UNIVERSITY of Prince Edward ISLAND

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The Honourable Tom McInnis
Senate of Canada
Ottawa, Ontario
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Dear Senator McInnis;

Thank you for inviting me to appear before the Special Senate Committee on Senate Modernization. I enjoyed the experience and the discussion that followed.

There was one question that I declined to answer. It came from Senator Paul Massicotte who asked whether the Senate had, in fact, the power to change the manner in which the Speaker of the Senate was chosen; that is, to introduce an election with secret ballots for the Speaker, just as now occurs in the House of Commons. Could this be done without a constitutional amendment?

At first glance, I thought the answer would be fairly straightforward. No. The Constitution Act, 1867, s. 34 makes it plain that the Speaker of the Senate is chosen by the Governor General. Any changes to that process would therefore require a constitutional amendment.

However, the more I thought about it, the more complicated that question became. I have now spent a few more days considering this question, and with your indulgence would like to share my thoughts. Even these, however, are preliminary.

Yours truly,

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Electing the Speaker of the Senate: Some Preliminary Thoughts

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The Speaker of the Canadian House of Commons is elected by the members of that chamber (Constitution Act, 1867, s. 44). This is a tradition embedded in the Westminster system that goes back in history to a time when the Commons was basically a body of representative petitioners who wished to impress upon the king the importance of their long lists of grievances (Lyon, 2003: 105-106). The king would refuse to respond to these grievances until they chose someone to speak for them, and so they would choose their "speaker." The king's eventual response, of course, was his Speech from the Throne.

In Canada for a time, the "election" of the Speaker was a mere formality. By convention, the Speaker was chosen by the Prime Minister. An election was still held, but since the voting was not conducted through secret ballots, the majority party – and so its leader – determined who the speaker would be. However, that ended in 1986 with changes made to the Standing Orders, which were in turn a partial implementation of the recommendations found in the Lefebvre Committee Report, and the McGrath Committee Report. The most significant recommendation implemented was the introduction of secret ballots as the means of choosing the Speaker. In the very early hours of October 1st, 1986, and after eleven ballots, John Fraser became the thirty-second Speaker of the House of Commons, and the first speaker to be elected under this process (Levy, 1986/87).

As the honourable senators well know, the Speaker of the Senate is not elected by senators. The Senate Speaker has a different historical origin, and is based on the position of Lord Speaker, a title and office once held by the Lord Chancellor of the British House of Lords, which is in turn a position predating the Commons' Speaker. Just as the Lord Chancellor is appointed by the monarch,[1] the Senate Speaker is appointed by the Governor General (both on the advice of their respective prime ministers). The Governor General's power to appoint the Speaker is found in the Constitution Act, 1867. Section 34 reads: *The Governor General may from Time to Time, by Instrument under the Great Seal of Canada, appoint a Senator to be Speaker of the Senate, and may remove him and appoint another in his Stead*.

In the case of the selection process for the Speaker of the House of Commons, the adoption of a secret ballot did not affect the constitutional provision that the Speaker be elected. However, a similar change to allow for the election of the Speaker of the Senate would seem to constitute a change to the constitutional provision that the Speaker be appointed, and be so appointed by the Governor General. When serving as Speaker of the Senate, the Honourable Dan Hays was asked whether a bill, currently being debated and which was meant to provide for the election of the Speaker, would require a recommendation from the Governor General (royal consent). Bills affecting the Governor General's prerogatives and powers require such a recommendation. Did this bill affect the Governor General's prerogatives and powers? Speaker Hays believed it did, and it did so because would affect the power of the Governor General to appoint senators, as set

1 After the Constitutional Reform Act 2005, the position of Lord Speaker was separated from that of the Lord Chancellor. The Lord Speaker is now elected by the members of the House of Lords.

out in CA 1867, s. 34.[2] It is reasonable to conclude, then, that providing for an election of the Speaker of the Senate would require a constitutional amendment.

However, this is not a simple issue (it never is).

First, if a constitutional amendment is to be pursued, which formula would be required? I am inclined to agree with Senator Hays, who also believed that changing the manner in which the Speaker is chosen could be accomplished under the amending formula found in Constitution Act, 1982, s. 44 (Hays, 2007: 21; see also Hays, 2009). That formula reads: *Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons.*

The second question is whether such a change would constitute an alteration in the powers (and so the office) of the Governor General. If the Governor General was no longer able to appoint a speaker, because the procedure was changed, would this not then constitute an imposed limitation on the Governor General's prerogative power? If so, would providing for the election of the Senate Speaker then require a constitutional amendment under CA 1982, s. 41, the unanimity clause (that is, requiring the support of all provinces as well as the Parliament of Canada)?[3]

Possibly, but this would require the phrase "the office of the Governor General" to carry a lot of weight. Is it reasonable to read that phrase as meaning *any and all* functions carried out by that office? Or does "office" simply mean the position itself?

Perhaps we can gain insight from the recent Senate Reference case (*Reference re Senate Reform*, 2014 SCC 32). An argument could also be made that changing the method of selecting senators affected the office of the Governor General. But the Supreme Court chose to prefer the clearer intention of CA 1982, s. 42 s.1(b) (the powers of the Senate and the method of selecting Senators), that changing the means by which senators are selected would require the general formula, and not the unanimity provision. Similarly, CA 1982, s. 44 (Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons) should encompass any attempt by the Senate to change the means by which the Speaker is chosen, as this is effectively an administrative change. While it might improve the operation of the Senate, it does not substantially alter its character, its ability to represent the provinces or its function as a chamber for sober and secondary thought.

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2 See Speaker Hays' ruling regarding Senator Donald Oliver's Bill S-13, An Act to amend the Constitution Act, 1867 and the Parliament of Canada Act (Speakership of the Senate): *Journals of the Senate*, 1st Session, 38th Parliament, Wednesday, November 17, 2004. The specific question in this case, however, had to do with whether it was appropriate to debate the bill prior to receiving such a recommendation.

3 CA 1982, s. 41: An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province:
(a) the office of the Queen, the Governor General and the Lieutenant Governor of a province.

But there's another wrinkle: the specific wording of CA 1867, s. 34. It is interesting and unusual, and may provide some room to maneuver, without the necessity of a constitutional amendment at all.

CA 1867, s. 34, reads: "The Governor General *may* from Time to Time, by Instrument under the Great Seal of Canada, appoint a Senator to be Speaker of the Senate, and *may* remove him and appoint another in his Stead" (emphasis added).[4]

Note the use of the word "may," and contrast it to the use of the word "shall" in such sections as CA 1867, s. 13: The Provisions of this Act referring to the Governor General in Council *shall* be construed as referring to the Governor General acting by and with the Advice of the Queen's Privy Council for Canada;

CA 1867, s. 24: The Governor General *shall* from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon qualified Persons to the Senate; and, subject to the Provisions of this Act, every Person so summoned *shall* become and be a Member of the Senate and a Senator;

CA 1867, s. 38: The Governor General *shall* from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon and call together the House of Commons.

Consider now how different those sections would read if we substituted the word "may" for "shall."

The difference between "shall" and "may" in legal documents has been the subject of much debate. *Black's Law Dictionary* states that "In construction of statutes ... word 'may' as opposed to 'shall' is indicative of discretion or choice between two or more alternatives" (5th ed., 1979: 883). However, not all legal scholars accept that the use of these words can be counted upon to be quite so specific in meaning and intent (for discussion, see Kirk, 1970-71; Charrow, 1982: 186; and Issacharoff, 2001: 644). We should also be cautious about imposing exact meanings on words that may (!) have been used without such precision 150 years ago.

That being said, the wording suggests to me that the appointment of the Senate Speaker by the Governor General might have been meant to be a temporary measure. In their haste to set the new parliament in motion, the framers of the BNA 1867 allowed for several provisions to be dealt with at a later date (Ward, 1950: 62; 1957, 531).[5] Some are surprising, such as qualifications for election to the House of Commons, and even qualifications for voters. The idea, however, was to set Parliament up, put it in motion, and then figure out the other details.

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4 The French version reads: *Le gouverneur général peut, par acte revêtu du grand sceau du Canada, nommer un sénateur président du Sénat, le révoquer et le remplacer*.

5 CA 1867, s. 18: The privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities, and powers shall not confer any privileges, immunities, or powers exceeding those at the passing of such Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof.

I realize that this a bit of a stretch, but it is possible that this odd wording was meant to mean that the Speaker of the Senate would be appointed by the Governor General until such time as the Senate figured out a means to do it themselves. I've no evidence for this, but I do intend to look at those early debates to see if I can find something. By the way, the meaning of the provision (CA 1867, s. 33) that the Senate would be the body that decided whether a senate seat was vacant (as a result of a senator being deemed ineligible) was debated in the Senate, in 1884. The debate concerned exactly what power this provision gave the Senate. Did it mean they could then recommend disqualification, or could they also enforce a disqualification? Perhaps there was a similar debate on the appointment of the Speaker.

In any case, CA 1867, s. 34 does seem to imply that the Governor General is not obligated to appoint a speaker, which would further suggest that the Governor General would have the prerogative to hand such a duty over to the Senate, if he so desired. This could not be forced upon the Governor General, but it could certainly be requested. With such a request granted (and I assume there is a formal manner which would acknowledge this), then the Senate would indeed be free to determine for itself a procedure to elect its speaker.

There remains the issue that the Governor General does not act except on the advice of the Prime Minister. This is likely a moot point, as I do not imagine the current prime minister would object to the changes being discussed. However, as a constitutional question, this too is interesting. What, for sake of argument, would the constitutional position be were a prime minister to insist that he or she had the sole "right" to choose the Senate Speaker, albeit as advice to the Governor General? I have long been curious about the limits to the advice given by a prime minister to a governor general, and also about the limitation on the House of Commons and its ability (or lack thereof) to affect the proceedings and functions of the Senate.[6] This might well be an example of such a limit.

In what capacity would the prime minister's advice on choosing the Speaker of the Senate be? In his capacity as the head of the political executive, or in his capacity as the majority leader in the House of Commons? Of course, the Prime Minister remains the sole person who can advise the Governor General as to whom he should summon to the Senate. But otherwise, does the Prime Minister have a right to influence how the Senate administers its own proceedings and affairs? I understand that the Governor General would be placed in an untenable situation were he be required to decide between the choice of a speaker as recommended by the Prime Minister and that as chosen by the Senate; however, in my view, he would be best advised to choose the person chosen by the senators themselves. As the Senate is not a confidence chamber, the Prime

6 The recent prorogation "crisis" engendered considerable debate on whether the Governor General was obliged to accept the advice of the Prime Minister, and at what point she would not (for a review, see MacDonald, 2011). As for the relationship between the Commons and the Senate, I am thinking here of the historical conflict between the House of Commons and the Senate on the right of the latter to amend money bills. The House of Commons *Standing Order* 80(1) states that "All aids and supplies granted to the Sovereign by the Parliament of Canada are the sole gift of the House of Commons, and all bills for granting such aids and supplies ought to begin with the House, as it is the undoubted right of the House to direct, limit, and appoint in all such bills, the ends, purposes, considerations, conditions, limitations and qualifications of such grants, which are not alterable by the Senate." This is a claim denied by *The Report of the Special Committee Appointed to Determine the Rights of the Senate in Matters of Financial Legislation (the Ross Report)*, tabled in the Senate on 9 May 1918. For discussion, see Albinski, 1963.

Minister would not be able to (I do not think) argue that to ignore his advice was tantamount to a withdrawal of the Governor General's confidence in his prime minister.

Ultimately, the two chambers must act, and be able to act, independently if the balance envisioned by the framers, and reiterated by the Supreme Court, is to be preserved.

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