virtue so early on in how the Senate was to operate.

²⁸³ Thomas, Paul, “A Senate That is Like Baby’s Porridge: Not Too Hot or Too Cold” , *Dialogues: Senate Reform*, Volume 2, Issue 3, Canada West Foundation 2006, pg 24

CHAPTER FOUR: A MODERN QUEBEC CONFERENCE

150 years ago, Canadians faced a political impasse. French and English Canada had failed to find a working model that accommodated their competing interests in responsible government, their sectional identities and representation by population. They chose a federation over a legislative union to preserve the sectional identities established in the colonies, yet they deliberately set out to create a strong centralized federation in light of the carnage being waged south of them where the competing states' interests and federal interests had precipitated a bloody civil war. Even in appointing senators from the regions, the Fathers chose centralized appointment over provincial to prevent too much influence by sectional interests at the federal level.

The relative status of provinces and the federal government has changed. The Supreme Court opinion on the *Senate Reference* is merely the latest confirmation of that reality. Notions of democracy have changed dramatically since 1867, with suffrage no longer limited to white males, and the modern capacity to follow and participate in issues and debates enabled by the Internet and social media have an impact on expectations for involvement and immediacy of feedback on ideas.²⁸⁴ The multicultural diversity of the country has increased significantly, and pressures for demographic representation based on factors other than territorial location are growing. The scope of governance issues has exploded and the capacity of a Cabinet executive and Parliament as a whole to oversee

²⁸⁴ In fact, in a 2003 Library of Parliament paper reporting on views of parliamentarians, "The Parliament We Want" (<http://www.parl.gc.ca/Content/LOP/researchpublications/sp1-e.pdf>) there was an observation even then, before the advent of social media that "Citizens do not want to provide dictates to Parliamentarians or governments – they want to provide advice. Also, they do not expect their advice to be taken at all times; rather, they want to be told how their advice was used. Feedback is critically important to the success of consultation." Pg 5

the work of the public service is tested regularly and the addition of the Charter of Rights and Freedoms makes legislative solutions to policy issues even more complex.

The Senate was used as a means to achieve many ends. Its seat distribution, method of selection, powers and age and property qualifications were specifically chosen to reconcile two nations; to balance regional representation with representation by population; to protect responsible government while still providing the complementary and check functions second chambers often perform; and to influence the character and nature of the Senate and the senators appointed there. The Supreme Court of Canada decision in the *Senate Reference* has made consultation with the provinces, and their agreement in keeping with the Constitutional amending formula, obligatory in order for meaningful changes to be made to any or all of these characteristics of the Senate.

The Founding Fathers approached the Quebec Conference of 1864 mindful of their challenges. However, unlike modern day reformers, they were advantaged in some respect by the fact they were creating an entire system; they were forced to take the larger picture into account. Modern Senate reformers need to bear in mind not only just how much the Senate's current features were created specifically to accommodate the needs of the country then, but also what the country's needs are now and how changing the Senate's composition, method of selection and qualifications might intentionally or unintentionally affect the country's federal institutions now.

The Founding Fathers grounded their decisions in political philosophy and found ways to accommodate sectional identities while respecting representation by population considerations. In other words, they achieved a sophisticated, systemically more democratic and inclusive outcome than a simplistic, majority-rules, exclusionary system,

all the while counterbalancing mutually exclusive considerations. Safety valves for minorities, protection from oppression by the majority, the two founding nations perspective, and technical revision of legislation were all built into the Senate particularly, but were done so in light of how other institutions, such as the House of Commons, were conceived and constructed.

The federation and our form of parliamentary governance are so closely involved in the features of the Senate that it is imperative that such reform be considered comprehensively in the form of a second Quebec Conference. The question is how to structure the conference in such a way that the Senate is not a bargaining chip, and as not only a means to many ends, but also a properly functioning element of Parliament.

A modern Quebec Conference would necessarily and inevitably require consideration of institutions of Confederation other than the Senate. The many additional issues that might be brought to the table that do not directly implicate the Senate as it was initially intended and how it has evolved would add far too much to the scope of this paper. However, it is worthwhile to wonder, if the political elite do decide to take time to reflect on the immediate desire to reform the Senate and come to the conclusion that there is a need and a will to enter into constitutional talks, what might they consider? How would they order their principle objectives and how can they accommodate competing interests?

Issues Facing the Federation

Before the Senate can be revisited and reinvented, future Quebec Conference delegates will have to ask themselves what the fundamental character of our federation is and why? Manning's argument suggests that the foundational concept of two nations

must be re-examined and a consensus reached. Is Canada essentially the reconciliation of French and English Canada into a single nation that has carved out a distinct identity for the French minority by providing a territorial home for its linguistic, cultural and legal heritage, while providing for the equality of its language at the national level? Or has it morphed into Manning's vision of a federation of provinces instead of founding ethnic groups? Must it be either/or? In addition, is there a claim to be made for including space within the federation and its institutions for First Nations? If so, how can that be achieved? If the composition of the Senate is to be used to balance or accommodate dynamics or representations issues, it is important to know what those issues are and what compromises are necessary.

Quebec, for example, has outstanding grievances and aspirations for Constitutional reform it holds in the aftermath of the patriation of the Constitution in 1982. In light of the Supreme Court opinion on the *Senate Reference*, it is relevant that newly elected Premier Phillippe Couillard, as a confirmed federalist, mentioned on the campaign trail that the thought of Quebec signing the Constitution patriated in 1982 in the year 2017 had some appealing symmetry to it and that he was open to constitutional negotiations if they were initiated by the federal government. However, he also stated that his starting point for any constitutional negotiations would be the 'traditional' expectations of Quebec and that there had to be a reasonable expectation of success if he were to spare the time and talent necessary from focusing on the challenges posed by Quebec's fiscal situation.²⁸⁵ In effect, addressing Quebec's priorities for signing the

²⁸⁵ For example, as reported by Graeme Hamilton, National Post, March 18, 2013 <http://fullcomment.nationalpost.com/2013/03/18/graeme-hamilton-quebec-liberals-take-a-gamble-with-new-leader-philippe-couillard/>

Constitution would mean revisiting the Quebec Round, which was not primarily focused on reforming the Senate. Senate reform was a side deal to begin with in order to get western buy-in.

Peter Russell summarizes the ‘traditional’ expectations, taken from Claude Ryan’s beige paper on a new Constitution, as calling “...for a decentralization of power, especially in the fields of social policy and culture. It proposed increased powers for Ottawa in setting national economic policy and emphasized Quebec’s role in central institutions such as the Supreme Court and a new, provincially appointed, Federal Council replacing the Senate. Although the paper insisted that a new Canadian Constitution give Quebec the powers needed “for the protection and affirmation of its distinct personality” it also insisted that this not be done in such a way that would “...contradict the fundamental principle that all partners within the federation are fundamentally equal.”²⁸⁶ Again, based on Meech and Charlottetown, it cannot be said that Quebec has a special focus or objective for Senate reform beyond what it can do to strengthen or advance its larger constitutional goals.

Seat Distribution

Meanwhile, the new conference delegates will have to make other calculations that affected the original decisions taken in 1864. Population growth, and where that growth has taken place in relation to other parts of Canada, has long been a source of grievance with respect to how seats in the Senate have been allocated. In 2006, Senators Jack Austin (former Leader of the Government for the Liberals and from British

²⁸⁶ Russell, Peter, *Constitutional Odyssey, Can Canadians become a Sovereign People?* University of Toronto Press Incorporated, Toronto, 2004, pg 103

Columbia) and Lowell Murray (former Leader of the Government for the Conservatives, a chief architect of the Meech Lake Accord and from Ontario) initiated a debate in the Senate about the distribution of seats in the Senate amongst the provinces. In short, their proposal was to increase the number of seats representing provinces west of Ontario by 12: 6 more for British Columbia, 4 more for Alberta and one more for both Saskatchewan and Manitoba. Moreover, British Columbia would stand distinct as a fifth region, separate from the Prairies.²⁸⁷

Have shifting populations and changing/competing economic engines created the conditions necessary to reconsider the concept of what counts as a region in Canada? In light of the evolved status of provinces, are regions even relevant anymore when provinces have evolved to become much more distinct and powerful entities in Confederation? If Aboriginal or First Nations are to be somehow accommodated – in the Senate or otherwise – will it be based on territorially based considerations, such as reserves? If so, how does that affect non-reserve Aboriginals? If not, what approach will be taken to selecting representatives of that community?

A modern Quebec Conference will have to consider these questions about the federation carefully. If the two nations concept of the country is no longer valid, and provinces are equal sovereign partners in Confederation, then how do we accommodate Quebec's determination to sustain its current levels in the House of Commons and the Senate in order to protect its unique cultural and linguistic heritage?

Even in 1864, the thought of Prince Edward Island having an equal number of seats to Ontario or Quebec was such a stretch that it was thought more appropriate to

²⁸⁷ Senate of Canada, Special Senate Committee on Senate Reform, *Report on The motion to amend the Constitution of Canada (western regional representation in the Senate)*, 39-1, pg 2

balance representational considerations by creating the regional construct. In 2011, 140,204 people were counted as living in PEI, a little over .4% of the total population of Canada. With four senators, the province has roughly one senator for every 35,000 citizens. By way of contrast, Ontario, with almost 40% of the national population, has one for every 535,000 citizens.²⁸⁸

2011 Census²⁸⁹		
Canada	33,476,688	
Atlantic (including Nfld-Lab)	2,327,638	7%
Maritime	1,813,102	5.4%
Nfld-Lab	514,536	1.5%
Quebec	7,903,001	23.6%
Ontario	12,851,821	38.4%
West	10,286,963	30.7%
Prairie	5,886,906	17.6%
British Columbia	4,400,057	13.1%
Territories	107,355	.3%
Aboriginal	1,172,790	3.8%

Some may say this is an extraordinary imbalance in representation and unacceptably antidemocratic. Others may claim that representation by population is – at least

²⁸⁸ *Ibid*

²⁸⁹ 2011 Population Census, Statistics Canada, <http://www12.statcan.gc.ca/census-recensement/2011/dp-pd/hlt-fst/pd-pl/Table-Tableau.cfm?LANG=Eng&T=101&S=50&O=A>

notionally – found in the responsible House, the House of Commons, and that the original concept of balancing population by allotting seats by region was and still is appropriate.

The question remains, however: does the notion of what constituted a region in 1864 translate well in 2014? The report of the Special Committee of the Senate on Senate Reform summarized British Columbia's criteria in arguing, since the 1970s, that it deserved the distinction: "...the proposal claimed that there had long existed a unique pacific economy, characterized by growing size and significance in Canada, and a distinctive geography, economic base, trade patterns, and unusually wide cyclical swings between high and low rates of unemployment. The proposal also outlined a range of distinctive demographic and cultural characteristics, noting a relatively high proportion of Asian immigrants, an unusually strong organized labour movement, a unique frontier political culture, and social support programs adapted to the needs of the economy and population."²⁹⁰ There is no reference to historical considerations extant 1864 to ground the approach. The criteria are, therefore, an original construct or proposition. Do the criteria included have merit? Do the claims of the West, with a combined percentage of the population including British Columbia that is half way between that of Quebec and Ontario, merit being separated into two regions and having its overall percentage of seats in the Senate increased to 30% as compared to 20% each for Ontario and Quebec, based on the proposal?²⁹¹

The proposal would bring them to an equal footing with the Atlantic share of seats, with the Maritime provinces and Newfoundland and Labrador combined, which in relation to their population numbers appears more than fair. On the other hand, Quebec

²⁹⁰ Senate of Canada, Special Committee on Senate Reform, op. cit., pg 5

²⁹¹ *Ibid* pg 2

and Ontario might each individually be reluctant to lose their relative share, but at a combined total of 41% of the new allocation of seats, compared to 62% of the population, the principle of the formula appears to respect the regional balances of the original deal and to address grievances about balancing seat allocation somewhat more equitably according to the regional principle.

As with the original Quebec Conference, achieving the regional weighting principle will pose an enormous challenge to the federal and provincial delegates to a modern Quebec Conference. For the smaller provinces, the number of MPs they have cannot fall below the number of senators they were originally allocated. In the case of Quebec, its share of the Senate can be considered one part of its belt and suspenders protections found in the composition of the Senate and House of Commons.²⁹² Any change in Senate representation will have to take these factors into account and an accommodation that protects the vested interests implied while allowing for any new formulation's principles to prevail will be difficult to achieve.

On the other hand, representation by population has largely been notionally applied rather than practically applied in Canada. Of the current 308 seats in the House of Commons, 305 are allocated to the provinces and one each for the territories. Based on percentage of population, Ontario is short just over 12 seats, Alberta 6, British Columbia 6. Meanwhile, Prince Edward Island, Nova Scotia and New Brunswick, and Newfoundland and Labrador have between 2 and 3 MPs more than their respective shares

²⁹² PEI already enjoys this protection, provided under Section 51A of the Constitution Act 1982, known as the "senatorial clause". Quebec's representation in the House of Commons is constitutionally guaranteed to never fall below the number established in 1985, a provision known as the "grandfather clause". Going into the next election, where 338 seats will be contested, Quebec will be provided 6 seats above the number indicated by the formula: "Allocation of Seats in the House of Commons"
<http://www.elections.ca/content.aspx?section=res&dir=cir/red/allo&document=index&lang=e>

of the population would warrant, Saskatchewan and Manitoba between 4 and 5 more, and Quebec 3. After the redistribution in effect for 2015, these numbers will be closer to a proper proportion, but the underrepresented provinces will still be underrepresented in relation to population, and the overrepresented provinces will still be overrepresented.²⁹³

Taking the steps necessary to achieve full representation by population would either require removing floor provisions, which is unlikely, or increasing members for underrepresented provinces substantially. Embracing representation by population fully, however, would mean that all Canadians contribute equally to the ultimate selection of their governing Executive. It could then also be an argument for finally strengthening the Senate and making its mode of selection more politically empowering in order to compensate for the even greater weighting towards the more populous provinces in the House of Commons. However, the dilemma remains: electing the upper chamber enhances its power and its connection to the people, but at the expense of representation by population and responsible government.

Appointive versus Elective Principle

As noted earlier, province wide constituencies make competition by candidates more expensive, more dependent on party support, thereby compromising independence. They may also lead to less demographic personal identity diversity. However, the Supreme Court decision in the *Senate Reference* points to another truth about any change contemplated: it will affect the character of the institution and how the individuals within it see themselves as political actors. “The proposed consultative elections would

²⁹³ Comparison of Seat Allocation by Province”
<http://www.elections.ca/content.aspx?section=res&dir=cir/red/allo&document=index&lang=e>

fundamentally modify the constitutional architecture we have just described and, by extension, would constitute an amendment to the Constitution. They would weaken the Senate's role of sober second thought and would give it the democratic legitimacy to systemically block the House of Commons, contrary to its constitutional design."²⁹⁴ Moreover, "...the listed nominees would become popular representatives. They would have won a true electoral contest during which they would presumably have laid out a campaign platform and made electoral promises."²⁹⁵ In other words, instead of being dispassionate, independent and objective in their work, complementing rather than competing with the representatives in the House of Commons, providing a different perspective and an opportunity to rethink rash decisions, elected senators have promises to live up to, which logically means they have an active agenda to achieve. Speaking for constituencies comprising an entire province, they may even feel they have a stronger mandate to live up to than MPs.

Method of selection, then, has a direct impact on the character of the institution as a whole and on its members. Delegates may consider alternative forms of election, such as proportional representation, where senators are selected from lists provided by their respective parties, based on their share of an election. This might have the desired effect of democratizing the selection process without giving the selected senators as direct a mandate as is conferred by the first past the post process MPs compete in. But should appointment be from a General Election federally, or based on provincial elections? If federal, then proportions will be based on the campaign and results in the election for House of Commons and the federal parties will have the largest hand in selecting

²⁹⁴ SCC 32, 2014, op. cit., para 60

²⁹⁵ *Ibid*, para 61

senators, thereby perpetuating electoral party considerations over independence. It would also mean that the process of competition for seats in the House of Commons would drive the outcome for seats in the Senate. How would that affect the perspective of senators selected in this manner? Does that adequately reflect the desires of provinces to be more strongly represented in the federal parliament?

Alternatively, senators could be selected proportionately from provincial lists, based on provincial elections, as they are in Australia. In Australia, this system almost always results in no one majority party in the federal Senate and forces the Executive in the House of Representatives to compromise on matters where they cannot get their bills through the Senate as drafted. There is no convention that the Senate acquiesces, finally, even though the issue may have been one the majority party campaigned on. Perhaps this degree of resistance is what Manning was looking for in his reflections. However, it still leaves the responsible government question hanging, unaddressed and unanswered.

The Australian model, like the Canadian, does not explicitly prohibit its Senate from defeating budgets entirely, which offends the notion of the confidence principle and responsible government. As an elected body, the Australian Senate has not avoided direct confrontation with the Government and in 1975, triggered a general election. In the Canadian case, convention, coupled with the fact that the Senate is not elected, has largely governed this dynamic satisfactorily.

One solution to reconciling an elected Senate would be to insist on the financial prerogative remaining with the House of Commons. While suspensive vetoes essentially rob the second chamber of a considerable lever, as observed earlier in examining the Alberta Select Committee Report, the principle of responsible government would mean

that ultimately, the accountability for financial matters and control of the Executive would remain in the representation-by-population house. So long as other powers were maintained and mechanisms for resolution of differences, such as inter-house conferences,²⁹⁶ were used, the second chamber would still have a meaningful role. Of course, definitions of what constitutes Ways and Means or Supply proceedings will have to be well defined.

This is one example of how the method of selection has consequences and many facets that need to be calibrated in relation to other institutions and conventions illustrates the care with which it needs to be approached. The considerable amount of debate that has followed the appointive principle, particularly in recent years, indicates the importance people place on democratic input into the institutions that govern them. To date, by design and by intent, the Senate has not been a ‘governing’ institution, but a check on and a complement to *the* governing institution. Using an elective principle will change that. The elective device chosen and the representative dimension it takes on will shape its dynamics. How those fit into responsible government and general accountability issues needs to be tailored to accommodate those changes for our current form of governance to continue.

Independence: Qualifications and Term

The Supreme Court decision on the *Senate Reference* did not put much weight on the existing qualifications to be a senator. At least in part, this is because none of the interveners put any emphasis on or thought into those qualifications. “There is nothing in

²⁹⁶ Hon. Dan Hays, PC, “Reviving Conference Committees”, *Canadian Parliamentary Review*, Autumn, 2008, pg. 8

the material before us to suggest that removing the net worth requirement would affect the independence of Senators or otherwise affect the Senate's role as a complementary legislative chamber of sober second thought."²⁹⁷

The net worth and property qualifications have not changed since they were enacted in 1867. Consequently, the need to possess \$4,000 in real property and to have a net worth of \$4,000 or more (and in the case of Quebec, to either own that real property in one's senatorial constituency or to be resident there) is no longer the significant indicator of wealth it once was. In addition, being 30 years of age – 12 years older than the current minimum age of an MP – is not the advanced stage of life it was in 1867, either, and no longer a threshold to one's years as an elder. In the absence of arguments or concern expressed by the interveners, it is assumed the Court made the assessment that time had rendered the property and age qualifications sufficiently insignificant to mean the federal Parliament could unilaterally change these aspects: "It [repeal] updates the constitutional framework relating to the Senate without affecting the institution's fundamental nature and role."²⁹⁸

However, the framers of the *BNA Act, 1867* believed that property and age were of great significance to the fundamental nature and role of the Senate. Gairdner, commenting on George Brown's speech to the Legislative Assembly in support of an appointed second chamber, identified the core principle behind age and wealth qualifications: the importance and implications of having a stake in the country imbues in

²⁹⁷ SCC 32, 2014, op. cit., para 88

²⁹⁸ *Ibid*, para 90. This citation is in regards to net worth, specifically, but accurately paraphrases para 91 on real property.

the possessor.²⁹⁹ In addition, we return to Macdonald’s remarks, where he underscores the importance of independence: “[The Senate] must be an independent house, having a free action of its own, for it is only valuable as being a regulating body, calmly considering the legislation initiated by the popular branch and preventing any hasty or ill-considered legislation which may come from that body...”³⁰⁰ Being of a mature age and financially settled, a man – again, advisably in light of the times – in the Senate would be free to behave independently without feeling a personal interest lay in following orders from another political body.

Term of office is another factor that was hoped would have a similar effect on the institution and its members. The Supreme Court said, “Senators are appointed roughly for the duration of their professional lives. This security of tenure is intended to allow senators to function with independence in conducting legislative review. This Court stated in the Upper House Reference that, “[a]t some point, a reduction in the term of office might impair the functioning of the Senate in providing what Sir John A MacDonald described as the ‘sober second thought in legislation’”.³⁰¹ In a footnote, the decision explains that the 1968 imposition of a maximum age of 75, down from a life appointment, did not materially affect this feature of independence.³⁰²

Combined, the tenure provided by a term that can reasonably be expected to carry the incumbent well past his or her most productive years, and wealth provisions would certainly still tend to have the desired effect today of weakening any bonds that may exist or dependencies an incumbent may feel. Thus, they would likely lend themselves to

²⁹⁹ Gairdner, William D., in *Canada’s Founding Debates*, op. cit., pg 85

³⁰⁰ Sir John A MacDonald, *Canada’s Founding Debates*, op. cit., pg 80

³⁰¹ *2014 SCC 32*, op. cit., para 79

³⁰² *Ibid*, footnote 8

creating an independent house, insomuch as personal interest of an ambitious or fiscal sort matters. However, arguing that wealth, position in society and professional accomplishment in this day and age are the main criteria that should be applied for reducing the pool of potential senators is not likely to carry as much weight in our more egalitarian times as it did in the days of Locke.

The modern Senate is recognized as having a greater degree of independence from party discipline than the House of Commons. In one example that stands out in recent times, the *Clarity Act* was considered an important personal initiative by Prime Minister Chrétien. It was given a great deal of extra attention in the Senate, and on the culmination of proceedings at 3rd Reading, attracted 4 substantive amendments, all of which were moved and seconded by Liberals. On the first, 8 of 61 Liberal senators present voted for the amendment and 3 abstained. On the second amendment, 3 voted for and 5 abstained. On the third, 8 voted for and 4 abstained. On the fourth, 9 voted for and 2 abstained. On the final vote for 3rd Reading, 2 voted against and 9 abstained.³⁰³

Anecdotal instances of this kind of willingness to buck strong personal lobbying from PMO are not difficult to come by. In 2013, in the case of C-377, a bill designed to make union finances public, government caucus senators refused to uniformly obey the party whip. “Prime Minister Stephen Harper’s office has issued a stern warning to Conservative senators who helped gut a controversial bill that would force unions to publicly disclose details of their spending. On Wednesday, 16 Tory senators bucked the government’s wishes and joined their Liberal counterparts in approving a number of amendments to bill C-377, while another four abstained. The vote represented the

³⁰³ *Debates of the Senate*, 36-2, Thursday, June 29, 2000, pp1913-1917

culmination of weeks of contentious debate in the upper chamber during which a number of Conservatives had expressed unease about the legislation, arguing it went too far and was badly written.”³⁰⁴

However, there is also a degree of concern that senators are not sufficiently distant from the influence of party leadership. In the wake of the publication of emails cited in the RCMP’s Information to Obtain application in its investigation of suspended Senator Duffy’s expenses,³⁰⁵ public reaction to the imagery of officials in the PMO allegedly directing senators on desired outcomes ultimately led to the Liberal Leader, Justin Trudeau, choosing to sever formal political ties with Liberal senators and any involvement in national caucus.

The Senate was once referred to as a place of sober, second thought. A place that allows for reflective deliberation on legislation, in-depth studies into issues of import to the country, and, to a certain extent, provide a check and balance on the politically-driven House of Commons.

It has become obvious that the party structure within the Senate interferes with these responsibilities.

³⁰⁴ Berthiaume, Lee, “Tory Senators join forces with Liberals to ‘gut’ Conservative-backed union disclosure bill”, The National Post, June 26, 2013 as accessed <http://news.nationalpost.com/2013/06/26/sixteen-tory-senators-join-liberals-in-gutting-union-disclosure-bill-approved-by-house/>

³⁰⁵ As provided here <http://www.cbc.ca/news/politics/read-and-search-the-rcmp-s-duffy-wright-documents-1.2434140>

Instead of being separate from political, or electoral concerns, Senators now must consider not just what's best for their country, or their regions, but what's best for their party.

At best, this renders the Senate redundant. At worst ... it amplifies the Prime Minister's power.³⁰⁶

However future delegates to a Quebec Conference choose to address the issue, independence was a core objective of the framers of the original constitution. Property and net worth qualifications have been allowed to wane in importance. As noted earlier, the patronage and partisan influence of the appointive principle, magnified by length of tenure of Prime Ministers – and in the case of the Liberal Party over time, successive Prime Ministers from one party – has meant extensive appointments of senators with strong ties to the party, such as strategists, fundraisers and past presidents, to unsuccessful party electoral candidates or long time MPs, with few to no “crossbench” appointments. It is not clear, therefore, that the normative objectives of the Fathers were realized over time with respect to independence. However, the property and residence qualifications found in the Constitution physically locate senators in the province they represent, a feature by itself that could be lost if an indiscriminate approach is taken to simply eliminating the real property qualification without balancing it with some other residency requirement.

³⁰⁶ Justin Trudeau, February 29, 2014, <http://www.liberal.ca/newsroom/blog/major-announcement-partisanship-patronage-senate/>

Future framers will want to consider what features of independence they wish to see in new senators and how they choose to achieve it. Mill's assumption that the people will naturally defer to a higher class and the Fathers' Lockean assumption that mature, wealthy individuals with a 'stake' bring an obvious merit to their appointment to the Senate, are likely not consistent with modern egalitarian sentiment. At the same time, criteria that set potential candidates apart as being more 'qualified' to exercise an objective, meaningful role in evaluating public policy exercises might still be worthwhile exploring. Senator Joyal, in his factum to the Supreme Court on the Senate Reference, paraphrased Professor David Smith as follows: "...the legitimacy of the Senate is premised on the independence of its deliberations, while the legitimacy of the House of Commons is based on democratic accountability to the electorate".³⁰⁷

Minorities

Consistent with the philosophy of Mill, second chambers provide 'the minority' a democratic safeguard. Second chambers, simply by existing, play a role in forcing a majority government to pause and reflect on policies they are intent to introduce and at least consider the existence of perspectives other than their own, that it makes them at least consider alternate viewpoints, if only from the perspective of risk analysis in mapping out parliamentary strategy. In general, 'the minority' in this philosophical context is the minority opinion or point of view on how to best address an issue.

By providing a complexion different in its orientation and nature to the popular house, a second chamber provides room for a different voice. The 'air of divinity' that

³⁰⁷ The Hon. Serge Joyal, PC, Factum, 2014 SCC 32, op.cit., pg. 13

can attach itself to a popular majority needs a means of ventilation. As Sir Henry Maine might suggest, it is not for the purpose of pure opposition that a second chamber exists, so much as to reassure that the confirmation bias of the majority mind of the popular house has not forgotten to consider a point of view or an unintended consequence and that it has chosen its course well.

The creation of the Senate, however, had a more targeted, concrete kind of minority protection in mind. “There was no doubt in Canada what the Senate's role was to be. It was to protect vulnerable minorities. It had other tasks, such as to scrutinize legislation coming from the Commons, but protection was its primary role. It was this role that particularly required an assured measure or sphere of independence. So certain were some Fathers of Confederation — for instance, George Brown — of this role for the upper chamber of the federal Parliament that they pressed for a unicameral provincial legislature. Ontario had no need of local bicameralism since the Senate stood ready to come to the aid of any threatened minority.”³⁰⁸

English Protestants in Quebec and French Catholics in Ontario were minorities of particular attention in 1867. In 2014, significant 3rd language profiles other than English and French exist throughout the country in many provinces.³⁰⁹ The symbols of England, France, Ireland, Scotland and Wales figure prominently in Parliamentary architecture,³¹⁰ yet the diaspora of many other countries and ethnicities make up sizeable communities within Canada.

³⁰⁸ Smith, David, testimony to the Special Senate Committee on Senate Reform, 39-1, Issue 4, pg 81

³⁰⁹ http://www12.statcan.gc.ca/census-recensement/2011/as-sa/98-314-x/98-314-x2011003_2-eng.cfm

³¹⁰ The arms for these five European nations are exclusively represented on the ceiling of the Senate.

Using the appointive principle, Prime Ministers have compensated for a lack of demographic representation in the House of Commons by recommending representatives from those communities. Status Indians were not allowed the elective franchise in Canada until 1960, but three years earlier, Prime Minister Diefenbaker recommended the appointment of James Gladstone to the Senate.³¹¹ Today, the Senate has four senators that claim aboriginal heritage. The Senate allows Canada to add broader gender representation as well. While the House of Commons comprises 25% female membership, the Senate is at almost 40%.³¹² Ethnic backgrounds spanning the globe are represented, as are many religions and occupational backgrounds.

As noted, David Smith argues that the Senate contributes to democratic governance by providing time and space for political dissent, by simply using time to allow a greater awareness and understanding, and for consent to develop among the people for legislation too rapidly passed in the House of Commons, and by giving it expression in the Senate, that dissent can stand or fall on its own merits.³¹³ The inherent democratic merits of having a second chamber in a Westminster parliamentary system, regardless of its method of selection, appear to at least balance the perceived drawbacks of the appointive principle. The Senate, then, has an inherent and important democratic role separate from whom or what it represents or how it is selected.

Conclusion

The decision of the Supreme Court in the *Senate Reference* may appear to make the normative point of this thesis moot; based on the decision, meaningful reform of the

³¹¹ The Senate of Canada, <http://sen.parl.gc.ca/portal/sentalk/sen-james-gladstone-e.htm>

³¹² Women in Parliament, Inter-Parliamentary Union, as of April 1, 2014, <http://www.ipu.org/wmn-e/classif.htm>

³¹³ Smith, *The Senate in Bicameral Perspective*, op cit., pg 135

Senate cannot be achieved under the Constitution without provincial participation. However, the real point of the thesis stands; yes the provinces must be involved in the process to reform it constitutionally, but meaningful reform of the Senate should only be attempted in full consideration of how the Senate has been used to accommodate otherwise incompatible tensions not only within the federation, but also the parliamentary form of governance. This naturally includes the interests of the provinces, but it includes as well how responsible government works and it also includes political identity issues for people and groups not currently included in the federal-provincial mix per se that have either always existed (First Nations) or that have arisen either as a result of multiculturalism or post-Charter awakening.

The core elements of the Senate are interwoven with the fibers of how responsible government works, the balance achieved among regions versus representation by population, and the democratic values and dimensions it provides the federal Parliament. Moreover, it has been used to include minority groups not adequately reflected in the House of Commons. Even if unilateral reform were technically possible, doing so in isolation from or ignorance of these factors would in all probability destabilize the core foundational principles of Confederation, Parliament, or both. The decision of the Supreme Court assists us in understanding why and how the Senate involves provincial interests, and therefore triggers the amending formula, but, because the Court was not required to in order to reach its conclusions, it does not delve into the merits of specific options or their respective countervailing features.

The period of mega-constitutional rounds that played out in the 70s, 80s and 90s exhausted the psyche of Canadians. Sectional interests interwoven with divergent

theories of how to view the federation made the negotiations difficult and precarious. The emotional toll of those efforts and the failures of Meech Lake and Charlottetown make the subsequent lack of desire on the part of the current political elite to enter into another period of constitutional negotiations understandable. Yet, as this paper reflects, there are issues beyond the Senate that are pressing for attention. The Senate itself is an institution that appears to require significant revitalization and can be one way in which those issues can also be accommodated.

The NDP position, advocating the abolition of the Senate, is difficult to reconcile with a party that, for its entire history, reaching back into its days as the CCF, never really threatened to form a federal government. The original antipathy of the CCF/NDP towards a second chamber is easy to understand, coming from a party that at the time held policy positions that were radical and promised tremendous social and economic upheavals. In the class warfare rhetoric and philosophy of the time, the Senate undoubtedly did represent a very real obstacle to those ambitions. However, as time passed it was clear that the socially progressive, economic equality party that evolved had become decidedly less radical and more of a conscience of Parliament.

How the party that championed ethnic and minority rights and social and economic equality could not intellectually reconcile itself with a second chamber specifically designed to give a voice to those very concepts is difficult to understand. Now, for the first time, the NDP has formed the official opposition federally and are very much contending for power. The party continues to advocate abolition, following the Supreme Court decision. “Democracy in Canada is in urgent need of repair. New Democrats believe it’s vital that trust and confidence in our practices and institutions be

restored. That means making sure Canada's electoral system truly represents the expressions of voters, ensuring Parliament reflects real party support across Canada. It means cleaning up the appointments process, abolishing the unelected and unnecessary Senate, and eliminating obstacles to the right to cast a ballot. Making Parliament more accountable also means policing lobbyists and protecting public servants who report unethical practices."³¹⁴ Neither the policy book nor the rolluptheredcarpet.ca website provides insight or direction on how the party intends to ensure a unicameral Parliament balances representation by population and regional interests. The party doesn't even identify these dimensions as issues. Nor does the party detail how its unicameral Parliament will ensure a voice for minority interests, or how minority regions or minorities of a demographic nature will be protected from a majority unchecked by any other institution. Yet these are issues that have been historically vital to our understanding of how Canada has evolved and the nature of the institutional structures it has developed to accommodate them.

Reform of the Senate by itself may not be sufficient cause to overcome the general reluctance to enter into constitutional negotiations. Whether a future Quebec Conference may be called specifically to reform the Senate, or to overhaul the Canadian federation, one cannot be looked at in isolation from the other.

Perhaps the Senate can implement some of the ideas proposed by the many authors surveyed and find ways to renew itself from within and address its public credibility. Perhaps some form of constitutionally acceptable selection process will be devised that calms agitation for a more democratic form of selection. Or perhaps

³¹⁴ NDP Policy Book, Section 5, pg 21 http://xfer.ndp.ca/2013/policybook/2013-04-17-PolicyBook_E.pdf

circumstances will transpire to inspire future giants of Confederation to come together in common cause, to put aside, as Macdonald, Cartier and Brown did at Monck's urging, their personal and party interests, and address the needs of the Canadian federation. If that day comes, the Senate, in all likelihood, will again prove to be a useful pressure release valve on issues of seemingly irreconcilable nature; a means to many ends.

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