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COMING TO TERMS:

AN ANALYSIS OF THE SUPREME COURT RULING ON THE SENATE, 2014

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ACKNOWLEDGEMENT

Following the ruling of the Supreme Court of Canada on the Senate reference (April 25, 2014), the late Senator P.C. Nolin moved a motion inviting the Chamber to review the Senate's constitutional role. Senator Serge Joyal, P.C., thought it important to seek a scholarly analysis of the ruling to serve as a guide for the renewal of the institution.

It is with gratitude that I acknowledge the active engagement of Senator Joyal in the development of this Paper, considering his undoubted appreciation for the significant role played by the Senate in our parliamentary system.

INTRODUCTION

> Canadians do not understand nor do they have experience with bicameralism; they hold distorted views of what second chambers are intended to do and how they may be constructed to achieve their desired end; the Supreme Court ruling (2014) alters the *status quo ante* by establishing bicameralism as a constitutional practice of first importance to be respected in the passage of legislation; the Senate's role is to complement the House of Commons by exercising independent judgment on matters that come before it.

For most of the country's history the Senate has been viewed as peripheral to the principal political forum, the lower house. The incandescence of the Commons emanated from the electoral politics that continued on the floor of the chamber. Still, whether opinion is high or low, the centrality of the Senate in modern Canadian politics is hard to dispute. The Supreme Court ruling in 2014[1], with microscopic clarity, positioned the Senate as a distinct although equal legislative chamber to the Commons in Canada's bicameral Parliament. From the perspective of the constitution, the implications of that ruling for the Senate and its unique and essential role in Parliament are enormous. It is they that are the core subject of this Report. Before moving to that issue, however, some political husbandry work with regard to the structure, procedure, and role of the Senate of Canada is required.

Like Mark Twain's weather, there is and always has been talk, usually critical talk, about the upper chamber-- but nothing else. There seems to be a view when the subject is the Senate that nothing of substance may be accomplished unless it takes one of two forms: abolition or reform. The consequence of abolition is clear, at least as far as the upper house goes—there would no longer be one. What unicameralism would mean for the operation of Parliament in a federation as diverse as Canada's or its implication for the quality of public policy coming from that single-chamber legislature goes unexamined. Reform is a more complicated option since, except for the Triple E proposal, the substance and sequence of reform invariably is left unspecified. It needs to be said that reform of institutions in democratic societies, including Canada's, is exceedingly rare[2]**.** What should also be said, but never is, is that the conduct of the second chamber business falls in the main within constitutional custom and convention; changing the law, as that term is popularly understood, changes very little. This is not to suggest that custom and convention may be changed at whim—although in fact they might, and there may on occasion be good reason to act in this manner—but rather to underline that Canada's constitution, much like that of the United Kingdom, depends more upon agreement, conventions and understanding for its conduct than it does codified law.

Paradoxically, the ease by which custom and convention may be changed may actually contribute to the vacuity that surrounds the debate on Senate reform generally. Few Canadians who are not trained in the law or have not sat in one of the two houses of Parliament understand parliamentary procedure or appreciate the extent to which that procedure is *not* based in statute. It is difficult to promote changes

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[1] Reference Re Senate Reform, 2014 *SCC* 32.

[2] David E. Smith, 'The Senate of Canada and The Conundrum of Reform,' Jennifer Smith, ed., *The Democratic Dilemma: Reforming the Canadian Senate* (Montreal and Kingston: McGill-Queen's University Press, 2009), 11-26.

in convention and custom as substantial alterations to existing practice when the subject is so elusive to the Canadian public. One example, discussed in detail later in this report, is the method of selecting individuals to be appointed senators. From 1867 to the present, this has been the prerogative of the prime minister. Sir John A. Macdonald did it this way, and so have all of his successors. A basic criticism of this 'status quo' is that in almost all instances partisan sympathy has determined selection. If another method of canvassing and winnowing names of suitably qualified persons to sit in the upper chamber could be devised, and then a list of these be submitted to the prime minister from which he would recommend one to the governor general to appoint to fill a Senate vacancy, a significant change in a century-and-a half's practice would occur. And yet, how would that less partisan procedure be evident to, let alone seen as an improvement by, the Canadian public in general or to Senate critics in particular?

Canada's is one of the world's most stable and democratic political systems. A contributing factor to this end has been the adaptive and accommodative capacity of its institutions. In this respect the Senate has played an important part. A crucial asset of the Senate is not at first its intellectual appeal but the substance of its institutional structure. Criticism of the Senate--that it is not elected and not 'representative' because it is not elected—is almost exclusively of the 'intellectual' variety. As an appointed upper chamber in a federation, it stands apart, and it is that difference that many find inexplicable. How to rationalize it? As a working institution, however, it is seldom criticized. On the contrary, its committees are praised for their skill and diligence. It is ironic, therefore, that reforms advanced for the Senate often threaten to diminish the contribution the present structure makes to the quality of parliamentary legislation.

One conclusion of the ruling of the Supreme Court on the Senate may be summarized as follows: 'treat the Senate as if it mattered.' It cannot be denied that this injunction runs contrary to public opinion, whose common thread is that the Senate does not matter. Only if it is reformed, goes the argument, will it have weight—to do what? The answer to that question is never made obvious.

FEDERALISM

> The Fathers of Confederation purposely designed the Senate to serve Canada's distinctive federation of jurisdictions and cultures; senatorial divisions of equal size accommodate provinces of disparate population and geography; since 1915, the Senate has provided a guarantee to provincial representation in the Commons; as the House of Commons has come to represent the principle of rep-by-pop more faithfully, the Senate's need to protect areas of comparatively slow growth has increased; without the Senate, there would be no Canada.

It may be said with absolute certainty that the Senate mattered to the Fathers of Confederation. To begin with, it was the only institution purposely designed to serve the needs of the new Dominion, and it was that novelty that explained the longer time spent discussing the upper chamber than any other matter. By contrast, the Commons was a copy of the lower chamber at Westminster, while the Crown was incorporated absolutely: 'The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen,' S.9 *Constitution Act, 1867*. Nor was agreement on the Senate of momentary importance, as Patrick Boyer, a former Member of Parliament, maintains in his book, *Our Scandalous Senate*: 'The greatest single role of the Senate was this, enabling Confederation to take place at all. The day Confederation became a reality on July 1, 1867, the Senate's principal function had been fulfilled'[3]**.** The thrust of that comment is that the Senate and, for example, S.145 (the pledge to construct the Intercolonial Railway), are of the same order— terms of a deal, a slighting turn of phrase for an agreement on a constitutional enterprise that united much of British North America, for the first time, into one of the world's then largest countries; that reconstituted French-English relations (for another century and a half) from their near paralysis in the last years of the United Province of Canada; and that gave birth to a political and economic engine which would in a few decades drive territorial expansion to the Pacific and the Arctic oceans. It does an injustice to the vision of the men who conceived (and for many of them, carried through) the project to so categorize their achievement. The uniquenesses, exceptions, and anomalies that lie at the core of Canada are waved away in the service of a rootless conceptual principle.

More than that, such an interpretation depreciates the Senate at its creation and thereafter. Alexander Galt spoke especially for the provinces east of the Ottawa River when, at the Quebec conference, he prophesied: 'To the Legislative Council all the Provinces look for protection under the Federal principle'[4]. As this Report will illustrate, that statement is factually correct: Quebec and the Maritime Provinces looked to each other for support in balancing their interests alongside those of ever-expanding Ontario, and they had every reason to look to the Senate as a sanctuary, because in that chamber seats were allocated equally among senatorial divisions, of which there were originally three: Ontario, Quebec, and the Maritime Provinces. It should be noted that Galt was not alone when he linked the Legislative Council (the Senate) and federalism. Contrary to the view expressed in the twentieth century that Canada is a second-best or quasi-federal system and that the Senate of Canada falls short of a model

[3] J. Patrick Boyer, *Our Scandalous Senate* (Toronto: Dundurn, 2014), 181.
[4] Joseph Pope*, Confederation: Being a Series of Hitherto Unpublished Documents Bearing on the British North America Act* (Toronto: Carswell Co., 1895), 117.

federal second chamber, the Fathers of Confederation disagreed[5]**.** The cry of rep-by-pop heard west of the Ottawa River had no echo to east, nor would the huge central provinces then (or ever) accept equal membership in the Senate for all provinces. The structure of the Senate, as agreed to at Quebec and incorporated in the founding act of the new Dominion, represented the terms of the federation then, and to come.

To equate the work of the Fathers of Confederation as a deal—and no more-- telescopes decades of history into one moment of time and treats the Senate as weightless. Neither the Commons nor the Crown are treated this way. When it comes to examining the Senate, the orientation of critics is always to look at the institution's past—and when it comes to the claim that Confederation was a deal the orientation is actually to the past's *own* past. That is, how to explain what happened one hundred and fifty years ago? Never is the perspective reversed, so that the future of the past—its realization or problems encountered in seeking to secure what the founders of modern Canada sought-- examined. Yet, history has a future and modern Canada—warts and all—is the future the Fathers of Confederation set in train.

In that enterprise the Senate was central. No other institution acknowledged federalism: in the minds of the framers, the Crown was indivisible (the Judicial Committee of the Privy Council's revisionist interpretation of the *Constitution Act, 1867*, was yet to come) and the Commons was about the achievement of the long-sought principle of representation of population, although the chamber's seats were distributed among the provinces using a formula which, until the 1940s, saw Quebec the basis for calculating the allocation of seats to other provinces. In this arrangement, as in the constitution's original recognition of distinctive language, educational, and religious rights, Canada was a federation which from its birth acknowledged distinctions of identity. Indeed, it continues to do so: in 2006, the Commons passed a motion that 'recognizes that the Québécois form a nation within a united Canada.' Two years later at celebrations to mark the four hundredth anniversary of Quebec City, the prime minister, Stephen Harper, elaborated on his government's understanding of the significance of the motion: 'Passing the Quebec nation resolution was an act of recognition and reconciliation'[6]**.**

It is customary, when referring to federalism in modern Canada, to speak and think of the provinces. The phrase 'federal-provincial relations' encourages the assumption of a jurisdictional dichotomy; for good reason, because there is such a parallelism. More than that, what one might call the rhythm of federalism sustains that perspective: fourteen budgets, fourteen speeches from the throne; fourteen sets of elections. Provincial life somewhere in the federation is front-page news every day. But there is more to federalism than its pulse, there is also its sustainability. The continuity of Canadian federalism, which places Canada today among a minority of the world's counties that existed in 1914 and which retain the same form of government as then, owes a debt to Canada's national institutions, among them the Senate. If in the muscular vocabulary of democratic legitimacy, the House of Commons embodies through its elected members the will of the people from coast to coast to coast, the Senate may be considered to express the sum of those other identities the constitutional architects believed essential to acknowledge at the creation of Confederation**.** In this respect and unlike the House of Commons,

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[5] K.C. Wheare, *Federal Government*, 3rd ed.([London: Oxford University Press, 1953): 'The federal principle has come to mean what it does because the United States has come to be what it is' 12; and 'It seems justifiable to conclude that although the Canadian Constitution is quasi-federal in law, it is predominantly federal in practice' 21.
[6] Marianne White, 'Happy 400th Birthday Quebec City,' *Leader-Post (Regina).* 4 July 2008, B12.

which in size alone is unrecognizable from a century ago, it may be said that the Senate reflects a fourth dimension—time. The Senate today is (with the additions that came as the country expanded) the same institution the Fathers of Confederation created. There is no doubt that they would recognize the compact upper chamber, less so the swollen lower house**.**

It is a distinctive feature of the constitution in Canada (but not the United States, which is so often cited by critics when indicting the Senate) that it is used to strengthen federalism. Affirmations of identity are but one example. Very different, and specifically related to the Senate, is representation in the Commons. In 1913, the Maritime Provinces sought to stem the rep-by-pop principle in action a half-century after Confederation, first by means of a 'Memorandum on Representation' whose object was to restore the 'representation of the Maritime Provinces in the House of Commons … to the number allowed upon entering confederation upon terms that the same may not in future be subject to reduction in that number'[7]. Later, the *Constitution Act, 1915,* amended the 1867 Act by the addition of section 51A, which read: 'Notwithstanding anything in this Act, a province shall always be entitled to a number of members in the House of Commons not less than the number of senators representing such province.' The nexus thus created between a province's Commons and Senate seat allocations has fixed the attention of small provinces in particular upon the guarantee the nexus provides and strengthened their resolve to resist any change that might threaten it. The desire of the Maritime Provinces for predictability in 1913 as to their numbers in Parliament achieved a level of unimagined certainty decades later in the *Constitution Act, 1982* (s.41b)), when one of the four specified matters requiring unanimous consent for their amendment—the Crown, the Supreme Court of Canada, the use of the English or the French language were the others—was the guarantee that no province should have fewer members of the House of Commons than it had senators. The constitutional recognition of the federal principle was included in the four major constitutional proposals of amending formula negotiations from 1960 to 1981[8].

One other feature of the 1915 Act requires notice: a half-century after Confederation and following a debate in which no Member of Parliament dissented from the principle of senatorial regions, the Act recognized the four provinces of Western Canada as the fourth such region. Writing soon afterward, A.H.F. Lefroy observed that 'this Act preserves, or rather restores, the Senate's original quasi-federal aspect which had become impaired, the original idea of the composition of the Senate having been that of affording protection to the smaller provinces which they might not always enjoy in a House when the representation was based on numbers only'[9]**.** Christopher Dunkin, the minister in charge of Canada's first census, described Confederation as the 'three kingdoms'[10]. The allusion was to the United Kingdom, which encompassed England, Scotland, and Ireland, along with the principality of Wales, and notwithstanding whose diversity appeared to the Fathers of Confederation the paradigm of a successful nation. Lefroy's insight was to appreciate the significance that came with 'broadening out,' from a trio to a quartet of senatorial regions.

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[7] Memorandum on Representation of the Maritime Provinces. *Canadian Sessional Papers, 1914*, no. 118a, reprinted in *Constitutional Issues in Canada, 1900-1931,* ed. R. MacGregor Dawson (London: Oxford University Press, 1933), 173-5.

[8] The Fulton-Favreau Formula 1965; the Victoria Charter 1971; the Constitutional Resolution 1980; the Provincial Constitutional Accord 1981.

[9] A.H.F. Lefroy*, A Short Treatise on Canadian Constitutional Law* (Toronto: Carswell, 1918), 41-2.

[10] *Commons Debates*, 8 March 1868, 280.

One consequence was that the 'tight' federation Macdonald had been instrumental in creating became less tight. In the Confederation Debates of the Province of United Canada, Macdonald drew a revealing analogy:

(Quotation) The union [between England and Scotland], in matters of legislation, is of a federal character, because the Act of Union between the two countries provides that Scottish law cannot be altered…No matter… how much it may interfere with the symmetry of the general law of the United Kingdom … that law is not altered except with the consent of the Scottish people, as expressed by their representatives in Parliament. Thus, we have, in Great Britain, to a limited extent, an example of the working effects of a Federal Union, as we might expect to witness in our own Confederation' (end quotation)[11].

The Anglo-Celtic model of this political homily worked-- and only worked-- in Canada if the members of Parliament of the 'third kingdom,' the Maritime Provinces, were part of the calculation. Canada East would never have entered Confederation without the Lower Provinces as partners. At one point Macdonald jauntily explained rep-by-pop: 'The whole thing is worked by a simple rule of three'[12]. By that he meant the ratio of Quebec's population per member determined the number of members each province would have in the new lower chamber. Three was a magic number: four provinces but three senatorial regions—and the regions mattered, then and now. (The redistribution that will come into effect in 2015 means that those provinces with the most seats in the House of Commons will get more, while the Atlantic Provinces, Saskatchewan and Manitoba remain as they are—or in proportionate terms, will have fewer seats. In consequence and just from the perspective of arithmetic, the rationale for the Senate in the nineteenth century continues, perhaps even grows stronger).

The fourth senatorial region came into being forty years after two of the four western provinces had been established and after the creation of Alberta and Saskatchewan. The constitutions of three of the western provinces are found in statutes of the Parliament of Canada; British Columbia's is in the form of an Imperial order-in-council. The Prairie Provinces were areas of homesteading, with initially slow and then very rapid population growth, so rapid that a quinquennial census had to be introduced (1906) to keep track of the pace of change (until 1936). This was the change the Maritime Provinces feared would, without constitutional intervention, silence their voice in national politics. The West proved unsettling to the federal government as well, beginning with the uprising at Red River in 1869. When introducing the *Manitoba Act* in 1870, the prime minister told the House that 'it was not a matter of great importance whether the province be called a province or a territory. We have provinces of all sizes, shapes and constitutions … so that there could not be anything determined by the use of the word'[13]**.** The postage stamp province of Manitoba that resulted—with its bicameral legislature, official bilingualism and denominational schools—conformed to no blueprint past or future. In the words of David Mills, Liberal journalist and later minister in the Mackenzie government, Parliament but more particularly the Conservatives had failed to do what 'the theory of their system required'[14]**.**

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[11] *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces.* Quebec, 1865 (Ottawa: King's Printer, 1951), 30-31. Hereafter *PD*.
[12] PD, 38.
[13] *Commons Debates, 2* May 1870, 1287.
[14] *Commons Debates*, 25 April 1870, 1178.

First Nations and explorers notwithstanding, the West was new and the rest of the country old. The national policy, the national railway, a flood of immigrants, and a sense of grievance against the federal government set the region apart from the centre. The *Constitution Act, 1915*, incorporated the West as an equal partner in the Senate. Senate critics would say the amendment was of little importance. In that opinion they are wrong; the 1915 Act re-iterated the constitutional logic of the Fathers of Confederation—without (to repeat) any opposition. In this regard, it is important to note that at their creation—and constitutional provisions to the contrary-- western provinces were not treated equitably in the allocation of Commons seats. For instance, 'Manitoba, which had an electorate far too small to entitle it to even one member, was given four; British Columbia, which could muster almost enough citizens to justify a single representative, was given six.' Manitoba's number was guaranteed only until the census of 1881, when the constitutional formula for seat allocation would come into effect; British Columbia's number was treated as permanent, in the sense that it could only increase[15].

Senatorial regions constituted a rare institutional affirmation of federalism in the *Constitution Act, 1867.* By contrast, the federalized cabinet, to which attention traditionally is paid, is a creature of convention. The hallmark of Canada's federal system lies in the division and distribution of legislative power found in the *Constitution Act, 1867*. It is these reasons—the quasi absence of federal institutions and the centrality of jurisdiction—that support W.P.M. Kennedy's claim of long ago that 'the federal idea [in Canada] has sought from, and been granted by, political parties a place in the other organs of government'[16]. (Significantly, in this book Dawson gave more space to political parties than he did to federalism; moreover, he believed political parties a fit subject for inclusion in the 'constitutional' category.) And it is for these reasons too that the Senate serves to act as an institutional corrective to the majoritarian results revealed through a general election.

It is commonly said that Canada is among the world's most decentralized federations[17]; although a single criminal code, the desire from the outset to make the common law uniform (except in Quebec), and since 1982 a Canadian Charter of Rights and Freedoms stand as correctives to that generalization. None the less, there are grounds for that sentiment, and it is this: there is no model or template for province-hood. In this regard Canada is unlike the United States. The United States Constitution did more than provide for the institutions of the three branches of government; it founded the first modern federal system and, almost simultaneously, recreated the states of the Union. With no prior claim to recognition based on historic, collective, or popular identity, their security lay through Congress in 'the mutual recognition of the legitimacy of statehood'[18]. Such was not the case in Canada, where the constitutions of the Maritime Provinces pre-date Confederation: in Nova Scotia, 'the basic components of the constitution were, in fact, two prerogative instruments, the Commission and Instructions to the governors,' and in Prince Edward Island, 'the British North America Act [s.129] provided for the continuance of existing provincial institutions, principles, and practices, except in so far as they were

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[15] Norman Ward, *The House of Commons: Representation* (2nd ed., Toronto: University of Toronto Press, 1963), 23.
[16] W.P.M. Kennedy, 'Law and Custom in the Canadian Constitution.' *The Round Table* (December 1929), cited in R. MacGregor Dawson, *Constitutional Issues in Canada, 1900-1931* (London: Oxford University Press, 1933) 50-62.
[17] Richard Simeon, *Political Science and Federalism: Seven Decades of Scholarly Engagement* (Kingston, Institute of Intergovernmental Relations, 2002), **x.**
[18] Peter S. Onuf, *The Origins of the Federal Republic: Jurisdictional Controversies in the United States, 1775-1786* (Philadelphia: University of Pennsylvania Press, 1983), 24.

changed by the Act itself'[19]. It surely was with this knowledge in mind that George Etienne Cartier justified equal treatment of the Maritime Provinces with Quebec and Ontario when it came to Senate membership: '][t must be recollected that they had been independent provinces, and the count of heads must not always be permitted to out-weigh every other consideration'[20].

Canada's is a double federation—of jurisdictions and cultures. One might almost describe the duality as shallow and deep federalism, seldom expressed as directly as found in the Constitution Act, 1867, which on the one hand recognizes Quebec's distinctiveness in its civil law, while on the other hand provides for and deeply wishes to see uniformity of the law elsewhere. Nor has the vulnerability of minorities ever been more poignantly expressed than by Archbishop Taché, the ecclesiastical and national leader of French Canadians in Manitoba, on the eve of the creation of Canada's 'first' new province: 'Number is going to make us weak, and since under our constitutional system number is power, we are going to find ourselves at the mercy of those who do not love us'[21].

Canadian provinces do not have constitutions in the sense that American states do: provincial constitutions do not come from the people –never has there been a vote –but rather from above through prerogative power of the Crown. Even where, as in the case of the Prairie Provinces, there is a statutory component this hardly begins to tell the constitutional story. Entry into Confederation was subject to negotiation, each set of terms *sui generis*. Canada never had legislation like the Northwest Ordinance in the United States, passed in 1787 by Congress under the Articles of Confederation, which pledged republican governments and constitutions for the states to be created out of that vast territory beyond the Ohio River. A territory had to have a population of 60,000 people, but once admitted the new state would be treated as an equal to the original thirteen states. The contrast between this regimen and what happened in Canada when provinces were created by Parliament out of Rupert's Land and the Northwestern Territory is central to understanding the different constitutional experiences of the two North American settler democracies. If Americans are a calculating people committed to rule-based behaviour, Canadians are an accepting people tolerant of constitutional ambiguity. And ambiguity does not lend itself to codification.

In essence, Canadian federalism was achieved through the division and distribution of legislative power. Either in consequence or as explanation of this feature, 'the federal idea was never driven to its full logical conclusions'[22]**.** Whether it is the amending formula adopted more than a century after Confederation or the composition of the Senate whose lineage originates in the Quebec conference, equality as a federal principle is honoured fitfully. Despite what proponents of a Triple E Senate implied, the provision in the United States Constitution of equal representation of each state in the upper house of Congress is by no means uncontroversial[23]. As a value and as a precept, equality underlies Canadian society and law—but not in politics. The baroque history of electoral redistribution in the Commons offers proof enough: whatever the formulae constitute, it is not pure rep-by-pop. That statement should perhaps be written in the past tense, because independent federal electoral boundary commissions

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[19] J. Murray Beck, *The Government of Nova Scotia* (Toronto: University of Toronto Press, 1957), 12; Frank Mackinnon, *The Government of Prince Edward Islan*d (Toronto: University of Toronto Press, 1951), 136.
[20] *Commons Debates*, 3 April 1868, 455.
[21] Dom Benoit, *La Vie de Monseigneur Taché* (Montreal, 1904), vol.11, 195-6 cited in Ramsay Cook, *Canada and the French Canadian Question* (Toronto: Macmillan, 1971), 183.
[22] Kennedy, 'Law and Custom…' 51.
[23] See Robert A. Dahl, *How Democratic Is the American Constitution?* (New Haven: Yale University Press), 2002.

increasingly are drawing boundaries in a manner to promote closer population equality among constituencies within each of the provinces. Arithmetic carries more weight today than in the past, and other considerations, language and ethnicity for example, less. Since one of the roles of the Senate is to protect, or be alive to, the needs of minorities, the consequences of more equitable electoral redistribution in the House of Commons demand a more vigilant Senate. While the occasion for this comment is the subject of federalism, it is important to be aware that the Senate is a second chamber in a bicameral parliament, and that the subject of bicameralism (and the upper chamber's position in that arrangement of legislative power) is central to understanding the Senate and its future. Or, in the words of the Supreme Court of Canada in *the Reference re Senate Reform, 2014, 32*: 'The Senate's fundamental nature and role [is] as a complementary legislative body of sober second thought' (para. 52). One might almost say that with institutional bicameralism comes a bicameralism of the mind. No longer is the triumph of majority rule to be the measure of politics; rather a melding through sober second thought of diverse views and voices on an issue 'above' becomes the necessary complement to legislative agreement 'below.'

BICAMERALISM

> The Senate is a complementary legislative but not representative chamber in the sense of it being elected or accountable, as is the House of Commons, to those who do elect it; in its operation the Senate must be independent of concern for electoral considerations; the contrasting characteristics of the Senate and the Commons, in operation and membership, sustain Canada's diversity and pluralism, and thus its unity; five provinces have had bicameral legislatures and five have not; George Brown, who worked to establish unicameralism in the new province of Ontario, saw bicameralism at the federal level as indispensable to the success of the new federation; bicameralism is of central importance to Canada's constitutional integrity.

The Senate and the House of Commons are not autonomous legislative entities but comprise one unity—Parliament. The health of each chamber nourishes the other. The Senate needs to repeat and emphasize—to itself and others—the Supreme Court of Canada's ruling (*Reference re Senate Reform, 2014 SCC 32*) on the central importance of bicameralism to the constitutional integrity of Canada. Conceived by the Fathers of Confederation and confirmed by the Supreme Court of Canada, the subject has largely been ignored by scholars of Canadian government. Instead, for instance, in his book[24] *The Modern Senate of Canada, 1925-63: A Re-Appraisal*, F.H. Kunz uses in a chapter title the inadequate phrase 'relations between the two houses;' inadequate because the 'complementary' relationship between the chambers is central to parliamentary government in Canada.

Westminster-style systems of government are distinctive on several grounds, one of which is their reliance upon constitutional scholars for interpretation. While Canada has had J.G. Bourinot and Eugene Forsey, the most cited authority in the larger sphere is Walter Bagehot, whose best known work, *The English Constitution*, appeared in 1867. A journalist possessed of the successful journalist's talent for the apt phrase, Bagehot categorized British governmental institutions into two classes: 'dignified' and 'efficient.' Under the first, fell the Crown and the Lords; under the second, the cabinet and the Commons. The accuracy of Bagehot's perception, then or now, is neither here nor there. Rather, his taxonomy depreciated the upper chamber of the British Parliament; and since from the year his book appeared it was common practice to view Canada's parliamentary system as a reflection of that at Westminster—a constitution of a constitution, one might say, it was equally common to depict the Senate in a peripheral relationship with the Commons. In this analogy, the mistake was to confuse imitation with duplication.

More than Bagehot was responsible for the denigration of upper chambers in Canada. There was, as well, a reason indigenous to colonial government for accepting uncritically his assessment. It originates in the narrative of 'the achievement of responsible government,' at whose core lies the triumph of the legislative assembly over the legislative council[25]**.** In the first decades of the nineteenth century, there was a need to distinguish the executive in the assembly and to exclude ex-officio members from the

[24] F.H. Kunz*, The Modern Senate of Canada, 1925-63: A Re-Appraisal* (Toronto: University of Toronto Press), 1963.
[25] A recent interpretation is found in Michael S. Cross, *A Biography of Robert Baldwin: The Morning-Star of Memory* (Don Mills: Oxford University Press, 2012).

assembly. By contrast, the Supreme Court of Canada ruling (2014) demonstrates that the Senate is not (and was never intended to be) tangential to its surroundings. On the contrary, the stereophonic effect of bicameralism is emphasized. Neither chamber is superior or inferior to the other. Instead, there is a new altered condition to and recognition of the upper chamber: the Senate matters constitutionally, legislatively, and politically. **Another way of making this important point is to say that a systemic transformation of the constitution is underway, a transformation which, as of yet, has been insufficiently acknowledged.**

Placing the Canadian Charter of Rights and Freedoms to one side, governing in Canada has always been about power and never about restraint. The conception of the constitution as a limit on state power has been absent, no doubt because it took so long to develop a sense that Canada possessed a full constitution. Arguably, the Supreme Court ruling challenges that assertion. The requirement of dual legislative discussion of law and policy matters can no longer be ignored or dismissed. For too long the perspective was that the Senate did not matter. The Court says it does. And it matters not for its appearance (that is, its representative capacity)—which has been the focus for a century or more of criticism and proposed reforms—but for what it does as one part of Parliament. As the Supreme Court said in the *Senate Reference* in 2014: 'The framers sought to endow the Senate with independence from the electoral process …in order to remove Senators from a partisan political arena that required unremitting consideration of short-term political objectives' (para.57). The implication of words and phrases like 'independence' and 'unremitting consideration' will be examined later in this Report.

And what it does, as a *legislative* body, is complement the House of Commons in the following respects: 1) long tenure in the upper house versus short in the lower, with the result that the Senate has a stronger corporate memory and is not as easily disrupted as the Commons; 2) another way of saying this, is that the Senate is professional (senators bring and over-time acquire experience and perspective) while the Commons is amateur, 'one of the most amateur assemblies among advanced Western nations,' according to C.E.S. Franks[26]; 3) the chambers have contrasting career paths with different perspectives on the past and future: parliamentary activity occurs at a different time in an individual's career; 4) the contrasting size of the chambers—the Commons is three times the size of the Senate, with the former continuing to grow as larger provinces become more populous and occupy more Commons seats; 5) senators are equals because, unlike the Commons, there is less distinction in their ranks: for example, government versus opposition, front- versus backbench; indeed, there is no alternative government in the Senate—equal senators give equal weight to matters; 6) majoritarianism is reconciled with federalism, that is, the symmetry of the Senate (equality among divisions) and the asymmetry of Canadian federalism (the contrasting weight and size of the units of Confederation).

The division calculus is important because Canadians live in a majoritarian polity, which at the same time is a federation. Insufficient attention has been paid to the 'act of incorporation' that was Confederation: instead, emphasis is placed on responsible government, the maturing of dominion status (colony to nation), and the subjection of Canada's immense geography—'the national dream.' Today, the national dream is better portrayed in terms of the Charter and a rights-based citizenship/civil society.

[26] C.E.S. Franks, 'The Canadian Senate in Modern Times,' in Serge Joyal, ed., *Protecting Canadian Democracy: The Senate You Never Knew* (Montreal and Kingston, McGill-Queen's University Press, 2003), 152-88 at 170.

The Fathers of Confederation were committed to creating a federation that would promote unity and combat prejudice by emphasizing diversity. Institutionally and constitutionally, the pluralism that defines Canada is founded on and sustained by bicameralism and, more particularly, the distinctively Canadian feature of a fixed number of members in the Senate (never could there be in post-Confederation Canada, as in the United Kingdom, threats from the majority of swamping the upper chamber in order to secure passage of contentious legislation). The unlimited prerogative power of the Crown in the person of the sovereign to name peers had no counterpart in the relationship of the governor general and senators. The measure of the Senate is not to be found, as critics invariably assume, in its history or what it looks like, but rather in the logic of the agreement that produced it: to make modern Canada possible. 1867 was not about creating a new political system but about welding existing self-governing colonies into a federation. The ruling of the Supreme Court of Canada in 2014 makes that intention explicit: 'The Senate is a core component of the Canadian federal structure of government' (Para. 77). At the same time it is important to remember that, unlike many countries, the bonds of Canadian loyalty are essentially political: there was no pre-political community identity on which to erect the federation. Each colonial government had been separate from the other, each totally autonomous. Unlike the metaphorical 'boot' destined to become a unified Italy, Canadian unity defied, first, geography and, second, 'manifest destiny' on the part of its powerful neighbour.

Parliament's upper house offered a platform for expressing concerns about the federation and minorities. Unlike Members of Parliament, senators were not, in and of themselves, reflections or imitations of 'something else': they were not accountable to a constituency, however defined, or obliged to interpret legislation in any pre-determined way. To repeat: the Senate's is an individual voice—it does not speak for a constituency, or a province, or a government. Two consequences flowed from this feature. Bicameralism assumed fundamental (even existential) importance—the two chambers must work, and they must work in tandem for the benefit of the Canadian people, wherever they might live. At the same time, the second chamber must not rival the first. It must never, in other words, be elected by a constituency, since a democratic vote for the Senate would devalue everything but that vote. If this were to happen, conflict between the chambers would follow and the Senate's function as a moderating and unifying agency would be jeopardized. Senate thought would no longer be sober, that is, contemplative, nor would it logically come second.

In their opposition to the upper chamber, Patrick Boyer as well as some historians—Christopher Moore for instance[27]**,** personify (at least to this writer's mind) an insular Ontario preference for majoritarianism. The difference between them and George Brown, who did favour a unicameral Ontario legislature, is that Brown realized that federation demanded at the centre what was not required in the parts—a bicameral Parliament to help balance sectional and regional tensions.

It may be an exaggeration—but it is not false—to say that those who share this indictment of the upper chamber appear to be committed to the proposition that everyman is, or should be, his own legislator. In consequence, the Senate as an institution is disparaged; its history disregarded. The physics of a unicameral Parliament preoccupy their attention. For instance, according to Boyer, there are 'two solitudes of sovereign power the Crown and the people,' even though that last 'solitude' does not exist in Canada, where unlike the United States, there is no theory of popular sovereignty embedded in its

[27] Christopher Moore, *1867: How the Fathers Made a Deal* (Toronto: McClelland and Steward, 1998).

constitution[28]. Arguably, in this interpretation the compact theory of Confederation is not just dead, it never lived.

Boyer employs the word 'people' as a synonym for electoral democracy, a usage that again delegitimizes the Canadian model of bicameralism. To what extent, one wonders, is this malapropism attributable to the Canadian practice of claiming a constitution by association, be it found in the Preamble to the Constitution Act, 1867, or earlier, in Governor Simcoe's description of the Constitutional Act, 1791, 'as …a perfect image and transcript of the British Government and Constitution'[29]. The long stretch of borrowed terminology is evident when one realizes that Governor Simcoe was referring to the balanced constitution that resulted from the Glorious Revolution of 1688, and not to responsible government more than a century later. The British analogy refuses to acknowledge the uniqueness and strength of the Canadian upper house. To begin with, its history is different from that of the House of Lords—no barons here. The test of the Senate lies in what it does, usually in concert with the Commons. And what it does, in structure and practice, is to validate Canada's distinctive form of federalism, a subject ignored by those who criticize the Senate on grounds that it is undemocratic. More than that, this charge fails to acknowledge the primacy the Supreme Court of Canada has repeatedly awarded federalism: 'the dominant principle of the Canadian constitution is federalism' (Patriation reference, 821); 'one of the constitution's principles is federalism as a system of the country's government' (Secession reference, 217); and 'the Senate is a core component of the Canadian federal structure of government' (Senate reference 2014, para. 77).[30]

Bicameralism was as vital to the peace, order, and good government of the new country as the division of powers was to preserving the federation.

Federalism was about more than resolving the conflicts of United Canada, although it is the case that political problems in that colony drove the Confederation initiative. The original union comprised three former colonies, then four provinces; Ontario, Quebec, New Brunswick and Nova Scotia. Though few in number, those provinces were unequal (extremely so) in size and population. The Senate was designed to secure the voice of Maritime, and minority interests generally, in a Parliament whose lower house, based on rep-by-pop overwhelmingly advanced the concerns of central Canada.

Patronage, and Senate appointments in particular, as well as appointment over election itself, are regularly cited to disparage the second chamber, as is Macdonald's known preference for legislative over federal union. As an aside, it is ironic that Macdonald, the feigned federalist of this interpretation, should a century and a half later be celebrated as the pre-eminent nation-builder of the world's most extensive federation. Then again, perhaps there is no irony. Perhaps Macdonald, a man who before and after 1867 regularly displayed a talent for vigorous political invention, perceived what theorists have not seen—that parliamentary institutions are extraordinarily adaptive. (Indeed, one might argue that it is their fluidity that makes reform of a concrete nature so elusive.) And in British North America before 1867 there had been a number of occasions to demonstrate that adaptability: St. John's Island (Prince Edward Island) separated from Nova Scotia (1769); New Brunswick and Cape Breton Island separated

[28] *Our Scandalous Senate*, 172.
[29] Letter to the Duke of Portland, December 21, 1794, 3 Simcoe Papers at 235, cited in F.C. Buckley, *The Once and Future King: The Rise of Crown Government in America* (New York: Encounter Books, 2014), 94.
[30] *Reference re Resolution to Amend the Constitution*, [1981] 1 SCR 753; *Reference re the Secession of Quebec*, [1998] 2 SCR 217; *Reference re Senate Reform*, 2014 SCC 32.

from Nova Scotia (1784); Quebec divided into Upper and Lower Canada (1791); Upper and Lower Canada joined in United Canada (1840). The men who met-- at Charlottetown, Quebec, and in London-- were neither amateurs nor ingenuous when it came to constitutional matters.

More than that and despite the fact that several of their number were prominent members of colonial legislative councils, there was in their discussions and certainly among colonists generally strong allegiance to the principle of responsible government. In the study of Canadian political history, it cannot be stressed too often that the achievement of responsible government and of colonial self-government 'within the Empire' went hand-in-hand. It was not necessary to be a 'firebrand,' like William Lyon Mackenzie, to dismiss the pretensions of governors, upper chambers, and colonial cliques of whatever name to interfere with the work of the people's assemblies. Deference was paid to electoral power and not social status. It may be an exaggeration to say that Canadians are a unicameral people, but it is only that—an exaggeration. The link between that attitude and unfavourable opinion of the Senate today is not hard to make. Even though the history concerns colonies and the Senate is the upper house of a bicameral Parliament of a federation, it must be appreciated that negative opinion about the upper chamber is deeply rooted.

The achievement and conduct of responsible government, as far as the legislature was concerned, emerged with the formation of political parties. The principle depends upon more than the legislature for its realization, however[31]. It was political parties that gave coherence to the conduct of government in the legislature and provided the voter with a means of exacting accountability at the polls[32]. For efficient implementation, each of these functions looked to the development of the concept of party discipline. In an unelected upper chamber, where the government does not sit and which is a legislative but *not* a confidence chamber, a comparable rationale for disciplined political parties is less easily advanced. This subject will be explored in a later section of the Report. It is mentioned here only to note that the presence of political parties in the Senate is neither necessary nor sufficient for its operation, although partisan sentiment, as opposed to party discipline, may be inevitable as well as make a contribution to the chamber's operation.

Historically, there has been more talk than action on the matter of upper chambers in Canada, whether the subject was making the body elected or abolishing it. In the 1850s, colonial legislatures in British North America debated resolutions that would have seen their upper houses become elected. Prince Edward Island and United Canada instituted the change; but at the time of Confederation unicameralism prevailed in the new Ontario legislature, while an appointed upper chamber was established in Quebec. Only five Canadian provinces had second chambers after Confederation; two continued into the twentieth century with the last (Quebec's) being abolished in 1968.[33] Despite precedents that Senate abolitionists cite, there was no parallel between the vanished provincial houses and the Senate. For example, and as noted earlier, the Maritime Provinces were masters of their own (pre-Confederation) constitutions; more significant, Canada's upper house was a legislative body in a federation whose design rested with the framers of the constitution.

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[31] See J. E. Hodgetts, *Pioneer Public Service: An Administrative History of the United Canadas, 1841-1867* (Toronto: University of Toronto Press, 1955).

[32] On the emergence of the first feature, see Norman Ward, The Formative Years of the House of Commons, 1867-91,' *Canadian Journal of Economics and Political Science,* 18:4 (November 1952), 431-51.

[33] Provinces that had Legislative Councils, with their dates of abolition, were Manitoba 1876, New Brunswick 1891, Prince Edward Island 1893, Nova Scotia 1928, and Quebec 1968.

The object of criticism since its birth, the Senate of Canada has never been described as impotent. Indeed, its potential for legislative influence is the factor that traditionally agitates critics. The Senate's powers today are the same as they were at its creation. Indeed, every feature of the upper chamber – except term of appointment, now to age seventy-five but originally for life and admission of women (1929) — is as it was then. It is imperative to be clear as to the Senate's fundamental features. First, as just noted, senators hold their positions until age seventy-five; second, there is a fixed number of senators (twenty-four per senatorial division, of which there are four, plus nine add-ons [six from Newfoundland-Labrador—provided for in the Constitution Act, 1915—and one each Yukon, Northwest Territories, and Nunavut]; two divisions are single provinces and the other divisions have three and four provinces respectively)—a consequence of this limitation is that the Senate (at 105 members) is less than a third the size of the Commons, almost intimate in atmosphere; third, to repeat, the number is fixed and it is extremely difficult to add extra senators, a feat done only once (1988); and the fourth and last feature is that senators are appointed, on recommendation of the prime minister, by the governor general. Why did the Fathers of Confederation decide upon these particular features for the Senate?

Constitutional monarchy makes explicable—if not acceptable to some—appointment of senators by the Crown on advice of the prime minister. There is no need to rehearse the arguments against an appointed upper house. They are well-known. What can be said is that constitutional monarchy offered the Fathers of Confederation a practicable method of selecting senators to the upper house at a time when there were few alternatives. Election was not popular in United Canada after the experiment initiated in the 1850s. More than that, revitalization of the upper house through election relied on the theory of a balanced constitution (which originated in the Glorious Revolution of 1688 in the United Kingdom), where 'each branch should be independent of the other;' a theory that was largely destroyed in the early nineteenth century by the rise of responsible government with power concentrated in a political executive that dominated the lower house.[34] At the same time, selection by provincial legislatures of delegates from among their numbers to sit at the centre, as was done in nineteenth-century United States, violated the common sense of Parliament as the supreme legislative power (as in the United Kingdom) and the belief British North Americans held that creation of a national parliament marked an important step to constitutional maturity. According to J.G. Bourinot, the only examples in the nineteenth century of unicameral polities were the republics of Central America, the Balkan states, and the Landtags and Diets of the Austrian and German states[35].

Membership in the upper chamber is by senatorial region. The guarantee of fixed equal (regional but not provincial) representation with the more populous provinces of Ontario and Quebec was responsible for the entry of the Maritime colonies. 'On no other condition could we have advanced a step,' said George Brown[36]. The Senate was a form of compensation for securing rep-by-pop in the House of Commons: compensation to Quebec for what it had lost (equal representation in the Parliament of United Canada), and compensation for the Maritimes for what areas of growth elsewhere

[34] The words belong to J.W. Johnston, leader of the Conservative opposition in the colony of Nova Scotia, writing in *The Nova Scotian*, 3 March 1851, 69-70. They are found in K.G. Pryke, 'Balance and Stability: Nova Scotia Considers an Elective Chamber,' in J.M. Bumsted, ed., *Documentary Problems in Canadian History, Volume 1: Pre-Confederation* (Georgetown: Irwin-Dorsey Ltd., 1969), 185-7.

[35] J.G. Bourinot, 'The Canadian Dominion and the Proposed Australian Constitution: A Study in Comparative Politics', *Transactions of the Royal Society of Canada, Section 11* (Second Series, vol. 1, 1895), 3-43 at 19.

[36] *PD*, 88.

would gain. In this fundamental feature, as in others, can be detected the skeleton beneath the constitution now aged 150 years. It is neither possible, nor prudent, to forget what time has created or abandon what went before.

SELECTION

Senators are appointed by the Governor General on recommendation of the prime minister; the Fathers of Confederation opposed an elected second chamber because they believed that it would pose a challenge to the authority of the lower house; the Supreme Court ruling (2014) emphasizes the role of the Senate as a complementary and independent legislative body, where different voices and views are heard; partisanship in the Senate is rooted in the existing method of selection, with unpredictable (i.e. personal) but long-lasting (i.e. political) results; a balance of opinion in the upper house is preferable to a situation determined by the swings of electoral fortune in the lower house; alternative methods of selection to reduce partisan influence require study.

The Canadian Senate is not just an upper house in a federation, or a second chamber in an ordinal sense, but rather it is the co-equal legislative partner in the Parliament of a constitutional monarchy. Senators hold their position in the chamber because they were selected ('summoned,' s.24, Constitution Act, 1867) by the sovereign's representative. As with so much about the Senate, this is not as esoteric a point as it sounds, since it is related to the hallmark of the Senate and senators—its (and their) independence. One ingredient of the independence that senators are expected to possess may be said to emanate from their manner of selection, that is to say, selection by the Crown's representative. In a system of parliamentary-cabinet government, the coronation oath of the sovereign to do good becomes the obligation of her ministers, and her judges, to fulfil. And while the logic may at first glance appear circular, the advice ministers and, in this instance, the first minster, give the sovereign or her representative must itself be good.

Contrarily, what would happen if, following advice, the governor general's action were viewed as not good, but rather prejudicial to constitutional values; or, in the absence of advice, the governor general were unable to perform his or her constitutional duties, for example, summon a senator? This is the nub of the issue (as yet undecided) before the courts in the summer of 2015, where an applicant is seeking to require the governor general to fill vacancies in the Senate which the prime minister has stated he will not fill. In May 2015, Mr. Justice Harrington of the Federal Court summarized the issue by posing the following question: 'If the Constitution requires something to be done promptly, i.e. that Senate vacancies be filled, can the law be flaunted by convention?' Furthermore, he said: 'The Supreme Court made it perfectly clear in the *Reference Re Senate Reform* that significant changes to the Senate … require a formal constitutional amendment.'[37]

Hypothetical perhaps, but not unimaginable, and clearly of strong constitutional import. Yet in the context of this Report, how far should this theme be explored? It needs to be said, none the less, that selection of senators by the Crown is a first-order difference between the Senate and the Commons. The difference may appear obvious enough to be self-evident, but that is a misreading of the situation because the difference is disguised by the partisan cloak that envelopes the appointment process. It is

[37] *Aniz Alani and the Prime Minister of Canada and the Governor General of Canada*, Docket: T-2506-14, Citation: 2015 FC 649. A second, unsuccessful motion, brought by Mr. Alani, sought to expedite the proceedings by setting a pre-election (that is, 19 October 2015) hearing date. Citation 2015 FC 859.

that misreading that encourages a view of the Senate not as a distinctive legislative chamber but as a 'weak Commons,' principally because the government (and currently, no ministers) sit in the upper chamber. There is no study of the Crown and the Senate, as there is of the Crown and Lords in the United Kingdom[38]**.** The exceptions are the occasional biography of a governor general, where senators may make a fleeting appearance, and Eugene Forsey's article on s.26, Constitution Act, 1867 (the addition of senators in certain cases)[39].

Yet the time is approaching when the method of appointing senators will become a matter of discussion and, probably, dispute. Several reasons suggest this possibility, among them the prime minister's monopoly of advice to the governor general on appointments to the Senate. Alternatives to that monopoly will be assessed below. In addition to that crucial element in the selection process of senators, however, is another, more systemic, consideration: the selection of governors general him- or herself. When Prime Minister Stephen Harper sought a candidate to replace Michaëlle Jean as governor general, he is reported to have established a 'secret committee to search for candidates' who would possess constitutional knowledge and be non-partisan. C.E.S. Franks, a constitutional authority, praised the 'new' process and 'recommended that it be made permanent in law'[40]. There is no question but that the procedure followed in 2010 altered existing practice and in so doing increased the space between Canada's first minister and the representative of the Crown. How much space is open to question. In 2015, Mr. Harper asked David Johnston (chosen in 2010) to continue in his office until 2017: 'I look forward to him continuing his fine work in this critical role'[41].

The fact remains that in Canada the first minister selects the representative of the Crown, in that the first minister proposes the name of that individual to the sovereign; in the United Kingdom, the sovereign selects the first minister, which actually should be in the plural since sovereigns are on the throne far longer than first ministers are in office. 'A successor [to Johnston] … would [have] little time to prepare for a possible constitutional confrontation [if no party would have secured a majority of seats in the House of Commons at the 2015 election]'[42].

In the selection of senators, the role of the governor general could hardly be more central. The same may be said of his or her discretion in granting (or refusing to grant) the prime minister's request to exercise the Crown's prerogative powers in such matters as proroguing or dissolving Parliament. Contrary to Bagehot's dignified Crown of a century ago eliciting honour and loyalty but being negligible as an efficient institution, increasingly today in Canada the Crown is being drawn into the public eye. That matter is for another study, except that the central relationship between Crown and Senate

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[38] Roy Jenkins, *Mr. Balfour's Poodle: An Account of the Struggle between the House of Lords and the Government of Mr. Asquith* [London: William Heinemann Ltd., 1954. In this study of the parliamentary crisis of 1909 and 1910, the sovereigns [Edward VII and George V] are assigned significant parts, especially as regards their relationship with the prime minister.

[39] 'The Appointment of Extra Senators under Section 26 of the British North America Act,' *Canadian Journal of Economics and Political Science*, vol.12 (May, 1946), 159-67).

[40] B. Curry, 'Secret Committee, Seeking Non-Partisans: How Harper Found the Next G-G,' *Globe and Mail,* 12 July 2010, A1.

[41] John Ibbitson, 'Johnston's Term Will Continue into 2017,' *Globe and Mail*, 18 March 2015, A 3.

[42] Ibbitson. Convention—in the sense of customary practice—may change abruptly, even when it concerns a subject at the very heart of the constitution, such as gubernatorial selection of a first minister. For example, after nearly a century of delegate conventions selecting party leaders, s.49.5 (2) of a private member's bill (C-586), passed through Parliament in June 2015, makes it optional for a Caucus to cast a vote on leadership.

exposes it to danger in any confrontation that arises over the exercise of the Crown's powers. Literature on the Crown in Canada remains sparse, although growing. Relevant to this discussion, the newer studies examine the relationship of the Crown to other institutions and aspects of government, of which the House of Commons, royal succession, and citizenship provide examples. It is an indication of the changing character of Canadian politics that the basis for this scholarship lies in the Canadian Charter of Rights and Freedoms and in challenges to or in invocations of the exercise of prerogative power

In an analysis whose topic is renewal of the Senate in light of the ruling of the Supreme Court of Canada (2014), and in light of the unprecedented importance attributed to bicameralism, with the Senate assigned a complementary legislative role, the mechanics of selection of its members will demand more attention than has been true in the past. Such a change is all the more probable because election of senators is not going to happen anytime soon. Combined with the decline in public respect for political institutions generally but growing support for the Charter and the values it entrenches in civic life, the partisan monopoly on nominations of senators is more than likely to—it will certainly-- be challenged, with ramifications for both the political and formal executive in Canada.

There is historical irony in this approaching transformation, for the Fathers of Confederation could never have anticipated such a development. They lived at a time when democratic values were less questioned than today. It is well known that the men who met at Quebec thought that the constitution of the United States leaned too far in a popular direction--the American was not to be the British North American way. There is another, structural but unpredictable, reason why the constitutional development of Canada would have come as a surprise to its founders. If there is one feature common to every interpretation of the life and times of Confederation, it is the political instability that plagued the Province of United Canada in the late 1850s and early 1860s. By contrast, post-Confederation Canada has only had one coalition (really union) government, that led by Robert Borden after the election of 1917. At the very least, it was unexpected that given what had happened before 1867, the government of the new federation should be dominated by one man for the next quarter century, and by one party. Macdonald's achievement as the pre-eminent 'father' of modern Canada is rivalled by his creation of the first national (that is, federal) political party in constituencies from coast to coast. Before 1867, governments in Ottawa, much like governments at Westminster, were made and unmade in the House of Commons. After Confederation, and as a result of Macdonald's perception, governments increasingly were made in conformity to the election returns from the constituencies. His successors, regardless of party, sincerely flattered him in seeking to imitate his electoral success.

Shifting political alliances moving back and forth across the legislative assembly of the colony did not prepare politicians after 1867 to see one man in power for twenty-five years, and more to the point of this Report, in control of patronage of Senate appointments, as well as of almost all other patronage. Here was a dominance that Mackenzie King, Louis St. Laurent, Pierre Trudeau, Brian Mulroney, and the present prime minister continued to exercise. The difference between Senate and, say, senior public service patronage, is that senators until 1965 were appointed for life, and since then until age seventy-five. Contrary to the complaint that the major problem with the present-day Senate is partisanship (which it will be argued below is more accurately the result of the imposition of party discipline), it is the monopoly of appointments over such long periods of time that create parliamentary ruptures and disruptions that emanate from the Senate.

The appointment of senators on recommendation of the prime minister is much criticized, although loosely articulated with the animus directed more toward partisan nomination than gubernatorial appointment. As already noted, Canadians have long accepted, indeed celebrated, constitutional monarchy (there has never been a republican 'movement' in Canada as there has long been one in Australia) and an appointed judiciary. In other words, the principle is not in disrepute. From the point of view of the public, the problem with the present mechanism for selecting senators is that it is almost exclusively partisan. Partisanship is unfavourably viewed by the public, particularly for selecting members of a chamber whose primary characteristics are supposed to be independence and sober second thought in the conduct of its work.

Among the major problems with this form of nomination is less political allegiance per se than that the process will lead over time to an upper chamber that is imbalanced in terms of parties. Paradoxically, legislative bodies and political systems need the articulation of conflicting views if they are to be strongly democratic: the law of politics bids debate. The logic of different voices is the *sine qua non* for fair and competent legislation, and for coherent discussion. In the words of Edmund Burke: 'our antagonist is our helper.' In a chamber whose function is to be contemplative by providing sober second thought, and complementary to the Commons in the exercise of its legislative responsibilities, party sentiment is welcome as an organizing force. But because party discipline silences disparate voices and prevents dissent, it is destructive of the contribution the upper chamber may make to public policy. Where governmental confidence is not an issue, as it is in the lower chamber, discipline subverts the tone and substance of the Senate's work and, at the same time, challenges the cardinal feature assigned it by the constitution—independence.

It is necessary, none the less, to distinguish between party allegiance and party discipline. Canadian parties are frequently described as non-programmatic. That means that compared to parties in some other countries they do not have identifiable policies; that they do not stand for 'something.' It would be incorrect to say, however, that they have none, or that it does not matter who is in power when it comes to policies affecting foreign affairs, the economy, criminal law, language and culture, and more: the bloodline of Canadian prime ministers argues otherwise. More than that, there is a fundamental difference between political tendencies on the one hand and the weight of party discipline on the other hand.

Political parties comprise a loose aggregate of kindred minds on societal, economical, personal and broad vision of the world. Party discipline forced upon a senator compels the person to abide by a predetermined position to vote against one's own mind and, at its limits, to be sanctioned or disciplined for a refusal to obey thus preventing the person to use his freedom of expression in the Chamber contrary to parliamentary privilege long established in the Bill of Rights of 1689. Discipline imposed from below vitiates Senate claims to independence, for it puts the Senate in the service of the government. The defence sometimes heard, that party discipline promotes accountability to the public, may apply to the Commons but has no relevance when the subject is the un-elected Senate. On the contrary, discipline betrays the purpose of the Senate as set down by the framers of the constitution, because it distorts the regional- and minority-inclined Senate by making it the mirror image of the majoritarian-impelled Commons. Similarly, because the Senate is not a confidence chamber, it is misleading and detrimental to its operation to transfer the government-opposition alignment into the upper chamber, for there is no 'opposition' in the House- of- Commons sense of an alternative government.

The legal basis of Senate membership has nothing to do with political parties: there are no writs of election; there is no conventional commitment to an electoral platform. The prime minister who recommends a candidate for appointment will have left the scene before the terms of the senators he or she has recommended are completed. In other words, the *personal* allegiance of the latter to the former is transitory. Most Senators serve under different prime ministers of different political parties.

A major criterion of Senate effectiveness lies in its skill at improving legislation, which in light of the chamber's other features depends upon its independence from government and the lower chamber, capacity for sober second thought, acuity in revising and reviewing legislation, institutional memory, and responsiveness to minority and regional concerns. A core function of Parliament is debate and in this activity the Senate plays a major role, since debate but not decision is its pre-eminent contribution.

The Senate is the corrective to the discipline that responsible government in the House of Commons requires. The question then becomes how to promote cross-party cooperation in the legislative process and Senate procedures? Although the Senate cannot defeat the government or withdraw confidence, it has been argued that 'the Senate is better equipped to hold executive government accountable for its policies and conduct than is the House of Commons'[43]. The commonly- held view that government derives its authority and legitimacy from the Commons alone, rather than from Parliament as a whole, is limited and 'insidious' because it 'subverts the Senate's constitutional role of check and balance'[44]. The Senate cannot check the Commons if the Senate merely duplicates the Commons, that is, if it is elected on a partisan base similar to that of the House, or if, as an appointed body, the object of attention as a result of party discipline is the same as the Commons. Duplicating is not complementing.

How far can the Senate disagree with the Commons? The House has public support, demonstrated by the results of the last election, on its side; among the reasons for creating the Senate was to challenge majoritarian rule when that rule conflicted with minority or regional interests. Which majority—that found in the House of Commons or currently among the people—should prevail? How far may the Senate legitimately obstruct the Commons? Is there a clear answer to that question? This is unlikely, since the purpose of a complementary chamber is to force the other chamber to concentrate its attention on what is being said and to reconsider its position in light of what it hears. The upper chamber's constitutional power to veto a bill, which the Senate has exercised infrequently and which has been denied to the Lords for more than a century, is defensible on these grounds: that its potential use demands that the government and the Commons pay attention to what is happening in the Senate. Bicameralism is not—nor should it be-- a contest of wills. If, as is generally agreed, the Senate should not thwart the will of the Commons as the voice of the people; then the government in the Commons should not, through the extension of party discipline in the upper chamber, thwart the will of the Senate as it exercises its independence to complement the work of the Commons

Nominations to the Senate have been, and remain, overwhelmingly partisan, since it is the prime minister alone who proposes names to the governor general. Indeed, this practice as much as any other, on the part of all prime ministers, has fed proposals for an elected Senate. The problem with such an alteration, as the Supreme Court of Canada has noted, is that an elected upper house would jeopardize

[43] Serge Joyal, 'Conclusion: The Senate as the Embodiment of the Federal Principle,' in Joyal, ed., *Protecting Canadian Democracy: The Senate You Never Knew* (Montreal and Kingston: McGill-Queen's University Press, 2003), 271-316 at 285.
[44] Joyal, *Ibid.*

parliamentary bicameralism where the House of Commons is the confidence chamber. The Senate expense scandal and subsequent investigation by the Auditor General of senatorial expenses more generally have raised media and public attention of the upper chamber to unprecedented levels. One consequence of heightened criticism has been the decision of the leader of the Liberal Party, Justin Trudeau, to sever Liberal senators from the party caucus and, at such time his party forms the government, to introduce a new non-partisan means of selecting senators. Such a revolutionary change in selection, with accompanying change in personnel and practices of the Senate, is achievable not by statute or constitutional amendment but by altering the exercise of the convention that guides the selection process. The announcement made in the Throne Speech on December 4th 2015 gives credibility to the convictions that a radical change in the selection process shall be implemented in the New Year[45].

Sir John A. Macdonald instituted present practice and his successors emulated it; but there is no legal or constitutional reason why another mode of selection might not replace it. Bearing that in mind, there are two provisos to that statement. First, an altered method must respect the Crown's right to appoint (in other words, it must not, as the Supreme Court of Canada said of the recent Senate election legislation, dissimulate by 'privileging form over substance' [para. 52]). Second, it must respect (and more particularly, avoid) s.41 of the Constitution Act, 1982, which requires unanimous consent of the Senate, House of Commons, and the legislative assembly of each province for amendment in relation to 'the office of the Queen, the Governor General and the Lieutenant Governor of a province.' On this point, as on many others, the accuracy of the preambular phrase in the Constitution Act, 1867-- that Canada should have a constitution 'similar in Principle to that of the United Kingdom'—is increasingly cast in doubt. Indeed, the Constitution Act, 1982, with the Canadian Charter of Rights and Freedoms and the amending formulae, should serve to warn that the tradition of viewing Canada's constitution as one of association with that of Great Britain is becoming suspect.

This observation is timely because the transition of the House of Lords from a hereditary and aristocratic chamber to one where those characteristics are but shadows of the past and a portion of whose members are selected in a non-partisan fashion may offer an attractive model for Canada to emulate. None the less, the upper chamber at Westminster requires study. A useful place to begin is the *Annual Report, House of Lords Appointments Commission (2011 to 2013),* from which the following information is drawn: *Composition:* The Commission has seven members. Three represent the main political parties and ensure that the Commission has expert knowledge of the House of Lords. The other members, including the Chairman, are independent of government and political parties. The independent members are appointed by open competition. The party-political members are all members of the House of Lords and are nominated by the respective party leader for three year terms. *Role:* The role of the Commission is to make recommendations for the appointment of non-party-political members of the House of Lords; and to vet for propriety recommendations to the House of Lords, including those put forward by the political parties and the prime minister. Since the Commission was established in

[45] http://speech.gc.ca/en/content/making-real-change-happen; http://www.democraticreform.gc.ca/eng/content/government-announces-immediate-senate-reform; http://www.democraticreform.gc.ca/eng/content/backgrounder-senate-appointments-process.

2000 it has recommended (as of September 2013) 63 people for appointment from around 5000 nominations[46].

If at some point the House of Lords Appointments Commission were to commend itself to Canadians as a model for revising the selection process for the Senate, the mechanics and structure of the Commission would require closer study than the foregoing comments offer. Among several factors that must be acknowledged in the Commission's origins are the following: a Labour Party electoral landslide in 1997, under the leadership of Tony Blair; a Royal Commission on the Reform of the House of Lords, whose report in 2000 'A House for the Future,' fuelled debate on a very old topic (Lords' reform in the 1990s constituted the second-shoe [so to speak] after the first had fallen in 1911, with the introduction in the Parliament Act that year of a suspensive veto for the Lords); devolution of power to Scotland and Wales in 1997; membership in the European Union and adherence to the European Convention on Human Rights. These latter influences appear in another theme associated with Lords reform: concern to recognize diversity in the United Kingdom[47]. A publication representative of this concern is Meg Russell and Meghan Benton, in their 'Analysis of Existing Data on the Breadth of Expertise and Experience in the House of Lords'*[48].*

British example deserves study but also to be treated prudently (some might say, skeptically) by Canadians. In 2015, the Lords is more than seven times the size of the Senate, and may grow even more since there is no upper limit on its numbers. Indeed, the process of institutional evolution is a hallmark of the Lords, although far less so of the Senate. The Fathers of Confederation specifically said and deliberately acted so as to protect the Senate from being swamped by government appointees. The Lords was an aristocratic chamber, with close ties historically to the established church. In modern Britain class and religious hierarchy are out of fashion, as witness (regarding the latter) changes made in the Succession to the Throne Act, 2013. The real and property qualifications of s.23 of the Constitution Act, 1867, may be (and have been) cited to support the claim that the Senate exists to protect privilege, although it could also be said that they helped guarantee that appointees would be more financially (and thus, politically) independent than members of the Commons. In any case, there is no hereditary component to membership in the Senate. Macdonald admired the legislative union of Scotland and England, a union less unquestioned than it once was. The argument heard in Great Britain, that the Lords needs to become more territorially and demographically diverse, is not echoed in Canada, where senatorial divisions of equal size help complement the diversity the federation was intended to accommodate.

To these contrasts should be added what might be called systemic differences between Canada and the United Kingdom. British political parties and the governments they formed in the last two decades of the twentieth century were, by Canadian standards, strongly programmatic in their manner of governing. Margaret Thatcher and Tony Blair held firm and (similarly) negative views of the Lords at the end of the last century. The first prime minister ignored them, the second sought to change them. The mechanism Blair chose at the outset was a royal commission (Mrs. Thatcher appointed no royal

[46] lordsappointments.independent.gov.uk/media/28825/annual report oct 11-sept 13(pdf).pdf.
[47] David E. Smith, 'A House for the Future: Second Chamber Reform in the U.K.,' *Government and Opposition*, 35:3 [Summer 2000], 325-44.
[48] Meg Russell and Meghan Benton, 'Analysis of Existing Data on the Breadth of Expertise and Experience in the House of Lords,' *Report to the House of Lords Appointments Commission,* The Constitution Unit, University College London, March 2010.

commission during her years in office, her view of the utility of such bodies being the same as her view of the Lords). There has never been a royal commission on the Senate in Canada, nor a proposal for one, despite continuing criticism of the upper chamber. The reason why is that Canadian political parties have not articulated coherent views on Senate reform, and in their absence terms of reference for an inquiry are difficult to draft. It is worth remembering that the parliamentary crisis of 1910 and 1911, along with near-civil war in Ireland and the rise of the suffragette movement helped destroy the Liberal Party[49]. The Lords posed a threat in British politics then, and one that even a moderate leader like Clement Attlee later, in 1949, recognized when the first Labour government to have a majority in the Commons limited the Lords' suspensive veto even further than that set down in the 1911 legislation.

The majority of Lords are still appointed on recommendation of the prime minister. The 'non-party-political peers,' who are appointed on recommendation of the Lords Appointments Commission and who number fewer than one hundred, sit as crossbenchers and not with party groups. One may assume that it is this feature of the Lords today that appeals to Canadian advocates of a less- partisan selection process for Canadian senators. The analogy is far from perfect, however. There are no crossbenches in the Senate and there are only two party groupings, as opposed to three (now four, with the Scottish Nationalists- SNP) at Westminster (Conservative, Labour, and Liberal-Democrat). In addition, there are sixty-some other peers drawn from bishops of the Church of England, other parties, and non-affiliated members. The comparative merits of the two schemes would require more research than is possible to carry out in this Report. What is worth emphasizing is that the schemes differ, with the British arrangement looking more like the Canadian today than in the past. Such convergence as there is results from changes carried out in the United Kingdom and not in Canada. Following the election returns of May 2015, which saw dramatic change in fortune for the SNP, Liberal-Democratic, and Labour parties, the calculations that underlay a reconstituted Lords a decade ago appear less certain. The attraction of upper chamber reform is related to whether the viewer possesses a majority or minority in the lower chamber. The SNP gained fifty seats, but remains without a voice in the Lords; the Liberal-Democrats lost forty-eight seats but retain their one hundred peers; Labour lost its stronghold north of the Tweed but still counts 224 (of a total 783) peers among its parliamentary ranks.

As the subject of this Report is new directions for the Senate following the opinion of the Supreme Court of Canada in 2014, the digression into reform of the House of Lords may seem tendentious. It is defensible because of the historic association drawn between the upper chambers of the two countries and because the parallel relationship each upper house has with its lower, popularly elected chamber. Different premises inspire upper chamber reform. While various reasons may be offered for criticism directed at the Senate, one indisputable source is the partisanship that pervades selection of its members and conduct of its work. The emphasis the Supreme Court of Canada has placed on the Senate as a complementary house in a bicameral parliament underlines the conundrum when expectation confronts reality. In contrast, the 'party question' does not provide momentum to the House of Lords. Debate on the upper chamber in the United Kingdom has touched on many issues, but concern about the level of party influence has not been pivotal. The appointments commission mentioned earlier only vets nominees' qualifications; the majority of persons recommended to the Queen for appointment still hold party affiliation. A more accurate depiction of a paramount issue is the Lords as a representative body. In Canada, and outside of the Triple E proposal for what might be called structural change, the

[49] George Dangerfield, *The Strange Death of Liberal England* [Frogmore: Granada, 1970].

Senate as a representative body is not the question, since the constitution settles that point by establishing senatorial divisions of equal numbers and when there is more than one province in a division, allocates senators by province.

A conclusion from the foregoing comments is to exercise caution when using comparative examples. The Fathers of Confederation weighed and—for the purposes of the new Dominion—found wanting on a number of counts the example of the United States Senate. Similarly, Canadian society is different from British society in multiple ways, but relevant to this discussion is the contrasting setting of its politics. Canada is not an island kingdom but a continent-wide political, indeed partisan, construct. This is neither good nor bad, but true. Partisanship is pervasive in Canada and it has been a struggle to tame it—in the bureaucracy for the first half of Confederation and now in Parliament: Officers of Parliament, independent electoral boundaries commissions, election finance regimes, and more have the common purpose of limiting its excesses. The search for independence is a hallowed topic.[50]

A second model that recommends itself to some critics of the current practice of senatorial selection is drawn from Canadian experience with the selection of judges. Section 92 court appointments, that is appointments to provincial courts through action by one of the ten respective lieutenant governors, vary according to jurisdiction. This discussion will focus on Section 96, or federal, court appointments. The present committee system for federal judicial selection was introduced in the 1980s at the time Brian Mulroney was prime minister. The structure of the scheme reflects the fact that Canada is a federation, as Section 96 selection committees are typically comprised of the chief justice of the province, a person appointed by the federal Minister of Justice, another appointed by the Attorney General of the province, along with two lawyers and two laypersons normally appointed by the vote of the other committee members. Selection committees classify applicants as either recommended, or not recommended. Before 2006 there were three categories: “highly recommended” has been removed by the then minister of justice[51].

Compared to the present practice of senatorial nomination, where the prime minster exclusively dominates, the attraction of what may be called the judicial selection model lies in non-prime ministerial vetting of the process. Recommendations for the appointment of judges come to the governor general from the prime minister. Similarly, were this procedure to be copied with regard to senators, those recommendations would follow the same route. Presumably, the broader set of consultations demanded by this proposal would not trespass on the prerogative of the governor general in making the senatorial appointment. Yet, even if imitable from this perspective practical differences exist. The most obvious is a contrast in numbers: 105 senators versus 1137 judges and supernumeraries[52] compared to the present practice of senatorial nomination. If not full time, the work of the judicial advisory committees, especially in large provinces like Ontario, is continuing commitment. In provinces with four or six senators, which is to say half the provinces of Canada, the work of senatorial advisory committees would be discontinuous. It would not be feasible to compile lists of approved candidates for recommendation to the governor general years in advance of the need for action. Nor would individuals wish their expression of interest in the position to languish for an indeterminate time. More than that,

[50] See R. MacGregor Dawson, The Principle of Official Independence: With Particular Reference to the Political History of Canada (Toronto: S.B. Gundy, 1922); one of its nine chapters is titled, ‘The Senator.’
[51] Sean Fine, “Stephen Harper’s courts”, *The Globe and Mail*, July 25 2015, p. 1 and al.
[52] http://www.fja.gc.ca/appointments-nominations/judges-jugs-eng.html

law is a profession that is, in Canada, highly provincial in its character—law schools, articles, bar associations (along with judgeships) are examples. By contrast, the collegiality of senators is a post- not pre-selection phenomenon.

In the matter of models, a third, very recent and in many respects apt, precedent is the Advisory Committee on Vice-Regal Appointments: 'a non-partisan committee established to provide the Prime Minister with non-binding recommendations on the selection of Governors General, Lieutenant Governors, and Territorial Commissioners.' Comprised of the Canadian Secretary to the Queen, as well as two permanent (one anglophone and one francophone) federal delegates, each serves for a time not exceeding six years. For the appointment of a lieutenant governor or commissioner, two additional members drawn from the relevant province or territory will be temporarily added as members, each is a member for no longer than six months. A representative of the Office of the Prime Minister acts as an observer only.[53]

Irrespective of how applicable they may be in the present situation, these modified selection processes for senators attract little, very little, public interest. The present Senate expense scandal and earlier debate over the Triple- E Senate proposal draw attention to the genesis of senators, but to date the attention has been transitory. Proposals for parliamentary participation in the selection of justices of the Supreme Court of Canada, and even precedents of this nature, appear to have no public, as opposed to an academic or specialist, constituency to sustain them. Because populism is not a constitutional principle-- or even value--it offers no rationale for direct or indirect participation in appointments. In this regard, Canadian attitudes toward constitutionalism are intimately tied to Canadian attitudes toward the Senate: public ambivalence has serious repercussions for public understanding.

[53] See Terms of Reference, Advisory Committee on Vice-Regal Appointments, 4 November 2012 http://pm.gc.ca/fra/nouvelles/2012/11/04/pm-annonce-la-mise-pied-dun-nouveau-comite-consultatif-les-nominations-vice#sthash.pH6r0T3Z.dpuf (consulted on September 16, 2015)

INDEPENDENCE

> The hallmark of the Senate is its independence. Appointment over election, and appointment for life (now to age 75) over a term (long or short) supports the priority granted independence over accountability in 1867. The purpose of the Senate is to improve legislation by bringing long-term and dispassionate perspective to the business that comes before it. It should not be an echo-chamber of the House of Commons. Partisanship characterizes the House of Commons in its work and explains the widely-held view that the lower house does not hold the government effectively to account. Because it is not electorally accountable and because its members hold their positions two- and three-times as long as MPs, the Senate is well-positioned to listen to the immediate and long-term concerns of the Canadian public.

In its introductory comments on 'senatorial tenure,' the Supreme Court of Canada ruling observed that 'security of tenure is intended to allow Senators to function with independence in conducting legislative review … Fixed terms [as set down in the government's impugned legislation] provide for weaker security of tenure.' While 'independence' may appear a non-controversial term, on reflection its meaning rapidly loses certainty. For instance, the American colonies won their War of Independence by separating from imperial control in Great Britain. On this occasion, independence implied a severing of ties or emancipation. By contrast, Peter C. Oliver concludes his important study, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand*[54], with a chapter titled 'Constitutional Continuity and Constitutional Independence.' Here the outcome is the reverse to what happened in the United States: independence and continuity complement each other, with a marriage of apparent opposites— difference and similarity—being achieved.

In the sense in which the Supreme Court ruling in 2014 uses the term, independence cannot mean oversight, or control, or autonomy, for the reason that any of these definitions would vitiate the Court's pronouncement that 'the Constitution should be viewed as having an "internal architecture"', which means 'the individual elements of the Constitution are linked to the others and must be interpreted by reference to the structure of the Constitution as a whole'. [55] What can be said is that independence is an essential element in the Senate's performance of its complementary function in the legislative process. 'Performance' and 'function' are not structures that can be built; rather they emanate from attitudes and conditions that pervade the legislative process. It is a fallacy to think of bicameralism as a matter of structures when at its core it is a matter of the mind, or in the words of the Supreme Court evaluation: 'the assumptions that underlie the text' (para. 26). It is this intangible quality that allows the two chambers of a bicameral legislature to think and work together rather than to think and work apart or in parallel.

A major criterion of Senate effectiveness lies in its skill at improving legislation, which in light of the chamber's other features depends upon independence from government and the lower chamber,

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[54] Peter C. Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand,* Oxford: Oxford University Press, 2005.

[55] *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704, par. 26; *Reference Supreme Court Act*, *R.S.C., 1985 (Canada), 2014 SCC 21; Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, par. 50.

capacity for contemplative or sober second thought, acuity in revising and reviewing legislation, the resource of institutional memory, and responsiveness to minority and regional concerns. 'A core function of Parliament is debate, and the *process* of debate is as important as the decision taken.'[56] In this activity the Senate plays a major role because greater freedom of debate occurs where the confidence question does not prevail. The Senate is better situated than the Commons to connect with the public. While some senators have held elected office, many have not, and in that respect they are not professional politicians in the sense their opposite numbers in the Commons are. Instead of representing voters they represent citizens, who also are not elected. In that important regard, senators and Canadians share common ground. When the Senate turns partisan, it loses public trust in its deliberative capacity--the quality of the institution Canadians most admire.

In contrast, with lower turnout generally, and especially among younger Canadians, the ballot has become the equivalent of a ticket of admission to formal political participation. Canadian polling expert Michael Adams has demonstrated that the political parties earn the least respect among political institutions, with only seven per cent of Canadians trusting them a lot, compared with thirty-two per cent not at all[57]. When the Senate turns partisan it loses public trust in its deliberative capacity. Advocates of an elected Senate invariably argue that election is a source of legitimacy. This is a disputable claim in light of the strong support Canadians evidence for their appointed judiciary. Assuming for the moment the validity of the assertion, it needs emphasizing, although the point is rarely mentioned, that the legitimacy of the electoral system rests upon the independence of election administration from government in every jurisdiction in the country. And election administration is a far more complex process than the two-word phrase suggests, including, as it does, regulations, budgets, enforcement, implementation, and reporting.[58]

There is nothing to stop the Senate from creating opportunities to listen to public opinion. To some extent it already does this, and in some respects its form is better suited than is that of the party-aligned Commons. Support for the Senate among informed and active Canadians originates in the knowledge of its accessibility—thousands of witnesses over the years cannot be wrong. The 2014 ruling of the Supreme Court of Canada has made clear that independence is a primary characteristic expected of the upper house. Nor is that condition a matter of choice: the constitution requires the Senate to fulfil its fundamental roles and responsibilities. Ignorance, apathy, or a disinclination to act no longer suffice to explain inaction. Relatedly, one might ask, how far may the Senate be impeded by others in the fulfilment of its functions? Too often, or more often than in the past, the problem of the Senate appears to be the House of Commons, or more precisely, the party discipline under which the Commons operates and which makes comity between the chambers difficult.

Comity occurs between equals, and contrary to past attitudes which have assumed a hierarchy of chambers with the Commons above the Senate, that perspective is no longer (if it ever was) theoretically or practically valid. The Supreme Court ruling of 2014 is free of any doubt on this score:

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[56] Gil Rémillard, with the collaboration of Andrew Turner, 'Senate Reform: Back to Basics,' in Joyal, *Protecting Canadian Democracy*, 105-32 at 108, emphasis added.

[57] *AmericasBarometer: Citizens Across the Americas Speak on Democracy and Governance: Canada 2014, Final Report* (Ottawa: Environics Institute and Institute on Governance, 2014).

[58] David M. Brock, 'The Independence of Election Administration from Government,' *Journal of Parliamentary and Political Law*, Special Issue, The Informed Citizen's Guide to Elections: Electioneering Based on the Rule of Law, eds., Greg Tardi and Richard Balasko (Toronto: Carswell, 2015), 93-106.

the Senate is an independent and complementary legislative body, constitutionally equal to the House of Commons. The upper chamber is not a partisan colony of the lower.

In 1970, Albert O. Hirschman published his book *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States*[59]. A specialist in studying economic and political development, Hirschman argued that there were alternative ways of reacting to dissatisfaction with organizations. One way –exit--is to quit an organization or switch to a competing product; the other--voice--is to agitate for change from within[60]. The attraction of the book is the accessibility of its argument and the ease of its application. While Hirschman did not speak directly to parliamentary life, it does not stretch logic to see party discipline in the Commons in modern Canada, with its obeisance to the party whip, as a form of 'exit'—no argument, no debate, no participation. Beneath the cacophony the sound of silence. The Senate is different, in the sense that it exemplifies and amplifies 'voice.' And that means more than being an echo chamber of the Commons. It is often said that Parliament-- but really the critique is directed at the Commons-- does not speak for the people. Another way of phrasing the indictment is that Parliament does not hold the government effectively to account. The chamber where the public's voice may more clearly be expressed is the Senate. How to induce change? How to make the second chamber complement the first?

This is a report on future directions for the Senate in light of the constitutional prominence the Supreme Court of Canada has given bicameralism in its 2014 opinion. For that reason the House of Commons may appear tangential to the discussion. And so it is; but it cannot be ignored altogether. Canada is an electoral democracy whose centrepiece is the Commons. Members of Parliament are the one and only national officeholders Canadians have the opportunity to choose. All MPs are members of political parties; 'independent' candidates do not get elected. The few MPs who 'cross the floor' seldom are re-elected. A strong case can be made that the political history of Canada is the history of its political parties[61]. A consequence of fundamental importance for the political culture of Canada follows from the pivotal position that parties play: partisanship and partisan sentiment pervade public life and debate. To the extent that party politics becomes the measure of Parliament itself.

From one point of view, that comment may appear tautological; still, it is defensible. The shadow of an approaching or departing election always hovers. It is the partisan prism that explains the perpetual distortion of parliamentary life found in the media and public discussion: that governments in Canada are 'elected;' that the official opposition lacks credibility because it is not 'elected;' that governments have 'terms' (this even before the arrival of 'fixed date' election laws); and more. It is by the partisan 'measure'—more than by any other—that the Senate is said to fail to meet the test of 'legitimacy.' Freely invoked, this is a crude standard none the less, when only a minority of members of the Commons enjoy the support of a majority of voters in their constituencies. To distortion may be added misrepresentation, as in the CBC bulletin on election night in Alberta in May 2015, *'Voters Pick Wildrose Party as Official Opposition'*[62]. Of course, voters did no such thing, any more than they chose the

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[59] Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States,* Cambridge: Harvard University Press, 1970.

[60] http://www.hup.harvard.edu/catalog.php?isbn=97806742276604.

[61] David E. Smith, 'Party Government, Representation and National Integration in Canada,' in *Party Government and Regional Representation in Canada,* ed., Peter Aucoin, 1-68. (Toronto: University of Toronto Press in Cooperation with the Royal Commission on the Economic Union and Development Prospects for Canada, 1985).

[62] http:www.cbc.ca/news/elections/alberta-votes/alberta-elections-2015 …

government. Governments in a constitutional monarchy are appointed (and on very rare occasions, as in Australia in 1975, dismissed) by the Crown's representative. Reminders of how constitutional monarchy works in Canada are often treated as punctilious and of no importance. However, they are important and in the context of this Report go some distance in explaining the handicap under which the Senate exists and operates.

Governments in Canada are appointed, but nobody sees this as a problem, or if they do, they do not see it as significant. Senators are appointed and many people see this as a problem, but for different reasons: they are not accountable (to the public) or they are partisan, to the extent that the Senate cannot fulfil the complementary role the Fathers of Confederation intended, and the Supreme Court has re-iterated, they should play. What is to be done? How to sort out the matter? An example of the confusion may be found in an editorial in the *Globe and Mail*, 'Why Is the Senate Stalling This Bill?'[63]. The bill being 'delayed' is Michael Chong's Reform Act (mentioned earlier in this Report): 'This bill doesn't need lengthy study in the Senate, sober or otherwise. That's because its subject is the workings of the House of Commons, and the party nominating process for people who want to become MPs. It does not affect senators. If any bill passed in the Commons deserved to be rubber-stamped by the Senate, this is it.' It is a narrow (and misplaced) argument to make, that the Senate has no 'interest' in this Bill because it touches only members of Parliament and their political parties. The Senate has a reputable history when it comes to participating in electoral redistribution matters or in examining legislation that might affect the conduct of elections. Seldom is the argument made that the Senate 'rubber-stamps' legislation; more often, as here, it is that the Senate delays.

The editorial speculates that 'the inaction leaves the impression that the Conservative majority in the Senate has been told to smother it in the crib.' With Parliament adjourning in another month, and an election in the fall, it says, 'the bill will die.' Whether the editorial is correct in its surmise that partisanship is the source of inertia is unprovable. What is significant is the assertion that the Conservative majority in the Senate may be acting (or in this case, not acting) because it was 'told to smother it in the crib.' In this interpretation, the direction comes from the other place, and it is that injunction and the discipline it enforces in the Senate that challenges the independence of the upper house. Partisanship as a means to accountability in an elected chamber is one thing; partisanship as obstruction to the work of the unelected upper chamber is quite a different matter. As an aside, the *Globe's* editorial comment on this matter was unusual for its discriminating analysis. More typical was reference to 'obstructionism by the *Senate*'[64]. The contrast in media and public attitudes toward the Commons as an institution comprised of individual members, on the one hand, and the Senate as an individual-less assembly, on the other, is of long standing in Canadian politics. The singular activity of the individual senator—unless it involves an element of scandal-- is lost because of this flattened perspective.

As a rule of interpretation, it may be said that the thrust of political change in Canada has been centrifugal. Chong's proposal, by contrast, is centripetal. The precept to be taken from this debate is that the future of the Senate lies in its empowering and expanding, not limiting, Canadian democracy.

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[63] *Globe and Mail*, 'Why Is the Senate Stalling This Bill?', 08 May 2015, A12.
[64] Chris Selley, 'You've Won Me Over, Chong,' *National Post,* 20 May 2015, A12, emphasis added.

WHAT IS TO BE DONE?

> First, recognize the Senate's strengths: data confirm committee meetings on issues of public concern attract hundreds of witnesses each year; accessibility to the Senate is expanding while traditional political/electoral activity is in decline; one reason for establishing the Senate was to see that minority interests were heard, while adoption of the Canadian Charter of Rights and Freedoms re-affirms a similar moral commitment. Second, establish a framework to reinforce the distinctive contribution the upper chamber makes to Canada's constitutional well-being. Examples of what may be done are: establish with the House of Commons a working relationship whose measure is public not partisan good; moderate the partisan complexion of the Senate by altering the manner of selection of its prominent officers, beginning with the Speaker; and explore the establishment of oversight authority while at the same time protecting Parliament's historic privileges.

To begin with, the Senate should democratize its iconography by emphasizing that its rules and procedures are less rigid and more accommodative of public opinion than are those of the Commons. Party discipline is not as oppressive above as it is below. It should be noted too that public perception of the Senate influences how the Senate sees itself, as witness Senator Munson's comment that raising public consciousness about autism made *him* feel 'more empowered than ever'[65]. In short, a reciprocal relationship exists between senators and the public, one that is essentially different from that which obtains between MP, as representative, and the constituent, as represented. It needs repeating that senators are not agents of a principal. Absent that connection they are, on the one hand, free of the constituency pressures MPs experience but, on the other hand, they are bereft of the personal, political, and community support which members of the Commons predictably and necessarily attract.

Compared to the past, even the recent past, there is more activity and interest today in the Senate. As source of the interest, the critic might cite the trial of Senator Duffy and the recent report of the Auditor General of Canada on senatorial expenses. While no doubt true as far as it goes, the work and range of Senate activity, especially of its committees, is equally important as an explanation. Although the committee work of the Senate is regularly lauded by media, academics, and the public, the scope of that activity, and the sense of access to its proceedings, deserve closer study than may be given it here. Indicative of its volume, however, are data in the annual Senate Report on Activities for the period between 2008-09 and 2012-13, which reveal over 2300 committee meetings to have taken place with more than 6000 witnesses in attendance, and which produced roughly 500 committee reports (http:33sen.parl.gc.ca/portal/annual.reports-e.htm).

It has been said that 'a Senate committee system unhindered by partisan rancour offering a platform to experts and Canadians from across the country would soon regain institutional respect.'[66] The Senate already enjoys respect for its committee work; a reduction in partisan rancour would *increase* that good repute. In this investigative dimension of its work, it might be argued that the Senate comes closer to

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[65] *Senate Debates*, 19 June 2014.
[66] David McLaughlin, '"Toxic" Senate Will Have to Heal Itself,' *Globe and Mail*, 01 August 2015, F2.

playing the type of role the Fathers of Confederation originally envisioned it playing. If so, is this an example of recovered memory at work or are social media a growing factor: are they today's equivalents of the extra-parliamentary conventions the Chartists called for in the early nineteenth century in order to broaden participation? It used to be said that, when compared with politics at Westminster, debate in Canada took longer because factors like distance and bilingualism had to be surmounted before public interest was engaged. Modern communication technology annihilates distance and even parliamentary time, with disorienting results for politicians and the public**. Less so, it would appear, for the reputation of the Senate than the House: 'Canadian parliamentarians take pride in how their statements or publications may be used by the courts. See for example, Senator George Baker, "This example is perhaps a lesson for all honourable senators that what we say in the Senate is often quoted in our courts. What they say in the House of Commons is never quoted; but what we say in the Senate is often quoted. I see it in case law that I read every day […]."'**[67]

What aspects of role, formation, and composition of the Senate could be objects of renewal without reopening the constitution?

The opportunity exists to help empower civil society, for unelected though it is, the Senate stands as an ally and not an opponent of the popular will. Also, it is more accessible than the House of Commons. Canada is a country of contrasts—big versus little--whether the subject is territory or population; and in either case, the contrast is the bane of each of the ten provincial and three territorial independent electoral boundaries commissions appointed following the decennial census. Because the Commons is comprised of many small constituencies and the Senate of a few large divisions, one would expect that the focus of Commons business would be on micro matters and the Senate on macro ones. But there is a counter-argument to be made to that assumption.

First, there is a very big difference in the size of the two chambers: 105 seats in the upper house versus 338 seats (after the current redistribution) in the lower, and in their contrasting trajectories of growth: in 1917, the Commons had 235 seats; in 1974, the number was 264; and in 2015, 338. In other words, in the last century the House has increased roughly by the size of the Senate. In the same period, the Senate grew by just nine seats. *Second,* the House of Commons would be expected to represent smallness because of the multitude and variety of its constituencies, but political party discipline obliterates localism—as it always has. The smaller, complementary but free-of-constituency-accountability Senate is better positioned to articulate specific concerns whether or not rooted in geography. *Third*, the Commons is highly polarized in an era when the public is more pluralistic and volatile in party affiliation. Again, according to Michael Adams in the previously cited study *AmericasBarometer*, since 2012 more than half of the population have been active in the last year signing petitions, sharing political information online, and participating in demonstrations and protest marches. Political activity on the internet is growing rapidly, especially on social media. For more detail, see the special issue devoted to digital issues of *Canadian Parliamentary Review,* 37:4 (Winter 2014). It is most popular among younger Canadians (those under the age of 30 [45 per cent]), who are more than

[67] *Debates of the Senate* (Hansard), 3rd Session, 40th Parliament, Volume 147, Issue 77, 13 December 2010 quoted in Senate, *A Matter of Privilege: A Discussion Paper on Canadian Parliamentary Privilege in the 21st Century* (interim report of the Standing Committee on Rules, Procedures, and the Rights of Parliament, June 2015), 50.

twice as likely to use social media for political expression than those 60 years of age and over (19 per cent).

A number of reasons may be offered for this development. One relevant to the discussion, a heightened belief in the need for real and perceived fairness and a resulting transformation in the sense of what rules should look like, is voiced by Australian Judith Brett-- people do not like the tone of parliamentary conflict: 'For those experienced with the modern informal meeting and its consensual style of reaching a decision, parliamentary procedure is no longer seen as enabling but as precluding cooperative action'[68]. There is a sharp contrast here between what might be termed a permissive view of organizing the public forum and the long, unchallenged authority of *Robert's Rules of Order* and the atmosphere it demanded. An example of the contrast is given by George Ross, premier of Ontario and later a senator, in his autobiography: '[As a young man] I associated myself with a division of the "Sons of Temperance"… The business of the division was conducted according to well-defined rules of procedure and debate, which gave it an air of dignity and self- restraint not unlike a parliament in miniature[69]. Adams's research demonstrates that Brett's observation is not confined to Australia: 'Half of Canadians (50 per cent) strongly agree with the statement: "Political parties should allow MPs to vote in Parliament according to what they believe is right, even if it is not consistent with their party's position, with very few (six per cent) who strongly disagree."'

The dominion of the Senate derives from the chamber being accessible and scrupulous in the conduct of its legislative work (consider, and compare to the House of Commons, the breadth of its examination of the Fair Elections Act in 2014). Embracing these qualities, the Senate acts as a bridge to the public, whose concerns most often are not political so much as concerns about the workplace, family, religion, health, diversity and citizenship. To that list of familiar topics may more recently be added civic issues that defy traditional jurisdictional compartments: science, the environment, and culture. These are not constituency or regional issues as those terms are generally understood. Still, they serve to thicken the network of Canadians interested in the activity of the upper chamber. Like the country it serves, the Senate has demonstrated a capacity for adaptation, and may still do so. Distinctively Canadian at its creation, it remains so 150 years on.

Another dimension of civic empowerment is the representation, promotion, and protection of regional interests. In its ruling in 2014, the Supreme Court of Canada specifically speaks to the 'distinct form of representation for the regions' provided by the Senate. It is important to be clear on this point: although not an elected body, this raison d'être – to be the voice of Canada's regions – remains as relevant today as at the drafting of the constitution. Nor should the relevance be assumed to be limited to voice alone—for as the Supreme Court of Canada observed in 1980: 'a primary purpose of the creation of the Senate, as part of the federal legislative process, was … to afford protection to the various sectional interests in Canada *in relation to the enactment of federal legislation*[70].

The redistribution that came into effect in the last general election reinforces the logic of this point: those provinces with the most seats in the House of Commons were awarded more, while the Atlantic

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[68] 'Parliament, Meetings and Civil Society,' Australia, Senate Occasional Lecture Series, 27 July 2001 http://www.aph.gov.au/SENATE/pubs/pops/pop38/c08.pdf.

[69] George W. Ross, *Getting Into Parliament and After* [Toronto: W. Briggs, 1913), 7.

[70] *Reference re: Legislative Authority of Parliament in Relation to the Upper House* [1980], 1 SCR 54 at 67, emphasis added.

Provinces, Manitoba, and Saskatchewan remained as they were — or in proportionate terms, with fewer seats. In consequence and just from the perspective of arithmetic, the rationale for the Senate grows stronger. There is another reason to see the Senate's contribution to bicameralism benignly: regional politics often tells us about ourselves more faithfully and more accurately than do the electoral returns from the constituencies or the nation. This is because region is more than a geographic expression. That is why the Senate is such a useful sounding board for cultural, professional, and social interests, among others, that are not territorially rooted: children, the elderly, the poor (rural and urban), the sick and dying are but examples of the demographic heterogeneity that constituency and even provincial profiles inadequately convey.

Notwithstanding the contrasting total numbers for the Commons and Senate (given above), it is important in this discussion to bear in mind that to talk of the Senate at work is very often to talk of the committees of the Senate at work. Legislative studies, regardless of the country in question, too often adopt a global perspective. This is ironic, since legislative committee work is usually acknowledged to be the site in most political systems of the most productive and least partisan activity. More than that, in Canada the effect of equal senatorial divisions is to defend regional interest against combinations of majorities. It is also the case that the effect of seat redistribution on House of Commons representation of slow- or no-growth provinces is to reduce the potential influence of MPs from those areas, and increase that of senators from the same areas. Might this inter-cameral transference be another aspect of complementarity? Here is an unacknowledged aspect of bicameralism, one that helps explain long-observed reticence on the part of the governments of the Atlantic Provinces to consider proposals for Senate reform of the Triple-E variety. In the same vein, Philippe Couillard, the present premier of Quebec, has indicated that he is 'unequivocally opposed to the abolition of the Senate. He believes that its core mission of giving Canada's regions a voice in Parliament is more relevant than ever.'[71]

A variation on this theme—but one that touches on other minorities—concerns parliamentary representation of official languages: the Senate makes more audible at the centre the voice of French-speaking Canadians from those parts where they do not comprise a majority of the population. In a study commissioned by the Office of the Commissioner of Official Languages (2007), political scientist Louis Massicotte concluded that official language minority communities have little to gain but much to lose if the selection process for senators is amended [that is, replacing appointment with election]'[72]. He noted that 'official language minority communities are proportionately *better represented* [emphasis in original] in the Senate than in the House of Commons.' Two reasons explain the contrast between the chambers. First, senators are appointed on the recommendation of prime ministers, who, whether Liberal or Conservative, have treated the appointment of French-speaking senators (and not only from Quebec) as important. Second, MPs are elected, and in the absence of a territorial concentration of French-speaking voters—as occurs in New Brunswick and parts of Manitoba and Ontario—it is unlikely that French-speaking candidates will be elected.

Even where such concentrations of population exist, the redistribution principle of one-person, one-vote, one-value (which, as noted earlier in this report, is becoming more pronounced with each

[71] Chantel Hébert, 'Quebec Won't Discuss Senate Reform in Isolation,' 16 June 2015 http://thechronicalherald.ca/opinion/1293447-hébert-quebec-won't-dis...

[72] Louis Massicotte, 'Possible Repercussions of an Elected Senate on Official Language Minorities in Canada,' Report for the Office of the Commissioner of Official Languages, March 2007.

redistribution) may trump the counterclaim of respect for representation of official language minorities.[73] Parenthetically, the attentive reader will have observed that mention of the Commissioner of Official Languages, in this and the previous paragraph, constitutes the third reference to an officer of Parliament in this Report (the other two references are to the Chief Electoral Officer and the Auditor General of Canada). It deserves comment that the hallmarks of officers of Parliament (there are more than the three just cited) are their independence and impartiality[74]**.** Selected by Parliament, whose agents they are, their relationship with the two chambers must be distinctive in light of the pervasive partisan atmosphere of the House of Commons, on the one hand, and the more independent Senate, on the other hand. In similar fashion, care should be exercised when weighing the meaning of the word independence (or independent) when applied to officers of Parliament as opposed to the upper chamber of Parliament.

ALLEGIANCE VS PARTY DISCIPLINE

Is there a place for the alignment of government versus opposition in the Senate? There are a number of approaches one might take to answering that question, beginning with its misperception that there is a government in the Senate. What does the designation 'government' signify in a chamber that lacks a means of exacting accountability in the sense of withholding confidence and defeating a government? **The authors of a 2015 paper 'Working Together: Improving Canada's Appointed Senate' speak to this point: '[A] possible initiative, unexplored in debate and the literature so far, would be to move for the conduct of Senate business from a Government/Opposition model to a Majority/Minority model. The Government/Opposition designations are misleading suggesting as they do that the Senate might have some role, which it doesn't have, in the functioning of responsible government.'[75]** The ministerial and collective versions of the doctrine of responsibility do not exist in the Senate, and that is a big part of the chamber's attraction. This is a red-flag-to-a-bull statement for its critics but a source of strength too; for absent a personal stake (re-election) in the success of their advocacy, senators are accountable only to the Sovereign by whose command they are appointed, and to their personal and fraternal honour. These are essential ingredients if the Senate is to act as a complementary body in a bicameral Parliament. It is no small matter that the reputation of the Senate depends upon the reputation of its least honourable member. This is not the true of the Commons, and one reason for the difference, one may surmise, lies in the equality of status of each appointed senator versus an accretion of difference

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[73] See, for example, Office of the Commissioner of Official Languages, *Investigation Report of Complaints Concerning the Redistribution of Federal Ridings Proposed by the Electoral Boundaries Commission for the Province of New Brunswick* (Ottawa, July 1996); see too *Raîche v. R.* Federal Court of Canada-Trial Division, filed September 2003: file T-1730-03; and John C. Courtney, *Commissioned Ridings: Designing Canada's Electoral Districts* [Montreal and Kingston: McGill-Queen's University Press, 2001], chapter ten: 'Community of Interest and Effective Representation'.

[74] 'For this discussion, the genus consists of the auditor general, the chief electoral officer, the information commissioner, the privacy commissioner, the commissioner of official languages, the ethics commissioner of the House, and the ethics officer of the Senate…In the past neither the public service commissioner nor the Canadian human rights commissioner was considered to qualify for inclusion .' See David E. Smith, *The People's House of Commons: Theories of Democracy in Contention* [Toronto: University of Toronto Press, 2007], 62-70 at 63-4.

[75] 'Working Together – Improving Canada's Appointed Senate' is a twenty-six pages digest of ideas presented at a symposium on Senate reform, organized by the Faculty of Law of the University of Ottawa on 28 January 2015. **(mettre le lien internet une fois disponible)**

resulting from the individual election over time of more than three hundred MPs. **If the public carries a picture of the Senate in its mind it must be that of the stately 'red chamber,' the image reproduced to the exclusion of any other by the media. Such static representation discourages making the effort, either to get outside the frame and examine the context of Senate business, or to go inside it and explore the complex layering of Senate activity beneath the surface.**

The diametrically opposed alignment of government versus opposition undermines the quintessential character the Supreme Court of Canada has articulated for the Senate, its independence. It does so with particular virulence when the influence originates from outside the upper chamber. As applied to the Senate, the government-versus-opposition alignment is doubly enforced—from without and from within. Does parliamentary bicameralism signify separation or reciprocity? Surely it must be the object of a complementary legislative body to join in and influence policy and legislation with the goal of serving the public interest. Yet reciprocity precludes autarchy, for the first implies sharing while the second is synonymous with dictation. **How to assure that the Senate operates within the parameters set down in the Supreme Court of Canada—that is, fulfil its essential purpose-- and at the same time assure that the Senate works with the Commons and the government—that is, sustain its daily, sessional purpose?** These cannot be exclusive objectives.

Which elements of the operation of the Institution that are ruled by conventions, practices, Standing Orders, or statutes could be redefined better to reflect principles stated in the ruling of the Supreme Court of Canada?

Before answering that general question, it would be useful to summarize once again the 'principles' stated by the Court. These are:

Security of tenure supports independence in conducting legislative review.

Bicameral legislature gives shape to the Constitution Act, 1867

Preambular phrase, '**Constitution similar in Principle** to that of UK,' continues to apply.

The Senate provides **sober second thought**.

The Senate provides a **distinct form of representation** for the regions that joined Confederation.

Over time, the Senate has come to **represent various groups** that were under-represented in the Commons (a forum for ethnic, gender, religious, linguistic and Aboriginal groups).

The **foundational principles** of the Constitution include federalism, democracy, protection of minorities, as well as constitutionalism and the rule of law.

The Constitution should be viewed as having **an 'internal architecture**,' which means the individual elements of the Constitution are linked to the others and must be interpreted by reference to the structure of the Constitution as a whole.

The **assumptions** that underlie the text must inform our interpretation, understanding, and application of the text.

The principle of **constitutional equality of provinces** as equal partners in Confederation prevails.

The object of this enterprise is to set the Senate apart from the Commons, which chamber the public and media perceive as disciplined to the point of intransigency. Again, consider how the 'reform' bill proposed by Michael Chong is invariably described: **'**[The bill] has the potential to reverse years of power draining inexorably to the centre'[76]. It needs to be acknowledged that the terms of the bill apply to all parties. The Senate may be a complementary legislative chamber, but the ruling of the Supreme Court of Canada has provided it with both the opportunity and incentive to portray itself in alternative parliamentary terms, such as, for instance: 'We are complementary *because* we are different and an important ingredient of that difference is that we are not driven by partisan motives.' Political motives and inclinations are not foreign to senators but partisan calculations should not dictate their actions. What drives the Senate should be the public good determined under the aegis of the parameters enunciated by the Court. And the public good, as pronounced in every poll and opinion survey, is to make the institutions of government more open. It is governments that have the power and burden to decide, and the public wants more than shadow responsibility in return. On the contrary, they expect government to be responsible in the fullest meaning of that term—that is, accountable, answerable, and culpable. **Clearly, this is not the constitutional role that the Supreme Court of Canada interprets as being assigned to the Senate, although a Senate operating in conformity to the Court's description would go some distance in seeing that government itself acted responsibly. It is ironic therefore that functioning as a truly complementary legislative body, the Senate would help rescue the Commons from the low esteem in which it is currently held by the Canadian public. The binary relationship of the two chambers is inescapable when the subject is the reputation of each.**

Democratizing its iconography would go some way toward checking the reflexive and, it would seem, obligatory criticism of the Senate. In the issue of the *National Post* cited above, there is a column with the title 'Pass the Bill Already'[77] (in this instance, the Bill in question is C-279, 'An Act to Amend the Canadian Human Rights Act and the Criminal Code [Gender Identity]') written by a political science professor, in which the Senate is described as 'imperfect as it is.' As is usual with such comments, the meaning of the adjective goes unexplained. Since the professor, Kelly Blidook of Memorial University, is the author of a book titled *Constituency Influence in Parliament: Countering the Centre*, it might be assumed that he views the Senate as a centralizing institution.[78] It would be expected—and hoped—that a more open Senate would confound that assumption. In any case, it would effectively put to rest the familiar indictment of the Senate as a residual institution comprised of cloistered partisans. A contrary view, evidenced in the following comment by a present-day senator (Jim Munson), might come to prevail: 'Citizens of this country would be receptive to communicating with us, especially if they realized they are central in our thinking and commitment to a better society'[79].

What would be the hallmarks of a more open and democratic Senate? A revised selection process for senators is one, if only because the present (and past) prime-ministerial monopoly on appointments is irreconcilable with any pretense to openness. Adoption of a committee or commission-style system

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[76] John Ivison, 'MPs Buoyant as Chong Bill Proceeds,' *National Post*, 25 February 2015, A4.
[77] Kelly Blidook, 'Pass the Bill Already' *National Post*, 25 February 2015, A13.
[78] Vancouver, BC: UBC Press, 2012.
[79] *Senate Debates,* 19 June 2014, www.parl.gc.ca/Sen/Chamber/412/Debates/075db_2014.06.19.e.htm.

analogous to that used for judicial appointments in Canada, or for Canadian governors general and lieutenant governors, or for appointments to the House of Lords in the United Kingdom has much in principle to recommend it in the context of this discussion. The details of this altered scheme require study and refinement to accommodate the diversity of the federal system, but the object of the change is clear and the intent lucid. From the standpoint of the ruling of the Supreme Court of Canada in 2014, such a change would re-inforce a commitment to the values of bicameralism, independence, sober second thought, fundamental principles of the Constitution such as democracy, constitutionalism and the rule of law, and the guarantee of 'a Constitution similar in Principle to that of the United Kingdom.' As well, it would address the Court's concern about the integrity of the Constitution's architecture; for it is a fact that overbroad patronage over time has actually been reduced in its exercise in some areas of the public concern, a claim studies of the public service and the judiciary support.

The conundrum in this scheme of legislative restoration is Section 34 of the Constitution Act, 1867, which provides that the governor general 'may from Time to Time … appoint a Senator to be Speaker of the Senate and may remove him and appoint another in his Stead.' It is open to debate how far these gubernatorial powers may be changed without recourse to the amending formula of the constitution. None the less, there is a precedent: the Union Act of 1840 was amended by the Imperial Parliament to permit the Legislature of Canada to appoint or to elect the Speaker of the Legislative Council, hitherto appointed by the governor.[80] The first member elected Speaker of the Legislative Council was Sir Allan McNab in 1862. If that is the case, then the method of selecting the Speaker of the Senate, which in practice means on nomination of the prime minister, conflicts with the thrust of the present proposals to make the Senate more open and democratic. It also erects an obstacle to any proposal that the Senate imitate the secret balloting practice which MPs now follow when choosing a new speaker of the lower chamber.

Still, there may be profit in the Senate's examining the procedural changes (and their causes) that altered the operation of the Commons in the decade after 1980 (Parliament, House of Commons, Special Committee on Reform of the House of Commons [the McGrath Committee], *First Report*, December 1984. *Final Report*, June 1985). The effect of discipline in the Commons, which it needs emphasizing goes beyond voting to determining the order of House business and debate, and the composition of caucus, is strong-- on occasion very strong-- but it is not impervious to re-examination.[81] A study of when, why, and how past change happened in the House may offer enlightenment on strategies for the Senate to follow, or avoid.[82]

Yet there is the apparent contradiction: the Speaker of the Commons (the citadel of partisan feeling) is chosen by secret ballot while the Speaker of the Senate (among whose hallmarks the Supreme Court has pronounced to be independence) is selected by the governor general on advice of the prime minister. There is a way to change the convention without reducing regal power. The prime minister could ask the Senate to form a Special Committee to vet selection of three candidates for potential recommendation to the governor general. The PM would be free to select among those three senators the person to be

[80] *The Union Act Amendment Act, 1859*, 22 and 23 Vict. cap.10, cited in William Houston, *Documents Illustrative of the Canadian Constitution* (Toronto: Carswell and Co. 1891), 180-81.
[81] Stéphane Dion, 'The Right Dose of Party Discipline,' Notes for an address in the context of a symposium: entitled 'La démocratie québécoise et canadienne: un bilan de santé,' Quebec City, 9 April 2015.
[82] Sharon Sutherland, 'Responsible Government and Ministerial Responsibility: Every Reform is Its Own Problem,' *Canadian Journal of Political Science, 2*4:1 (March 1991), 91-120.

appointed Speaker. As it was done for the selection of judges for appointment to the Supreme Court by a parliamentary committee of the Commons. Perhaps, however, the contradiction is more apparent than real; for if the thrust of change is toward greater openness and democracy in the Senate, and less partisanship, especially discipline, then a hinge is required to fasten the two parts of the bicameral legislature. Parliamentary government in the twenty-first century is not, as it was in the eighteenth, about harmony, or checks and balances. Partisan feeling and perspective are irreducible features of parliamentary government: they fuel and structure debate in the Commons and assure that when a vote is required clarity of choice exists. By contrast, party discipline in the Senate vitiates debate and denies the exercise of choice. More than that, a whipped upper chamber mocks any pretense to be a complementary legislative body.

Evident already, but no less important for that, is the vital question: How to create a working relationship between the Senate and the Commons, one that does not at the same time devalue, through the imposition of party discipline, the upper chamber's independence but which, in turn, is an essential element if the Senate is to perform its constitutional role as a complementary legislative chamber? Critics never tire of enjoining the Senate not to thwart the will of the Commons because the Commons embodies the will of the people. Quite right, but challenging is not the same as thwarting; nor does it act in this manner when the will of the people is clear. Equally, the Commons, which under a scheme of responsible government means the government, should not, through the imposition of party discipline, thwart the Senate in the exercise of its constitutional responsibilities to listen, investigate, study, and report upon matters of public import.

It is a provocative notion to posit that the Senate may reject a bill that has support of the Commons. Then again, there are bills and there are bills, some of government provenance, some of private members. Is the Senate's judgment restricted according to the category of bill before it? The answer can hardly be a categorical 'yes,' for that would invalidate the quality the Supreme Court says the Senate embodies—independence, not independence in this or that context. And yet, the linkage provided by political party discipline in the two houses raises a challenge to that maxim. In 2015, when Bill C-377 (an amendment to the *Income Tax Act* affecting labour organizations) was before (and eventually passed) the Senate, its sponsor, a member of the House of Commons, told *The Hill Times* that 'he had been speaking with his allies in the Senate … and there was "tremendous support" and encouragement coming from within the Conservative caucus to have their senators fight to push the bill to a vote'.[83] In the present discussion, and for the future, the subject that requires study is not the terms of this particular bill but rather the legislative process itself and how its parts relate to one another. More especially, if, as some supporters of the Senate's legislative role maintain, the Senate performs the function of a sonar, detecting and communicating the views and opinions which the representative system in the Commons fails to detect adequately, how may silencing or limiting the upper chamber in the performance of its (non-elected) mandate be defended?

The point to acknowledge is that there are levels of independence, whether the subject is a legislative chamber or its members. In the matter of the Senate, it may be a chamber of the people but it is a representative body neither through selection nor accountability. Its independence as a chamber is limited by its complementary legislative role as an essential half of a bicameral Parliament. It is a

[83] Rachel Aiello, 'Senate Using Strong Arm of Majority to Pass Controversial Bill C-377,' *The Hill Times*, 29 June 2015, 1-5.

continuous legislative body, whose members address one another and whose primary purpose is to afford protection to the various sectional interests in Canada in relation to enactment of legislation. Politicians carry the story of Canada forward on a daily basis. The details may change, their origin does not. The 'limited identities' that historians once saw as essential to Canadians' understanding of themselves has disappeared. Not limited but multiple identities (gender, age, occupation, for example), few of which are regionally specific, define Canada today. Adopting Richard Hofstadter's phrase, one could say north of the forty-ninth parallel what was said of the United States: 'Born in the country, [Canada] has moved to the city'[84], a truth the economy, society, and plural culture verify each day. The Senate is in a better position than the Commons to speak of the common lived experiences of the people of Canada no matter where they reside, because it has the potential and perspective to engage the interests of modern Canadians who are less set than preceding generations in their partisan loyalties. John Stuart Mill argued that people are represented only if they think they are represented. Surveys repeatedly demonstrate that people believe the Commons is ineffective in representing them, particularly in holding government to account. Under a system of parliamentary government, the Senate must never replace the Commons and hold government responsible but it may make government more responsive and in that respect help moderate public cynicism about politicians and the constitution.

[84] Richard Hofstadter, *The Age of Reform: from Bryan to FDR* (New York: Vintage, 1960), 23.

CONCLUSION

The reputation of the Senate rests with senators. How to reconcile party allegiance with the tasks the constitution assigns the Senate? Public distrust of the Senate arises in part from the lack of knowledge of the Senate--how may the Senate be made known to the people it serves? A confluence of opportunities, beginning with the ruling of the Supreme Court in 2014, make the present time propitious for serious discussion and thoughtful action on the future of the Senate.

The upper chamber is perceived to be a partisan body whose proclaimed independence is a sham. The negative publicity of the last two years confirm the public's low esteem for the upper chamber. The media coverage, intensive as it has been, has done little to educate Canadians in the work of senators or the Senate. In sum, Canadians at large are ignorant of the Senate and its constitutional responsibilities, except they know that senators are partisan appointments. The Reform Party's long campaign for a Triple-E Senate and the former government's commitment to introduce some electoral component into senatorial selection has communicated the present Senate's composition. On the subject of the blank sheet that Canadians bring to the topic of the Senate, it should also be noted that the Supreme Court of Canada's ruling of 2014, which provides backdrop for this Report, is not widely known or its reasoning appreciated.

It rests with the senators to restore the reputation of their chamber. On the basis of the present study, there appear to be two broad avenues that must be pursued. The first concerns the place of partisanship, and more particularly, party discipline in the life of the Senate. How to reconcile discipline with the many and varied tasks and responsibilities that the constitution handed the Senate, which time has matured and multiplied, and which growing numbers of Canadians-- minorities are an example-- look to the Senate to protect? The second concerns openness. As already discussed, Canadians are unhappy with their parliamentary and electoral institutions. They see them as unresponsive to the public and ineffective in holding government to account. A Senate where party discipline does not drive all before it, and which itself is technologically competent to participate in the revolution of electronic communication, offers young and old, but especially young, Canadians a forum in which to be heard.

Several of the themes in the present analysis, such as improving the selection process for senators, electing the Speaker, expanding communication with the public, and reducing partisanship, are also to be found in the report 'Working Together: Improving Canada's Appointed Senate.' In addition, that report advocates other specific changes, among them, improved accountability and heightened practices of transparency. It is unnecessary to repeat those proposals here, although it should be said that 'Working Together' and 'Coming to Terms' need to be read as complementary analyses of the changed environment in which the Senate of Canada finds itself following the Supreme Court ruling of 2014. They provide a foundation for the discussion that must take place in light of that ruling. In social inquiry, it is often said that the prize goes not to those who give the best answers but to those who ask the right questions. These documents provide the base for posing essential questions to guide the future of the upper chamber.

What are some indices of openness? Aside from the Speaker of the Senate, whose method of appointment has already been discussed, chairs and vice-chairs of committees should be selected by their peers. The broadening of loyalties which this change would promote should, as a principle, be extended: for instance, no senator whatever his or her responsibilities should be in receipt of additional indemnity for duties they perform within the Senate committees' structure. As a general principle, a senator should be a senator. There should be no whipped votes, the rationale for this being that the Senate is by nature a non-partisan institution.

A common criticism of the Senate is that it is secretive. How valid the complaint is open to question, but it clearly arises in part from the public's lack of knowledge of the second chamber. If the Senate is to change this perception, then transparency and disclosure must be placed high among qualities to strive for. Television coverage of all aspects of the chamber's activities would silence critics who say they are denied knowledge of what the Senate is doing. The proceedings of the Internal Economy Committee should also be held in public. The public and the media's conclusion, along with comments on the content of the Auditor General's report, support the proposition that the Senate did not adequately regulate itself and its members. In that case, there may be need for a Canadian equivalent to the Independent Parliamentary Standards Authority (IPSA) in the United Kingdom, which manages the expenses and sets the pay and pensions of MPs in the Commons at Westminster. In the public mind the Senate is a corporate entity that supersedes its members. For that reason, there appears to be a strong argument in favour of creating an institutionalized internal audit regime with access to documents related to expenses and contracts. A proposed example is advanced by Jean T. Fournier, the first Senate Ethics Officer, 2005-2012.[85]

IPSA is a statutory body established following the parliamentary expenses scandal in the United Kingdom in 2009. Its job is to decide upon policies that assure MPs at Westminster carry out their responsibilities in a manner that is efficient, cost-effective, and transparent. IPSA reports to the Speaker's Committee (IPSA), whose job in turn is to see that the IPSA is efficient and cost-effective. The chair of the IPSA, Sir Ian Kennedy, has said that 'no-one wanted the system that brought Parliament to its knees in 2009 to come into being, but it was the inevitable result of hard decisions deferred'.[86] In the matter of the Senate, what has been said earlier about the value of comparisons in the selection of judges (in Canada) and peers (in the UK) applies to the model offered by the IPSA. Is what happens in the UK imitable in Canada? Are the problems to which this response is an intended solution the same as (or sufficiently similar to) problems that have arisen in Canada in comparable spheres? The answer to that question goes beyond the focus of the present analysis of bicameralism and the Supreme Court of Canada ruling in 2014. But the subject which the IPSA, and any independent authority of its kind, does raise is the effect the jurisdiction of such a creation has on the ancient but no less modern concept of parliamentary privilege. In the words of a parliamentary committee at Westminster: 'Parliament is not always well advised to adopt a passive stance. There is merit, in the particularly important areas of parliamentary privilege, in making the boundaries reasonably clear before difficulties arise. Nowadays

[85] **'**A New Independent Senate Expenses Commissioner Should Have Sole Jurisdiction over Expenses,' *The Hill Times*, 22 June 2015, 1 and 14.

[86] Sir Ian Kennedy, Chair, IPSA, 'Opening Remarks on Trust and Remuneration,' London, 5 July 2013, parliamentarystandards.org.uk/NewsandMedia/Speeches/IPPR_Speech_5_July_13_Distribution_Version.

people are increasingly vigorous in their efforts to obtain redress for perceived wrongs …If Parliament does not act, the courts may find themselves compelled to do so.[87]

At the present moment (Fall 2015), an unprecedented confluence of opportunities, in the form of the Supreme Court Ruling, the Auditor General's Report, the Special Report of the Rules Committee on Privileges and proposals advanced by political parties during the last general election, has arisen to promote a reassessment of the role, function, and composition of the Senate. As well, there is the opportunity to develop a consensus on a set of recommendations to be implemented. In its ruling, the Supreme Court spoke of the Senate as a key part of the 'constitution's architecture' (para.26 and 27). In subsequent public discussion that phrase proved to be contentious because it was deemed ambiguous and permissive. Some critics have seen the metaphor as artificial—'a delicate construct the Supreme Court conjured … out of the air.'[88] As a corrective to that perspective, it is instructive to read a review of 'real' architecture that has nothing to do with the Senate or Canada but none the less speaks aptly to the role of an upper chamber: 'The creation of architecture is a balancing act that contends not only with physical forces like stress, resilience, and gravity, but also with psychic forces like confidence, inspiration, and, often enough, sheer persistence. Ultimately, in order to work at all, an architectural design must come to terms with the world around it'.[89] The link between the Senate and 'the world around it' is surely to be found in the constitutional form articulated by the Supreme Court of Canada. **The authority of the Senate comes from the range and quality of its work. It is for that reason that the present method of senatorial selection is countervailing and negative in its influence.**

If the Senate is to become the chamber that listens to Canadians who feel they cannot get a hearing from government, then the Senate must consider unprecedented innovations, which could include provision for whistleblowing, with legislation to protect public employees who suspect wrongdoing within the chamber, and an extension of the access to information legislation to the Senate. As indicated above, there will be a need to reconcile the thrust toward openness with the custom of parliamentary privilege.

Change of this magnitude is neither easy nor palatable. Obviously, it requires close scrutiny. In its support is the argument that a more open Senate will become more closely aligned to the Canadian people and more strongly armed to deal with the stasis that party discipline has imposed in the past on its deliberations and on the implementation of decisions into legislative form. More than that, a commitment to openness strengthens the Senate in its constitutional role as an independent, complementary, and equal partner of the Commons in Parliament.

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[87] United Kingdom, Joint Committee on Parliamentary Privilege (UK), *Parliamentary Privilege- First Report- Volume 1. 9 April 1999* at para. 26, quoted in Senate of Canada, 'Parliamentary Privilege: A Discussion Paper on Canadian Parliamentary Privilege in the 21st Century,' *Interim Report of the Standing Committee on Rules, Procedures, and the Rights of Parliament,* June 2015, 23.

[88] Andrew Coyne, 'Supreme Court Ensures Our Widely Reviled Patronage House (the Senate) Will Stay Forever,' *National Post*, 25 April 2014.

[89] Ingrid D. Rowlands, 'In the New Whitney,' *New York Review of Books*, 26 June 2015, 14.