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Backgrounder

# Senate Reform

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# SENATE REFORM

The commitment in the 1987 Constitutional Accord[1] to put Senate reform on the agenda of yearly constitutional conferences, and the growing support in some quarters for an elected Senate, have rekindled the long-standing debate on the future of the upper chamber of the Canadian Parliament. The purpose of this background paper is to take stock of this question.

## AN OVERVIEW OF BICAMERALISM

In western constitutional history, bicameralism was originally justified by the need to represent the aristocratic element of society in a distinctive way within Parliament. The classical theory in relation to this was expressed in the 18th century by Montesquieu in a famous passage from his The Spirit of Laws:

> In a State, there are always people distinguished by birth, wealth or honours; but if they were mingled with the people, and if they had there only one voice like the others, public freedom would be their slavery, and they would have no interest in defending it, because most resolutions would be against them. The share which they have in legislation should therefore be proportionate to the other advantages which they have in the State: which will be the case if they form a body with the right to stop the undertakings of the people, as the people have the right to stop theirs.

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(1) The reader should keep in mind that the amendments in the Constitutional Accord of 3 June 1987 will become part of the Canadian Constitution only after a constitutional resolution authorizing the Governor General of Canada to proclaim them has been approved by the Senate, the House of Commons, and the legislative assembly of each province.

> Thus, legislative power will be entrusted to both the body of nobles and the body chosen to represent the people, each of which will have their meetings and deliberations separately, and separate views and interests.
>
> Of the three powers of which we have spoken, that of judging is, in a sense, nonexistent. There remain only two; and as they require a regulating power to temper them, the part of the legislative body which is composed of nobles is very well-suited to produce this effect.
>
> The body of nobles must be hereditary. It is so, firstly, by its nature; and, besides, it must have a very great interest in maintaining its prerogatives, hateful in themselves, and which, in a free State, must always be in danger.
>
> But, as an hereditary power could be tempted to pursue its own interests and neglect those of the people, it is necessary that in matters where there is a supreme interest in corrupting it, as with respect to laws concerning the raising of money, it plays a role in the legislation only in terms of its faculty of preventing, and not of its faculty of legislating.
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> I call faculty of legislating the right to order by itself, or to correct what has been ordered by another. I call faculty of preventing, the right to render null and void a resolution taken by some other; which was the power of the tribunes of Rome. And although he who has the faculty to prevent may also have the right to approve, then, this approval is nothing more than a declaration that he will make no use of his faculty to prevent, and arises from this faculty.(2)

The preceding extract is taken from a chapter dealing with the British system. The reader will have recognized the description of the composition and powers of the British House of Lords. This chamber still constitutes the typical model of the aristocratic upper chamber, although its powers were significantly reduced by the Parliament Acts of 1911(3)

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(2) Montesquieu, De l'esprit des lois (The Spirit of Laws), éditions Garnier Frères, Paris, 1973, Vol. 1, p. 172-173 (translation).

(3) 1 and 2 Geo. V, chap. 13.

and 1949,(4) and its composition altered by the creation of Life Peers in 1958. In the 19th century, this model predominated in most European states, with the members of the upper chamber owing their seats either to heredity or to appointment by the sovereign.

If the need to privilege the leaders of society had remained the sole justification for upper chambers, one may wonder whether they would have survived the spreading of the democratic spirit over the last 200 years. But it is to the American Fathers of the Constitution that we owe the elaboration of a new justification for second chambers, this time as instruments of representation of the territorial communities of a State. The origin of the U.S. Senate, which is the example always referred to, is enlightening. The constitution framers of 1787 were trying to reconcile, through the process of federalism, the need for union with the maintenance of regional autonomy. But the less populous states viewed with apprehension the creation of a legislature endowed with important powers but within which the application of proportional representation would leave them in a minority position. The large states, on the other hand, could not accept being placed within this legislative body on an equal footing with states two or three times less populous. And, as de Tocqueville writes:

> Under these circumstances, the result was that the rules of logic were broken, as is usually the case when interests are opposed to arguments. The legislators hit upon a middle course which brought together by force two systems theoretically irreconcilable.
>
> The principle of the independence of the states triumphed in the formation of the Senate, and that of the sovereignty of the nation in the composition of the House of Representatives.
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> Each state was to send two senators to Congress, and a number of representatives proportioned to its population.

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(4) 12, 13 and 14 Geo. VI, chap. 103. See also O. Hood Phillips, Constitutional and Administrative Law, 5th edition, Sweet and Maxwell, London, 1973, p. 107-113.

> It results from this arrangement that the state of New York has at the present day 33 representatives, and only two senators; the state of Delaware has two senators, and only one representative; the state of Delaware is therefore equal to the state of New York in the Senate, while the latter has 33 times the influence of the former in the House of Representatives. Thus the minority of the nation in the Senate may paralyze the decisions of the majority represented in the other house, which is contrary to the spirit of constitutional government.(5)

A reading of the Federalist Papers gives a clearer understanding of the intentions of the designers of this model. In their eyes, the equality of the states in the Senate was a constitutional acknowledgement of the sovereignty still left to the states and a way of ensuring the preservation of that sovereignty. At the same time, designation of senators by the state legislatures would permit more élitist recruitment ("a select appointment") while creating a useful link between the two levels of government.(6) This new model made it possible to create a moderating counterweight to the directly-elected house without openly contradicting the democratic principle. The French constitution framers of 1875 understood the usefulness of the model and transposed it within the framework of a unitary State by creating a Senate elected by the mayors and municipal councillors, with overrepresentation of the less populous and presumably more conservative communes, a model which is essentially still in force.

Second chambers have been passionately decried in some quarters. The old objection of Siéyès under the French revolution is well known: if the second chamber contradicts the first, it is not democratic; if it agrees with the first, it is unnecessary. While repeating this dilemma, which liberal minds considered simplistic, Harold Laski saw no reason to maintain this institution, even in federal states:

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(5) Alexis de Tocqueville, Democracy in America, Vol. 1, New York, Alfred A. Knopf, 1946, p. 118-9.

(6) Alexander Hamilton, James Madison and John Jay, The Federalist Papers, Bantam Books, New York, 1982, p. 313-314.

> Whether from the angle of its composition or of its powers, it is, in fact, impossible to discover a satisfactory Second Chamber in any way able to check the authority of the House of Commons. (...) Anyone who examines the nature and history of Second Chambers in general will discover that their main purpose is at least to delay, and, if possible, to prevent, the disturbance of the status quo. They are, in fact, part of the general tactic of conservatism. They enable the propertied interests in a State to interpose a barrier in the way of Radical legislation. (...) Indeed, it might be urged with justice that even in a Federal State no real necessity for a Second Chamber exists.(7)

These arguments, which ignore the role often played by second chambers in terms of regional representation or the improvement of laws, have not remained without effect in practice. "Almost obligatory prior to 1914," writes Michel Bouissou, "it (bicameralism) became optional between the two wars, and almost unusual in those constitutions entirely developed after 1945" (translation from French).(8) Opponents of the second chamber happily point to its abolition in Denmark, Sweden and New Zealand since the end of the second world war, as well as its total absence in the 10 Canadian provinces.(9) They refer to the successive reduction of the powers of the British House of Lords in 1911 and 1949 and the prudence with which the Canadian Senate uses its considerable constitutionally acknowledged powers. According to a survey of all countries a decade ago, unicameralism prevailed in 84 and bicameralism in 55.(10)

Nonetheless, many authors and politicians continue to defend vigorously the maintenance of second chambers. The historical evolution triumphantly pointed to by the partisans of unicameralism is not all on one

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(7) Harold J. Laski, Studies in Law and Politics, George Allen and Unwin, London, p. 119 and 121.

(8) M. Bouissou, "Bicamérisme ou bicaméralisme" (bicameralism) in Encyclopaedia Universalis, p. 257.

(9) The last remaining provincial upper chamber, the Legislative Council of Quebec, was abolished in 1968.

(10) Laurent Trivelli, Le bicaméralisme (bicameralism), Payot, Lausanne, 1975, p. 67.

side. In 1977, democratic Spain restored the Senate dissolved in 1923. And in France, the second chamber regained with the constitutional revision of 1954 and the Constitution of 1958 many powers of which it had been stripped in 1946.(11) In Canada, partisans of abolition of the Senate remain a minority, and the numerous proposals for reform in the last 20 years attest to the interest in a renewed Senate. More than two-thirds of the stable liberal democracies, the seven major western industrial powers without exception, and all federations possess second chambers. For a federal country, the question is no longer so much whether a second chamber is needed, but whether the existing one can play a role deemed useful by most electors, not only by those more wedded to tradition.

## THE CANADIAN SENATE

Bicameralism has ancient roots in Canadian history. Since the earliest days of the representative system, our successive constitutions have always provided for the existence of a Legislative Council. The three original provinces of 1867 each possessed one at the time of Confederation. The model of the upper chamber appointed by the Crown and possessing powers equal to those of the lower chamber clearly predominated. Only the Legislative Council of United Canada (from 1856 to 1867) and that of Prince Edward Island (abolished in the 19th century) were elected by the population. The appointed upper chambers were very active, especially before the advent of ministerial responsibility and helped the British governors to resist the wills of the elected assemblies.

As envisaged in 1867, the Canadian Senate combined the two traditional justifications for bicameralism. Its promoters, who devoted more attention to it than to any other part of the new constitution, wanted to make it an instrument to defend the privileged classes. From this intention came appointment by the Crown and the property qualification of $4,000 (a very high sum at the time). The role of regional representation

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(11) In 1946 and 1969, the French electorate refused to ratify by referendum the abolition of the second chamber.

was shown in the over-representation of the less populous Atlantic provinces at the expense of Ontario and, to a lesser extent, Quebec. The goal of protecting minorities was shown in the creation, in Quebec only, of 24 senatorial constituencies and the requirement that Quebec senators should reside in or meet the land qualification in one of them: this system favoured the appointment of senators from Anglo-Quebec constituencies. Francophone minorities outside Quebec, however, did not receive the same consideration.

As established in 1867, the Senate was composed of 72 members, 24 for each of the three divisions of that era: Ontario, Quebec and the provinces then called Maritime provinces (Nova Scotia and New Brunswick). Its members were appointed for life by the Crown on the recommendation of the Prime Minister. In addition to the aforementioned property qualification, they had to be at least 30 years old and to reside in the province for which they were appointed. Senators lost their seats if they stopped attending Senate sittings for more than two consecutive sessions, if they went bankrupt or if they lost the property qualification. The Speaker of the Senate was not elected by his colleagues, as was the Speaker of the Commons, but appointed by the Crown on the recommendation of the Prime Minister, like the Lord Chancellor in England.

The powers of the Senate, which have not been amended since 1867 (except with regard to the amendment of the Constitution), are impressive on paper. In formal terms, the Senate comes immediately after the Queen and before the House of Commons in the list of components of the Canadian Parliament. For a law to pass, it must be agreed to by the Senate: if a bill passed by the House of Commons is amended in the Senate, the amendment must in turn be approved by the Commons, failing which the entire text will die on the Order Paper. Supremacy was conceded to the Commons only in terms of financial initiative.

## A. Formal Changes to the Senate Since 1867

Like all other parts of the Canadian Constitution, the provisions relating to the Senate may be amended in two ways. Formal

amendments change the constitutional texts in accordance with an established procedure. The same texts may also be amended informally by either judicial interpretation or constitutional practice.

Most formal amendments have dealt with the distribution of seats among the provinces and were made necessary by the evolution of the small confederation of four provinces to the status of a country with 10 provinces and two territories. The Manitoba Act of 1870 provided for the addition of two senators for that province and the British Columbia Terms of Union the following year, awarded three seats to the new member of the federation. The entry of Prince Edward Island into Confederation in 1873 earned it, under section 147 of the Constitution Act, 1867, four seats, the representation of each of the other two Atlantic provinces having been reduced from 12 to 10 seats. The decennial censuses of 1881 and 1891 meant successive increases in the number of senators for Manitoba, first to three and then to four. In 1887, the "Northwest Territories" of the time were given two seats in the Senate, a figure which was doubled in 1903. Two years later, the newly-created provinces of Alberta and Saskatchewan each obtained four seats.

Thus, in 40 years, a series of arrangements had brought the total number of senators from 72 to 87. The Constitution Act, 1915 reorganized and rationalized somewhat the bases of the representation by creating a fourth division, the Western division, composed of the provinces of Manitoba, Saskatchewan, Alberta and British Columbia, each represented by six senators. The same act provided for the awarding of six seats in the Senate to Newfoundland when it entered the federation in 1949. Finally, in 1975, the two territories were each awarded one seat by a federal act.

In structural terms, the principal reform was the reduction in the senatorial term in 1965 by the Canadian Parliament acting alone. Under the terms of this reform, which does not apply to senators appointed on or prior to 2 June 1965,(12) senators must retire at age 75.

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(12) On 17 February 1988, nine senators fell into this category.

Almost unnoticed when the Constitution was patriated, the reduction in the powers of the Senate in constitutional matters contained in the Constitution Act, 1982, helped to clarify the real power of each of the actors in terms of Senate reform. Many believed that the federal Parliament had since 1949 had the power the amend as it pleased the provisions of the Constitution pertaining to the Senate, under section 91.1 of that Constitution. The Trudeau government made this interpretation, widely accepted by commentators,(13) the basis of its Bill C-60 on constitutional reform, in which it distinguished the reforms which could henceforth be made without the consent of the provinces (including replacement of the Senate by a House of the Federation) from the more ambitious reforms, notably those dealing with the distribution of powers, which would require the consent of the provinces. However, in light of objections from many quarters, the Supreme Court of Canada was asked to rule on the question and rendered in December 1979 a unanimous judgement confirming that as the law stood at that time, the consent of the provinces was necessary for the reform of the essential elements of the Constitution and the powers of the Senate.(14)

Under the amending formula provided for in the Constitution Act, 1982, the Canadian Parliament has exclusive authority to amend the provisions of the Constitution of Canada in relation to the Senate. In matters for which no special formula is provided, the procedure involves an act of the federal Parliament to be introduced in either House and having the agreement of both.

A more demanding procedure, however, governs amendments affecting the following four matters: the Senate's powers, selection of senators, the number of senators by which a province is entitled to be

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(13) Peter W. Hogg, Constitutional Law of Canada, Carswell, Toronto, 1977, p. 202; R. MacGregor Dawson, The Government of Canada, University of Toronto Press, Toronto, 1970, p. 301 n; Eugene A. Forsey, Freedom and Order, McClelland and Stewart, Toronto, 1974.

(14) Re: Authority of Parliament in Relation to the Upper House [1980], 1 S.C.R. 54.

represented, and the residency conditions to be met by senators. In these areas of vital importance, amendments are made by a proclamation of the Governor General authorized by resolutions of the Senate, the House of Commons and the legislative assemblies of seven provinces representing 50% of the population of all of the provinces. In addition, although the Senate has the power of initiative in these matters, it enjoys only a suspensive veto of 180 days. In the absence of Senate agreement, the House of Commons has only to wait 180 days and then adopt the constitutional amendment a second time.

This complex formula weakens the authority of the Senate, which no longer enjoys a veto over the essential aspects of its structure and functions, while paradoxically retaining a veto over more modest amendments. It strengthens the power of the provinces, whose role in the matter is officially recognized. The whole procedure scarcely facilitates reform of the institution. It is well known how difficult it is to obtain provincial consensus in delicate matters.(15)

## B. Informal Changes to the Senate Since 1867

Much more important than these formal changes would appear to be those made to the functioning of the Senate by political practice and jurisprudence.

One of the rare judgements in relation to the Senate is the case of Edwards v. Attorney General for Canada ([1930] A.C. 124). The controversy surrounded the possibility of appointing women to the Senate. It was argued on the one hand that the B.N.A. Act permitted the appointing of "persons" and that that expression included women. Others pointed to the repeated use in the Constitution of the pronoun "he" to designate senators and concluded from this that half of the Canadian population must be denied the right to be called to sit in the Senate. The conservative interpretation, confirmed, by the way, by the Supreme Court of Canada, was

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(15) For a discussion of the current proposals for constitutional amendments affecting the Senate, please see p. 36.

rejected by the Judicial Committee of the Privy Council in 1930. It noted that "the exclusion of women from all public offices is a relic of days more barbarous than ours."(16)

The essential evolution, however, has been the slow but constant erosion of the real powers of the Senate. The constitutional right has remained practically the same but in fact senators have become more and more cautious in its use, even when the official opposition has been in the majority in the Upper House. The veto was applied to only 7.9% of the public bills between 1867 and 1873, but to none over the course of the last 25 years. Approximately one-quarter of the public bills were amended by the Senate during the first six years of Confederation, but only 6.4% from 1957 to 1960.(17) Between 1960 and 1982, according to a compilation by the Information and Reference Branch of the Library of Parliament, the Senate amended 35 of the 1,000 or so public bills passed during the period; the House, moreover, accepted the Senate's amendments to 30 of these bills.

Concurrently with this decreasing legislative role, the Senate has developed, particularly since 1968, an investigative role applauded even by opponents of the institution. Senate committees appear particularly well placed to carry out long-term studies. Their members remain in office for a long time. The more routine tasks of examining votes and bills which often engage the attention of Commons committees take up less of the time of Senate committees. The public experience of senators, either in politics or business, makes them, in principle, excellent investigators. The productivity of Senate committees of inquiry in the last 20 years has fully justified the hopes placed in this formula, but without necessarily silencing all of the criticisms directed at the institution. In the mid-1970s, the Honourable Renaude Lapointe, the Speaker of the Senate, could even affirm that far from behaving as an

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(16) [1930] A.C. 124, p. 128.

(17) Unless otherwise indicated, the statistics are from R.A. MacKay, The Unreformed Senate of Canada, revised edition, McClelland and Stewart, Toronto, 1963, p. 199.

ultra-conservative body, the Senate had displayed a spirit of social reform in its inquiries.(18)

The fact remains, however, that, in the eyes of many, the Senate has not been able to fill the role of regional representative, the main justification for a second chamber in the federal system. This is despite the presence in its ranks of personalities with a great deal of experience at the provincial level - at one time it contained four former premiers. Hence the flowering, in the wake of the new affirmation of the provincial order of government since the 1960s, of proposals for revitalizing the institution and helping it play its principal role more effectively. We will now turn our attention to these proposals.

## SENATE REFORM PROPOSALS SINCE 1968: THREE "GENERATIONS"

The large number of proposals for Senate reform attests to the ingenuity of Canadian political scientists and politicians. However, the various suggestions may easily be grouped into a half-dozen basic options - such as, elected Senate, Senate appointed by the provinces - each of which enjoys an often transitory period of popularity before giving way to a new proposal more in keeping with the political and constitutional balance of the moment. Many of these formulas represent only a repetition of models in vogue a few decades earlier. It would be presumptuous for anyone to claim to have discovered the perfect formula and thereby to have resolved a debate almost as old as Confederation itself!

The Research Branch of the Library of Parliament prepared for the Special Joint Committee on Senate Reform in May 1983 a compilation of all the serious proposals for Senate reform made since 1968: it contains 16 proposals from the federal and provincial governments, parliamentary committees or organizations like the Canadian Bar Association and the Canada West Foundation, as well as at least seven private members'

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(18) Renaude Lapointe, "The Role of the Second Chamber in Canada" in S.S. Bhalerao (dir.), The Second Chamber. Its Role in Modern Legislature, New Delhi, 1977, p. 10.

bills.(19) To this list should be added the often specific suggestions for reform put forward before the Committee by several witnesses,(20) as well as the report of the Committee itself, tabled on 31 January 1984.

At the risk of simplifying matters somewhat, it is possible to distinguish three "generations" of Senate reform proposals.

The first generation contains three proposals, all from the federal government: the government White Paper entitled The Constitution and the People of Canada published in 1969; Bill C-60 of 1978, which is that Paper's rather belated translation into legislative language; and the 1972 report of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada (Molgat-MacGuigan Committee). All these proposals share a common characteristic: they are aimed in one way or another at involving the provinces in the selection of half of the senators, with the other half continuing to be appointed or elected by the federal government. The 1969 White Paper confined itself to suggesting that the senators "representing the provinces" be appointed by each provincial government "with or without the approval of the legislature, according to the terms of the Constitution of each province."

Bill C-60 on constitutional reform, tabled in June 1978, was as specific and detailed as the 1969 White Paper had been vague. The proposed "House of the Federation" was to contain 118 members, half of whom would be appointed by the House of Commons after each general election and the other half appointed at that time by the Legislative Assembly of each province after each general election; each member would remain in office as

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(19) L. Massicotte, Collation of Proposals on Senate Reform, Library of Parliament, Ottawa, 1983. This is available from the Library of Parliament in both official languages.

(20) Noteworthy were the contributions of Professors André Bernard, Robert Jackson, Edward McWhinney, Gil Rémillard and Senators Royce Frith and Michael Pitfield; see relevant Proceedings of the Special Committee, as well as the article by Hon. Gordon Robertson in Policy Options, September 1983, p. 8-11.

long as the legislative body which designated him or her.(21) In a rather original way, the bill would have required the competent authority to appoint the members of the House according to the principle of proportionate representation. The new body would have enjoyed a suspensive veto of at least two months over all bills adopted by the Commons. The idea of a double majority, of both Francophone and Anglophone senators, for approval of all measures of linguistic significance represented another bold innovation. The bill as a whole was keenly criticized before the Supreme Court ruled that the federal Parliament could not alone institute such a wide-ranging reform.(22)

The result of public hearings held across the country, the Molgat-MacGuigan report did not go as far as the two previous initiatives: all senators would have continued to be appointed by the federal government, but half of them would have been chosen from among candidates proposed by the appropriate provincial or territorial government.(23)

All of the proposals were based on the presumed need to reorganize the Senate so that the interests of the provinces would be directly represented there, and the governments or legislative assemblies of the provinces appeared at the time to be in the best position to appoint such representatives. However, it appeared necessary to balance this sectional representation by a contingent appointed by the central government so that the interests of the country as a whole would be represented and the Senate would continue to maintain and develop the sense of Canadian unity.

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(21) The representatives of the two territories would have been designated by the Governor in Council following the elections of their respective territorial councils.

(22) See Re: Authority of Parliament in Relation to the Upper House, [1980] 1 S.C.R. 54-79, judgement rendered in December 1979.

(23) The Lamontagne report of 1980 repeated this recommendation.

Although a similar proposal was made in 1962,(24) we must attribute the sudden popularity of the West German Bundesrat concept to the new situation created by the election of the Parti Québécois in 1976. The six Canadian variations of this proposal suggested since 1978 constitute the "second generation" of Senate reform proposals.

These distinguish themselves by the very favoured role they give to the provincial governments: these proposals would empower the provincial governments to appoint all of the members of the second chamber, and make it a permanent instrument of intergovernmental coordination by introducing the provincial premiers to the very heart of the federal legislative process. It is scarcely surprising to note that four of the seven proposals came from provincial sources: Ontario's Advisory Committee on Confederation and the Government of British Columbia in 1978, the Liberal opposition in Quebec in 1980 ("Beige Paper") and the Government of Alberta in 1982. But the arguments underlying the West German Bundesrat concept also appealed to the constitutional committee of the Canadian Bar Association and some elements of the federal Progressive Conservative Party in 1978 as well as the Task Force on Canadian Unity (Pépin-Robarts) the following year.

It would be pointless to repeat the details of these various formulas. All of them would have the members of the second chamber appointed and recalled by the provincial governments and acting on their instructions. They graded the powers of the new body according to the importance of the provincial interests at stake, reserving for it an absolute veto over the federal government's exercise of its powers to intervene in areas of provincial jurisdiction: declaratory power (section 92.10c of the Constitution), spending power, emergency power, etc... On all matters falling clearly under the jurisdiction of the central government, however, the proposed Councils would have had, at best, only a suspensive veto. Such a body would have been less the second chamber of

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(24) Peyton V. Lyon, "A New Idea for Senate Reform," Canadian Commentator, July-August 1962.

the federal Parliament than a watchdog for provincial interests, a rampart of sectional autonomy.

The criticisms directed at the Bundesrat concept were numerous and certainly contributed to the relative (but perhaps temporary) disfavour into which this idea has since fallen; the political context born of the Quebec referendum of 1980, however, and the patriation of the Constitution the following year more essentially explain this unpopularity. The partisans of federal preponderance observed that the unilateral powers of the central government constitute an indispensable characteristic of Canadian federalism and allow for greater equalization of opportunities for Canadians in the least prosperous regions; subordinating the exercise of these powers to the formal consent of the provinces would impede their usage, generally to the advantage of the richest regions. It must be observed that while the Bundesrat concept ensures that the sectoral autonomy of the provinces is respected, it strikes a blow at that of the central government, although it could be argued that to enable the provinces to control the central government's use of its power to encroach, is merely to re-establish a balance which is currently compromised. Finally, opponents of the concept underscore the differences between the Canadian and West German contexts: the Bundesrat operates in a society where the first allegiance of citizens is indisputably to the central government and falls within a Constitution which reserves for the latter almost all legislative powers, conceding to the provinces only powers to enforce the laws debated and passed in Bonn, in addition to meagre legislative powers. Though West German federalism is centralized enough to allow for a Bundesrat, is the same thing true of Canadian federalism?

Curiously, such a council was also the target of some partisans of the provinces who saw in it a dangerous Trojan horse. They pointed out that in federal West Germany, the importance of the powers of the Bundesrat has contributed not to decentralizing West German federalism but rather to centralizing it. Faced with the necessity of controlling the Bundesrat in order to govern effectively, the successive governments of federal West Germany strengthened their control over the regional wings of the party in power in Bonn and favoured the success in the provinces of

coalitions sympathetic to their views, even if this entailed intervening, sometimes conspicuously, in the regional political process. And it is common knowledge that the decisions of the Bundesrat are based on partisan rather than regional considerations. This is not the first time that a reform has produced the opposite result of what was expected!

The federal government has remained cold, if not hostile, to this model. In a document made public in August 1978, it flatly rejected this idea, and the two federal parliamentary committees which subsequently studied the question came to an identical conclusion. By proclaiming the death of cooperative federalism in 1982, Prime Minister Trudeau reduced to nil the prospects for a model which requires a broad identity of views among the partners in order to function smoothly.

It is in this context that the advent of a "third generation" of proposals, i.e., a Senate elected directly by universal suffrage, must be understood. The promoters of this model are responding to a wide range of motivations. Some want to revitalize the institution; they feel that only direct election will do this and that, in the absence of such a reform, the Canadian Senate will see its legitimacy atrophy and will, in the long term, be abolished. Others think that the Canadian federation is one of the most inclined in the world to intergovernmental squabbling, and that the lack of representation of regional interests in the federal Parliament is a major reason for this state of affairs. They maintain that the House of Commons cannot really play a role of regional representation because the plurality electoral system would favour regional polarization of the parties and entire regions of the country would in practice be excluded from the real centres of power, i.e., the government caucus and the Cabinet. Moreover, party discipline leads elected members to behave as federal party members rather than as regional representatives. Nor is the Senate in a position to play the role of regional representative owing to the partisan nature of appointments, party discipline and, in particular, the limited use it can make of its powers. With the insertion of a Council of Provincial Delegates within the federal legislative process being excluded a priori, there remains little but the solution of direct election. Still others see that the election of the Senate according to

proportional representation might make it possible for the major parties to elect representatives even in the regions of the country where they are in a minority position; this would facilitate the formation of cabinets more representative of the geographic diversity of the country. Finally, some favour the principle of direct election as being more democratic in their view than any of the reform options so far advanced.

In 1981, the Canada West Foundation issued a detailed proposal in this regard. It proposed a Senate composed of an identical number of members (6 or 10) from each province. Half of the Senate would be renewed at each general election, so that each senator would remain in office for two Parliaments. The basic constituency would be the province, and the election would take place under proportional representation with the single transferable vote in force in the Australian Senate and Ireland. The new body could neither overturn the government nor ratify diplomatic or judicial appointments. In compensation, it would be necessary for it to confirm appointments to some federal bodies, the use of the extraordinary preponderant powers of the federal government and, especially, constitutional amendments: in all these matters, it would enjoy an absolute veto. Over other bills, the Senate's veto could be overruled by a qualified majority in the Commons. In principle, senators would not be subject to party discipline and could not be Cabinet ministers.

Senator Roblin and Mr. Gordon Robertson added some variations to this basic model. The latter suggested that a double majority be required (Francophone and Anglophone) in order to pass linguistic measures. In June, a Green Paper from the Minister of Justice took stock of the numerous options proposed.

Following patriation of the Constitution, the debate on Senate reform began on the basis of the elective model. Senator Roblin, Deputy Leader of the Opposition in the Senate, in February 1982 made a motion along these lines, which was discussed during the following months. In April 1983, the former Clerk of the Privy Council and Secretary to the Cabinet for Federal-Provincial Relations, Gordon Robertson, defended this option in a speech which attracted considerable attention at the Conference

on the Constitution Act, 1982 held in Quebec City. Prime Minister Trudeau, at the same time, made remarks discreetly sympathetic to an elected Senate.

In December 1982, the two Houses of Parliament created a Joint Committee on Senate Reform. Chaired by Senator Gil Molgat and, successively, by MPs Roy MacLaren and Paul Cosgrove, the Committee supported the elective solution.

## THE REPORT OF THE JOINT COMMITTEE

### A. The Actual Proposals

Concluding nine months of work, the Committee tabled its report on 31 January 1984. It had heard from scholars and politicians in June 1983, held public hearings in each of the provincial and territorial capitals in the fall, and prepared its report in November and December 1983.

"We have concluded that the Canadian Senate should be elected directly by the people of Canada." The unequivocal statement which opens the report clearly reveals its orientation. Concerned with creating a body which would effectively reflect regional viewpoints, the Committee members proposed a Senate elected by universal suffrage and the single-member plurality system. Senators would be elected for a nine-year term, with one-third of the Senate renewed every three years. The total number of senators would increase to 144: 24 for Ontario and Quebec, 6 for Prince Edward Island, 12 for each of the other provinces, 2 for the Yukon and 4 for the Northwest Territories. During the transition period leading to a fully-elected Senate, senators would be appointed for a nine-year term, with every vacancy being filled within a six-month period.

The Committee's proposals are an attempt to answer three major objections to an elected Senate.

Many were apprehensive about the impact on the operation of the parliamentary system of a Senate elected by universal suffrage. One of two things would happen, they maintained. Either this Senate would be given the considerable powers suited to a legislative body elected by the

people, in which case it would inevitably one day come into conflict with the House of Commons, with consequences suggested by the Australian constitutional crisis of 1975. Or, with a view to preventing such a confrontation, it would receive only modest powers, making it an institution given little respect, incapable of attracting the best talents, whose election would arouse electoral participation analogous to that of municipal councils or school boards.

The Committee's response to this dilemma was a Senate whose powers would be carefully defined in order to avoid any conflict with the House of Commons. While maintaining the rule reserving to the Commons the initiative in financial measures, the Committee suggests three different levels of power according to the nature of the legislative measure. The Senate would have no power vis-à-vis supply bills (main, interim and supplementary estimates); this flows logically from the decision to reserve to the House of Commons the privilege of overturning the Cabinet. Vis-à-vis linguistic bills, the Senate would enjoy, in contrast, an absolute veto without appeal since a linguistic measure would have to receive not only the consent of senators but also the agreement of a majority of Francophone senators. Finally, on other bills, the Senate would enjoy a suspensive veto with two components of a maximum duration of 120 sitting days, i.e., in practice between seven and nine months. The Senate would be given a maximum of 60 sitting days to express its opinion on a bill passed by the Commons, and if it vetoed the measure, the Commons could not pass it again until after another 60-day period. Finally, the Senate would enjoy only its current suspensive veto of 180 days over amendments to the Constitution.

The other major objection had to do with the capacity of elected senators to act as regional spokesmen. Essentially, opponents of the formula asserted that recourse to popular election would make the federal parties the necessary route of access to the Senate. Whatever the electoral system in effect, candidates for the Senate could win only if they possessed an electoral organization, which only the parties could provide. Once elected, senators would be subjected to the full range of incitements and pressures which lead MPs to vote and speak according to the

party line. In these circumstances, the elected Senate would be a second House of Commons rather than an instrument of regional representation. The reform would thus miss the primary objective of its promoters.

To this very serious objection, the Committee tried to respond by arranging the structural specifics of its model so as to favour the independence of senators. The following choices relate to this concern.

The electoral system is single-member plurality rather than proportional and a list system. It was assumed that the proportional system would place senators directly under the thumb of party headquarters, while confusing voters by its novelty. A single-member constituency would permit a more direct link between the elected member and his constituents.

Senators would be elected for a long (nine years) and, above all, non-renewable term. It was assumed that senators would be more inclined to show evidence of independence if they did not have to fear facing the electorate later without the support of their party.

Senatorial elections would take place on a fixed date, with the Senate being renewed by thirds every three years. Were they to be held at the same time as elections to the House of Commons, the latter would conceivably overshadow them. Holding a distinct senatorial campaign would make it possible for regional issues to receive due attention.

Finally, senators would not be able to sit in Cabinet, would choose their Speaker and parliamentary leaders, control their own budget and sit in regional rather than party caucuses.

A third major objection advanced against the formula of the Canada West Foundation had to do with the problem of Quebec. Equality of the provinces in the Senate would make it possible to increase Western representation but would reduce that of Quebec to 10% (it was 33% in 1867 and is 23% today). On this score the Committee accepted the compromise suggested by Gordon Robertson and proposed in Bill C-60 of 1978: the Western share would be increased from one-quarter to one-third of senators, and Quebec representation would be reduced to 17% of the total (24 seats

out of 144); in compensation, Francophone senators would have a veto over linguistic measures.

One may wonder how the Senate proposed by the Committee would fit into the international scene. The model proposed is compared below with elected upper chambers in other democratic countries.

## B. Relative Position of the Proposed Senate

Seven western democracies now have a second chamber elected in whole or in part by universal suffrage. They are Australia, Belgium, Italy, Japan, Spain, Switzerland and the United States. Australia is probably the oldest example, since election of the Senate there dates back to 1901. The most recent is Spain (1978). It is interesting to compare the relative position of these chambers to that of the Senate proposed by the Joint Committee.

Evaluating the relative power of a legislative body is a complex operation; several criteria should be considered in arriving at an overall assessment.

The following comparative grid is based on a point system applied to a set of 11 criteria totalling 100 points. The method followed takes its inspiration from American research.(25) In considering second chambers, let us suppose at the outset that the "ideal type" of a strong Senate would include the following characteristics: it could participate in the selection of the Head of State and overturn the government; in addition to having power of initiative in all legislative matters, it would have a veto over all bills of any nature, and in particular supply bills and constitutional amendments; treaties and some appointments would require its assent; senators would be elected for a longer term than members of the other House and would not be bound by party discipline; finally, the Senate

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(25) For an application of this method to the status of the governors of the American states, see H. Jacob and K.H. Vines (dir.), Politics in the American States. A Comparative Analysis, Little Brown, Boston, 1965, p. 217 et seq. See the appendix for the weighting of the different criteria.

could not be dissolved by the Executive. A weak Senate would combine the opposite characteristics, with, of course, the whole range of intermediate options.

The table on page 24 was prepared on the basis of the comparison appearing in the appendix to this text and Constitutions in force. It is scarcely surprising to see the American Senate in first place, by far: experts consider it the most powerful legislative body in the western world. On the other hand, those who hope - or fear - that direct election would raise the prestige of the Canadian Senate to the level of that of the U.S. might see their hopes dashed if the Committee's proposal were ratified in its present form. Indeed, the model proposed by the Committee gets only 44 points and is in next-to-last place among the eight bodies compared, just ahead of the Spanish Senate and close to the level of Japan's House of Councillors. The Italian, Belgian and Australian Senates, as well as the Swiss Council of States, occupy an intermediate position.

There would undoubtedly be a great deal to criticize in terms of the details of this comparison, and the relative weight of each of the criteria considered could give rise to long discussions without a formula receiving general assent. An analysis of the table reveals, nonetheless, that the model developed by the Joint Committee seems to meet the objectives the authors had set for themselves fairly well: "that an elected Senate, while enjoying substantial powers, will not be able to contest the ultimate supremacy of the House of Commons."(26) In developing this model, the Committee, it was said, was navigating between two reefs. Wishing to revitalize the Senate by direct election, it risked making it a direct competitor with the Commons. On the other hand, by removing the Senate's right to overturn the government and giving it only a suspensive veto, the Committee created a discrepancy between the strong democratic legitimacy of the body and the modesty of its formal

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(26) Report, p. 23.

## Comparison of the Canadian Senate proposed by the Joint Committee with elected Senates in seven democratic countries

| Criteria | Countries | | | | | | | | Importance of the criterion (points) |
|---|---|---|---|---|---|---|---|---|---|
| | Canada (proposal) | U.S. | Australia | Italia | Belgium | Switzerland | Japan | Spain | |
| Can overturn the government | 0 | 0 | 10 | 10 | 10 | 0 | 0 | 0 | 10 |
| Participates in the choice of the Head of State | 0 | 0 | 0 | 5 | 0 | 5 | 0 | 0 | 5 |
| Veto over bills | 9 | 15 | 15 | 15 | 15 | 15 | 7 | 7 | 15 |
| Veto over supply bills | 0 | 10 | 10 | 10 | 10 | 10 | 5 | 5 | 10 |
| Veto over constitutional amendments | 5 | 10 | 10 | 10 | 10 | 10 | 10 | 10 | 10 |
| Can initiate bills | 5 | 5 | 5 | 10 | 10 | 10 | 5 | 10 | 10 |
| Must ratify some treaties | 0 | 5 | 0 | 5 | 0 | 5 | 5 | 5 | 5 |
| Must ratify some appointments | 5 | 5 | 0 | 0 | 0 | 0 | 0 | 0 | 5 |
| Party discipline | 5 | 10 | 0 | 0 | 0 | 0 | 0 | 0 | 10 |
| Longer term than that of MPs | 5 | 10 | 5 | 0 | 0 | 0 | 3 | 0 | 10 |
| Can be dissolved | 10 | 10 | 0 | 0 | 0 | 10 | 10 | 0 | 10 |
| TOTAL: 100 | 44 | 80 | 55 | 65 | 55 | 65 | 45 | 37 | 100 |

powers.(27) Clearly, the first danger was deemed more serious than the second. Politics, it was once said, is above all the art of choosing between great disadvantages.

### C. Reactions to the Report

The joint chairmen of the Committee held a press conference after the tabling of the report and committee members toured the provincial capitals. Many articles and editorials resulted; provincial governments reacted to the report and Senators debated its content.

Two ideas clearly emerge from the newspaper comments. Both the quality of the report and the essence of its recommendations were praised. The newspapers remained sceptical, however, as to the chances of its success in the near future. A Toronto Star editorial may have best summarized the general reaction by its title "Good Senate Plan Has Poor Prospects."

Praise was unstinted in most newspapers, both French and English. For the Globe and Mail, "the proposals deserve a respectful hearing and a full national debate."(28) An editorial in the Edmonton Journal commented: "At last, a report from a special federal committee that puts forward proposals which are timely, lucid and elegant in their simplicity and common sense."(29) The Winnipeg Free Press saw it as "the most serious and practical program for Senate reform that Canadians have yet seen."(30) "Soberly written, stripped of the quibbling typical of this kind of literature, the document impresses by its clarity, relevance, even the boldness of its recommendations," according to Jean-Louis Roy in Le Devoir.(31) Le Droit described the suggestions in the report as "very

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(27) This would be tantamount to reversing the existing discrepancy.

(28) Globe and Mail (Toronto), 3 February 1984.

(29) Steven Hume, Edmonton Journal, 4 February 1984.

(30) Winnipeg Free Press, 2 February 1984.

(31) Le Devoir (Montreal), 2 February 1984.

interesting."(32) In the Toronto Star, Ross Howard called them the best ideas advanced hitherto.(33) For Jean-Paul Desbiens, the double majority "is a way to enable Quebec to regain what it lost with patriation of the Constitution." He spoke of "the passage from arbitrariness to election" and the determination of a fixed mandate as gains and called on the Quebec government to participate in the debate.(34) However, the Calgary Herald declared the Committee's proposal defective; one of its commentators went so far as to write: "The entire thesis is so riddled with anomalies and contradictions that one wonders how a group of 18 seasoned parliamentarians could come up with anything so obviously unworkable in its practical details."(35) This assessment echoes that of the Gazette which sees in the proposal only a "recipe for trouble."(36) Several aspects of the report were the subject of specific comments. Rejection of proportional representation was deplored by the Vancouver Province, while the Ottawa Citizen observed that the passages of the report on this subject left most of the arguments in favour of proportional representation intact. Le Soleil of Quebec City felt that partisanship would dominate regional interests in an elected Senate. The nine-year term was criticized, not only for its length (only senators in France are elected for such a term), but because if senators served for one term only, they would be unaccountable to the electorate.

The reactions of the provincial governments were more reserved. Nova Scotia and Prince Edward Island endorsed the principle of an elected Senate; British Columbia did the same but rejected an increase in the number of seats. Saskatchewan deemed the report "less than

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(32) Le Droit (Ottawa), 2 February 1984.

(33) Toronto Star, 5 February 1984.

(34) La Presse (Montreal), 15 February 1984.

(35) Calgary Herald, 4 February 1984.

(36) The Gazette (Montreal), 2 February 1984.

perfect." New Brunswick opposed the idea of an elected Senate; the Ontario Cabinet appears to be divided on the question. The New Democratic government of Manitoba reiterated its preference for abolition, following in this the sole NDP member of the Committee, Mr. Rod Murphy, in his dissent.(37) In Quebec, Premier Lévesque described the proposal as a "new madhouse," while his Minister of Intergovernmental Affairs saw it as "at best a shrewd diversion, at worst a new trap."(38)

The Canadian government showed itself more sympathetic to the report in responding to it as the Committee had expressly requested under Standing Order 69(13) of the House of Commons. In a letter addressed to the joint chairmen on 10 April 1984, Prime Minister Trudeau wrote:

> The Government of Canada believes the Committee's report contains a useful set of proposals on which a fruitful public debate might be based. I am therefore pleased to inform you that the government intends to use the report as a whole as its working document on Senate reform for future consultations with provincial governments, interested groups and individual Canadians. While various elements of your report will require further study and discussion by this government and others, the government considers that the report as a whole provides an appropriate basis on which consultations might now proceed.

While welcoming the principle of direct election, the Prime Minister expressed some reservations about methods of proceeding suggested by the Committee. On the electoral system, for example, "the government is afraid that in the absence of some formula for proportional representation, the election of senators will exacerbate the very problem of regional polarization, which, according to the report, reform of the upper house should help to resolve." While observing that reasonable arguments may be made both in favour of and against the appointment of senators to the Cabinet, the government was concerned about the consequences of the non-renewable nine-year term.

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(37) House of Commons, Debates, 1 February 1984, p. 953.

(38) Le Devoir (Montreal), 24 February 1984.

The reactions of senators were chilly on the whole, although the press had estimated that a third of them were in favour of an elected Senate. The debate on the report gave rise to speeches by Senators Donahoe, LeMoyne, Stewart, Macquarrie, Denis, Robichaud and Leblanc. Among their themes were the inevitably partisan nature of an elected Senate, the relative reduction in Quebec representation, the proposed increase in the number of senators and the cost of the reform. However, some speakers supported the recommendations in chapter 7 of the report concerning reform of an appointed Senate.

The report of the Joint Committee opened the way to other proposals supporting the elective option for a reformed Senate. The next section looks at two examples of more recent support for an elected Senate and reviews the attitudes of public opinion on that matter.

## RECENT SUPPORT FOR AN ELECTED SENATE

### A. The Macdonald Commission Proposals

The reformed Senate proposed in the Report of the Royal Commission on the Economic Union and Development Prospects for Canada(39) (known also as the Macdonald Commission) is similar in many ways to the model recommended by the Molgat-Cosgrove joint committee. However, the Macdonald Commission differs on two major points: by recommending that the Senate be elected by a system of proportional representation and by rejecting the attempt to give senators a significant degree of independence of party.

The Commissioners' proposals for a reformed Senate are based on their belief that the Senate should embody the federalist principle and provide the regional representation lacking in the House of Commons. The reformed Senate must be elected, and election to the two Houses should take

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(39) Canada, Royal Commission on the Economic Union and Development Prospects for Canada, Report, Volume III, Minister of Supply and Services Canada, Ottawa, 1985.

place at the same time. Although the Commissioners stated that in the Senate representation should be weighted in favour of the less populous regions, they rejected the idea of giving equal representation to each province or even region on the ground that "the Senate should only temper, not obstruct, representation by population."(40)

The reformed Senate would be elected by a system of proportional representation, in six-member constituencies, the number of seats (144) and their distribution being the same as in the Molgat-Cosgrove proposals. A Senate elected by proportional representation would improve regional representation in Parliament, and thus in the Cabinet and in the caucuses of all parties.

The Commissioners acknowledged that under proportional representation, the governing party would rarely have a majority of Senate seats but they argued that it was highly unlikely, either, that a non-governing party would have a majority in the Senate. They held the view that "simultaneous elections of both Houses and party organization of elections should reduce the danger of such an impasse and of the paralysis that might follow."(41)

The reformed Senate would have a six-month suspensive veto, except in relation to legislation with linguistic significance. Passage of such legislation would require the approval of a majority of Francophone senators, as well as of the Senate as a whole.

The choice of a system of proportional representation for the election of senators was likely the most controversial element of the Commissioners' proposals concerning the reform of the Senate. Opponents of proportional representation argued that if the system were used for Senate elections, it would facilitate the emergence of purely regional parties, thus undermining the national parties which help to integrate and soften regional differences. The recommendation in favour of a Senate elected by proportional representation ran against a general unwillingness to

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(40) Ibid., p. 389.

(41) Ibid., p. 389-90.

introduce the complexities of such an electoral system into our political system.

### B. A "Triple E" Senate

The "Triple E" movement calls for a reformed Senate directly elected by the people of Canada, with equal representation by province and with powers that allow it to be effective. The "Triple E" concept gained official recognition when it was endorsed in the report of the Alberta Select Special Committee on Upper House Reform published in March 1985.(42) Furthermore, the Alberta legislature unanimously adopted a resolution to approve in principle the report of the Select Special Committee on 27 May 1985. This support proved to be a national launching pad for the "Triple E" Senate option.

The Alberta Committee recommended that the Senate of Canada "should maintain as its primary purpose the objective established by the Fathers of Confederation, namely to represent the regions (i.e., provinces) in the federal decision-making process."(43) In addition, the Committee proposed that the Senate should continue to act as a body of "sober second thought." Finally, the Committee came to the conclusion that the Senate should not be a forum for intergovernmental negotiations. To fulfill that function, the Committee recommended that the requirement that First Ministers' Conferences meet on a regular basis be entrenched in the Constitution.

The Committee held the view that only a directly-elected Senate "would enjoy legitimacy and would be able to exercise fully the significant political and legislative powers necessary to make a valuable

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(42) Strengthening Canada, Edmonton, March 1985.

(43) Ibid., p. 4.

contribution to the Canadian Parliament."(44) Adhering to the majority point of view in Alberta that Canada is made up of equal partners, the Committee concluded that "only equal representation by province would afford Canadians the balanced process of federal government which they deserve."(45) Thus the proposed Senate would consist of 64 senators, six representing each province and two representing each territory. Senators would be elected on a first-past-the-post basis, the system now in use in federal and provincial elections. Senators would represent constituencies whose boundaries would be identical to provincial boundaries and would be elected for the life of two provincial legislatures. In each province, three Senators would be elected during each provincial election, with each voter being able to vote for three candidates.

The proposed Senate would have the power to initiate any legislation except a money or taxation bill. The Senate would also have the power to initiate supply resolutions relating to its own operational budget. The Senate would have the power to amend any bill and the power to veto any bill except a supply bill. The Senate would retain the existing 180-day suspensive veto over constitutional issues. The House of Commons would have the power to override a Senate veto on money or taxation bills by a simple majority. Bills, other than money or taxation bills, would require a larger majority, that is, a House of Commons vote greater in percentage terms than the Senate's vote to amend. A time limit of 90 days would be placed on the Senate when considering a money or taxation bill and a limit of 180 days would be placed on all other legislation. All changes affecting the French and English languages in Canada would be subject to a double majority veto, that is, a majority of all senators combined with a majority of French-speaking senators or English-speaking senators, depending on the issue. Finally, non-military treaties would be subject to ratification by the reformed Senate.

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(44) Ibid., p. 24.

(45) Ibid., p. 26.

The set of recommendations dealing with Senate organization is based on the belief that if the role of the Senate is to represent the regions (provinces) of the country, it must be structured to represent those regional interests rather than the interests of national political parties. Therefore, the traditional opposition and government roles in the current Senate would be abolished, including the positions of Government Leader and Opposition Leader. Senators would be seated in provincial delegations, regardless of party affiliations. Each provincial delegation would select a chairman. The 10 provincial chairmen, headed by the elected Speaker of the Senate, would constitute the Senate Executive Council. This Council would determine the order of business of the Senate, appointment of committee chairmen and membership of committees. Finally, senators would not be eligible for appointments to Cabinet, since such an appointment would allow the principle of Cabinet solidarity to overrule senators' ability to be representatives for their provinces.

What are the prospects for a "Triple E" Senate? Up to now, the support for the concept has been concentrated in the Western provinces. The Canada West Foundation and the Canadian Committee for a "Triple E" Senate are campaigning to gain popular support for a "Triple E" Senate reform. The Special Joint Committee on the 1987 Constitutional Accord reported that none of the witnesses who wished to see the Senate retained in some form disagreed with the concept of an elected Senate.(46) However, the other two components of the "Triple E" Senate concept raised some concerns. The Joint Committee concluded its review of the evidence on proposals for reform of the Senate by pointing out that "many issues remain to be worked out in connection with the proposal for a 'Triple E' Senate. There is as yet no political or public consensus."(47) It is obvious, for example, that there is a disincentive for

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(46) Canada, Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the 1987 Constitutional Accord, Report, Issue No. 17, 9 September 1987.

(47) Ibid., p. 92.

Quebec and Ontario, who now control a quarter of the Senate, to move towards equal representation. Furthermore, if the reformed Senate is to be given effective powers to exercise, the relationship between the Senate and the House of Commons and especially the provisions to prevent or resolve deadlocks will have to receive careful consideration.

### C. Public Opinion

The best hope of partisans of an elected Senate remains Canadian public opinion. Indeed, polls show unequivocally a current of sympathy for an elected Senate. It is true that opinion appears hesitant vis-à-vis the three major options (the status quo, abolition and reform), since CROP polls conducted on behalf of the Canada West Foundation in 1981 and in September 1983 gave the following results:

| | 1981 | 1983 |
|---|---|---|
| Status quo | 30 | 28 |
| Abolition | 20 | 16 |
| Reform | 31 | 35 |
| Don't Know | 19 | 20 |
| | 100 | 100 |

However, when respondents are asked to indicate what solution they would prefer if the Senate were to be reformed, direct election wins easily.

| | 1981 | 1983 |
|---|---|---|
| Appointment | 8 | 5 |
| Indirect Election | 23 | 16 |
| Direct Election | 69 | 79 |
| | 100 | 100 |

C.W.F. analysts, therefore, appear justified in affirming that the consensus on this question is probably stronger than on any other political issue today. The other side of the coin is that the support of Canadians for an elected Senate calls to mind the attitude of Europeans vis-à-vis European integration: strongly sympathetic to the idea, they

are, however, far from seeing it as a priority. The relative indifference of the public with regard to Senate reform is illustrated by a CROP survey carried out in April 1983 for the Canadian Unity Information Office. Presented with a list of issues and asked to indicate how important they considered them, the respondents put Senate reform in eleventh place. Humorists have suggested that the only reason that the subject did not reach a lower level may have been that there were only 11 issues listed.

The same poll provided insights into the public's attitude toward some other aspects of the reform of the Senate. Thus, the equality of the provinces gets the support of only 21% of respondents, with 45.8% preferring each province to get a number of seats proportional to its population. The idea that Francophone senators should enjoy special powers over questions related to the French language and culture is supported by only 28.9% of respondents and rejected by 59.4%. The September 1983 survey by the same organization showed that only 18% of Canadians believed protection of French should constitute a major role for an elected Senate and reveals in particular the existence of a major linguistic split on this point: 49% of Francophones attach importance to this function and only 6% of Anglophones do the same. Likewise, public opinion would seem to concede to the elected Senate only a suspensive veto (48.5%) rather than an absolute veto (12.2%) or no veto at all (22.3%). Finally, Alberta is perceived as being the principal beneficiary of the proposed reform (30%), with 20% to 26% of respondents naming one of the other provinces (multiple choices were permitted).

A Gallup poll published on 5 October 1987 dealt with the matter of Senate reform. It should be kept in mind that this poll was conducted at a time when the Senate was attempting to amend Bill C-22, An Act to amend the Patent Act. Respondents were asked what they would like to see done with the Canadian Senate and were offered three choices. Their answers were as follows: 46% favoured an elected Senate, 23% chose abolition, 15% supported the present system of an appointed Senate, and 17%

did not respond.(48) In answer to a second question, 46% favoured the Senate retaining its right to turn back legislation passed by the House of Commons, while 38% wanted that power removed and 17% did not express an opinion.

This review of polls clearly indicates that an elected Senate is the favourite choice of Canadian public opinion. However, it also reveals an absence of consensus on other aspects of Senate reform, such as the equality of provinces in Senate representation, the type of veto to be exercised by the Senate or the recognition of a special role for the Senate in the protection of the French language and culture.

While discussions were taking place on proposals to replace our appointed Senate with an elected body, a more limited attempt at Senate reform was proposed by the federal government in 1985. We will now turn our attention to this initiative.

## PROPOSED CONSTITUTIONAL AMENDMENT RESPECTING THE POWERS OF THE SENATE

On 9 May 1985, the then Minister of Justice, the Honourable John Crosbie, introduced in the House of Commons a motion for a resolution to authorize an amendment to the Constitution of Canada altering the powers of the Senate. This resolution also committed the Prime Minister to convene a First Ministers' Conference before the end of 1987 to consider proposals for the reform of the Senate. The introduction of this resolution was prompted by the Senate delay in passing Bill C-11, An Act to provide borrowing authority for 1984-1985.

The resolution proposed that the power of the Senate over money bills be reduced to a suspensive veto of 30 days. Each such money bill would be so certified by the Speaker of the House of Commons whose opinion could not be challenged in court. The resolution provided for the

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(48) There should be no attempt to compare the results of this poll with those of the CROP polls conducted for the Canada West Foundation since the choices offered to respondents were different.

Senate to have a suspensive veto of 45 days over all other bills. Finally, the resolution proposed that if the Senate amended a bill from the Commons and the Commons did not accept those amendments within 15 days, the bill would be considered passed by the Senate in the form in which it was first presented to the Upper House. Only Senate amendments accepted by the Commons would be included in the final form of the bill that would receive Royal Assent.

The resolution was debated on 7 June 1985 but was never brought to a vote. The motion subsequently died on the Commons order paper when the session was prorogued on 28 August 1986.

Committed to national reconciliation, Prime Minister Brian Mulroney undertook a major constitutional initiative which resulted in the conclusion of the Constitutional Accord of 3 June 1987. The next section will review the provisions of this Accord that are relevant to Senate reform.

## THE 1987 CONSTITUTIONAL ACCORD

The 1987 Constitutional Accord contains a provision regarding vacancies in the Senate of Canada. Two other provisions of the Accord are also relevant to the Senate: one deals with the amending formula and the other with First Ministers' Conferences.

### A. Vacancies in the Senate

The Constitution Amendment, 1987 would add a new section 25 to the Constitution Act, 1867 respecting the procedure for summoning persons to the Senate. The new provision would require Senate vacancies to be filled by persons whose names have been submitted by the government of the province to which the vacancy relates. However, the person ultimately chosen for appointment would be named by the Government of Canada (and thus be acceptable to it). Technically, the Queen's Privy Council for Canada (i.e., the federal Cabinet) recommends that the Governor General "summon" the nominee it finds acceptable to sit in the Senate. Therefore, this new

procedure guarantees that no person will be appointed to the Senate who is not acceptable to both levels of government. Moreover, the political accord accompanying the Constitution Amendment, 1987 contains a commitment ensuring that the new nomination procedure for senators is to take effect forthwith upon signature of the Accord and prior to the proclamation of the amendments. The new procedure is to apply until there are constitutional amendments regarding the Senate generally.

The government of Newfoundland was the first provincial government to take advantage of the new nomination procedure for senators. On 30 December 1987, the Prime Minister's Office announced the appointment of former Newfoundland Energy Minister, Gerald Ottenheimer, to the Senate.

Provincial participation in Senate nomination under the temporary appointment procedure was not well received by some promoters of Senate reform. The Canadian Committee for a "Triple E" Senate and the Canada West Foundation have asked that Senate appointments be suspended until meaningful Senate reform has taken place. In their view, this would guarantee that the temporary nomination procedure will indeed be temporary.

The nomination procedure itself has raised some concerns. The new procedure rests on the ability of two levels of government to find mutually acceptable candidates. However, there is no provision to deal with a situation in which a province would refuse to submit a list of candidates. Furthermore, there is no requirement that the federal government must fill a vacancy: in case of disagreement, the seat could be left vacant. Finally, it should be noted that although the Yukon Territory and the Northwest Territories are entitled to one Senate seat each, the Accord does not give their governments the right to submit a list of candidates.

### B. The Amending Formula

The Constitution Amendment, 1987 would add, among other things, the powers of the Senate, the method of selecting senators, the number of members by which a province is entitled to be represented in the Senate, and the residence qualifications of senators to the features of the

Constitution of Canada that can be amended only with the unanimous consent of the House of Commons, the Senate[49] and the legislative assembly of each province. Such a veto power would ensure that no province will be forced to accept a Senate reform package that does not meet its wishes. It is quite likely, however, that it will take longer to reach a compromise with the unanimity rule than with the existing 7:50 formula.

### C. First Ministers' Conferences

The Accord would entrench as section 50 of the Constitution Act, 1982 a requirement that a constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces be convened by the Prime Minister of Canada at least once each year, the first to be held no later than the end of 1988. The agenda also entrenched in the Constitution would include Senate reform (its role and functions, its powers, the method of selection of senators and representation in the Senate) and roles and responsibilities in relation to fisheries, as well as "such other matters as are agreed upon."

The constitutional requirement for a yearly conference on the Constitution with Senate reform as a somewhat permanent agenda item guarantees that Senate reform will be on the political agenda of the country for the coming years. However, as demonstrated by the Constitution Act, 1982 provisions for constitutional conferences on aboriginal rights, the inclusion of a constitutional requirement for such meetings does not imply that any agreements will be reached. Furthermore, any agreement on Senate reform at such a conference would have to be subject to the amending procedure in the 1987 Constitutional Accord which calls for unanimous consent of Parliament and the legislative assembly of each province.

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(49) The Senate's current suspensive veto of 180 days over amendments to the Constitution would be unchanged.

## CONCLUSION

What are the future prospects for the Senate?

The debate on Senate reform is almost as old as Confederation itself. When it was created, the Upper Chamber of the Canadian Parliament corresponded to others in the main Western countries. Almost everywhere else, these bodies have been abolished or have seen their formal powers reduced. For its part, the Canadian Senate has chosen to adapt to democratic trends by ratifying without change most bills adopted by the Commons and by amending others slightly with the prompt agreement of the other House. However, recent attempts by the Senate to amend the substance of bills adopted by the House of Commons have led to a reconsideration of the powers of our appointed Upper House.

If for a long time the Senate has avoided becoming a political issue of prime importance, it has not avoided questioning, within the framework of global reflections on the reform of Canadian federalism, the way in which it has filled its role as regional representative. And on this point, the judgment of the Canadian government in 1978 undoubtedly represents a widespread opinion:

> The Canadian Senate does not now serve the need of the Federation for a House where the full range and depth of our regional problems, and the effect of national policies on those problems, can be discussed with independence and authority. The House of Commons cannot fully serve this function, as party discipline under the Parliamentary system requires that a national viewpoint be adopted. The Senate, appointed as it now is entirely by the federal government, has not been able to provide that recognized forum for the achievement of genuine understanding of the sometimes conflicting natures of our national and regional objectives - and for the search for solutions.(50)

Such a failing is all the more serious because regional representation is precisely the primary justification of bicameralism in a federal system. The solution to this problem was first sought along the

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(50) Pierre Elliott Trudeau, A Time for Action. Towards the Renewal of the Canadian Federation, 1978, p. 23.

lines of a West German Bundesrat. A Senate appointed by the provincial governments would certainly have expressed their concerns. The federal government, however, saw this as a potential invasion of its prerogatives, if not as a provincial Trojan horse disrupting the Canadian intergovernmental balance in favour of the provinces. Public opinion has never favoured such a plan. The idea of an elected Senate, formerly rejected out of hand, is aimed at breaking the impasse which has stalled the debate since 1980. Everyone agrees that it would give senators more authority. Some, however, question the importance of regional input in this Chamber. Would an elected Senate differ from the House of Commons simply by a distribution of seats slightly more favourable to the less populous Atlantic and Prairie provinces? If so, would it satisfy those who want to see it play a role of purely regional representation? Will the promoters of a "Triple E" Senate be successful in their efforts to impose this formula as the best option for reform of the Canadian Senate? The yearly Constitutional Conferences scheduled to begin in 1988 will have to consider these questions. The opening of official talks on Senate reform will most likely stimulate public debate on the issue.

# APPENDIX

## Note on the comparative table for elected Senates

For each of the 11 criteria selected, the highest mark was allotted to the option giving the Senate maximum authority, prestige and independence.

1. Can the Senate overturn the government
   - Yes: 10 points
   - No: 0

2. Over bills in general, does the Senate enjoy
   - an absolute veto? 15 points
   - a suspensive veto? 7
   - a suspensive veto, except in the case of language questions, where it enjoys an absolute veto 9
   - no veto? 0

3. Over supply bills, does the Senate enjoy
   - an absolute veto? 10 points
   - a suspensive veto? 5
   - no veto? 0

4. Over constitutional amendments, does the Senate enjoy
   - an absolute veto? 10 points
   - a suspensive veto? 5
   - no veto? 0

5. Do senators have the power to introduce
   - bills of any nature? 10 points
   - bills of any nature with the exception of money bills? 5
   - No power in this area 0

6. Must the Senate ratify some treaties?
   - Yes: 5 points
   - No: 0

7. Must the Senate ratify some appointments?
   - Yes: 5 points
   - No: 0

8. Is party discipline within the Senate
   - weak or non-existent? 10 points
   - average? 5
   - strong? 0

9. Compared with the term of the members of the other chamber, is the term of senators

| | |
|---|---|
| three times as long? | 10 points |
| twice as long? | 5 |
| one and a half times as long | 3 |
| the same length | 0 |

10. Can the Senate be dissolved?

| | |
|---|---|
| Yes: | 0 |
| No: | 10 points |

11. Does the Senate participate in the election of the Head of State?

| | |
|---|---|
| Yes: | 5 points |
| No: | 0 |

The answers to these questions were established for each country on the basis of the constitutional texts currently in effect and the documentary sources available.

Initially, each criterion was given 10 points. It was then decided that the election of the head of state is an exceptional event and that the ratification of appointments and treaties does not constitute a power used as much now as the general legislative power, whose importance was increased by five units.