

# SIPP Briefing Note

The Saskatchewan Institute of Public Policy

Issue 17, November 2006

ISSN #: 1708-8844

## SENATE REFORM

### Is This the Beginning?

by David E. Smith and John D. Whyte

#### INTRODUCTION

Reforming the Senate to make it electorally accountable, more effective and better able to represent regional interests has, for a long time, been given high priority in the West - particularly by Conservative governments in Alberta. It is, therefore, not surprising that when Canada elected a Prime Minister from Alberta, and from the right, Senate reform was placed on the government's agenda, and has once again become a matter for political attention.

On May 30, 2006, the deputy Government Leader in the Senate introduced Bill S-4 to amend the Constitution of Canada in order to establish an eight-year term limit on all future appointments to the Senate. Two days later the Senate held a long and careful debate on this proposal. Many senators sought to place this proposal in the broader context of other elements of Senate reform.

On June 27, 2006, Conservative Senator Lowell Murray introduced a resolution, co-sponsored by Liberal Senator Jack Austin, that would alter Senate representation through increasing Senate representation for British Columbia by six senators, for Alberta by three senators and for Saskatchewan and Manitoba by one senator each. Because this proposal cannot be implemented by ordinary parliamentary enactment, Senators Murray and Austin initiated a constitutional resolution as called for in the Constitution's rules for amendment.

On June 28, 2006, the Senate passed a motion referring the proposed reforms to a Special Senate

Committee. However, its terms of reference went beyond the specific proposals and invited a comprehensive review of Senate reform. The Special Committee met that day and decided to call expert witnesses before it in September. The Committee heard from about a dozen constitutional experts two of whom were David Smith and John Whyte, both Senior Policy Fellows of the Saskatchewan Institute of Public Policy. Both Professors Smith and Whyte prepared submissions and spoke to them at Committee hearings, as well as answered senators' questions.

Prime Minister Steven Harper appeared before the Special Committee on September 7, 2006 and made it clear that he gave Senate reform a high priority and that he was not willing to have his modest initial proposal stalled by some senators' counsel of perfection and completeness. He said to the Special Committee: "I have carefully reviewed your deliberations on the bill. Some senators have said it goes too far; others have said it does not go far enough. However, we can all agree on one thing: it does go somewhere, somewhere reasonable and somewhere achievable .... Canadians will be watching to see whether the current Senate will make itself part of the process of change." His appearance before the Committee gave force to this constitutional reform initiative and to policy debate on reform of one of the chambers of our national parliament.

On October 26, 2006 the Special Senate Committee on Senate Reform issued two reports, the first one dealing with the Harper proposal for eight-year senatorial appointments and the second

Saskatchewan Institute of  
Public Policy  
University of Regina,  
College Avenue Campus  
Gallery Building, 2nd Floor  
Regina, Saskatchewan • S4S 0A2



General Inquiries: 306.585.5777  
Fax: 306.585.5780  
sipp@uregina.ca  
www.uregina.ca/sipp

one dealing with the Murray-Austin proposal to increase Senate representation from Western Provinces. The recommendation of the first report is that “most Committee members endorse the underlying principle... that a defined term limit to the terms of Senators would be an improvement to Canada’s Senate”.

The second report’s conclusion is that most, but not all, members of the Committee support adoption of the Murray-Austin proposal “so as to give governments and legislatures across Canada a starting point for providing the West with equitable representation in Canada’s Senate.”

The low spirit for constitutional reform and the controversies that will be stirred by the Murray-Austin proposal may well preclude further progress towards its constitutional implementation. The Harper proposal, however, will proceed and will, it is hoped, trigger public debate over the purposes of the Senate, as well as the essential conditions for its legitimacy. It is because of the current need for a full debate on the role and structure of the Senate that the Saskatchewan Institute of Public Policy is pleased to publish the submissions of David Smith and John Whyte.

## SUBMISSION TO THE SPECIAL SENATE COMMITTEE

### 20 SEPTEMBER 2006

#### DAVID E. SMITH

‘A Constitution similar in Principle to that of the United Kingdom’—This phrase in the preamble to *The Constitution Act, 1867* is frequently cited to support the claim that the Senate of Canada was modelled on the House of Lords. This is an exaggeration if not an actual error in interpretation. The Senate was an appointed not an hereditary body after 1867, and while membership in each body lasted for life, until the retirement age of 75 was introduced for Canadian senators in 1965, the truly significant difference between the two chambers lay in the Senate’s fixed membership (save for the provisions of s. 26). There were historical reasons for this provision but the intent was clear—to limit executive influence in the affairs of the upper chamber of Canada’s Parliament. Here, as in the minimum age and property requirements senators were to meet, can be found evidence of the concern the Fathers of Confederation had for the independence of the Senate. Men of property, it was reasoned, stood apart from men of political power. Four thousand dollars real property may seem derisory as a

qualification for appointment to the Senate 140 years after Confederation, but the principle underlying that (and the minimum age) provision remains incontrovertible: senators should stand apart from the political fray.

Why they thought this way can be explained, first, by the role assigned the new Senate—to protect sectional and minority rights—and, second, by the experience Canadian legislators had been through in the 1850s when governmental instability had become the hallmark of politics in United Canada.

Agreement on the structure and composition of the Senate took far longer to achieve at Quebec City than did agreement on the form of the lower house. This is a well-known fact and often commented upon today, but the significance of the prolonged debate goes unexplored. In the 1860s in Canada, 35 years after passage of the Great Reform Bill in Britain, no one disputed that the house of initiative and responsibility would be the Commons. Yet, unlike in Britain where a House-of-Lords ‘problem’ was beginning to emerge—what was its function to be in the new world of electoral democracy? (1867 saw passage at Westminster of the second enlargement of the franchise)—there was no doubt in Canada what the Senate’s role was to be. It was to protect vulnerable minorities. It had other tasks, such as to scrutinize legislation coming from the Commons, but protection was its primary role. And it was this role that particularly required an assured measure or sphere of independence. So certain were some Fathers of Confederation (for instance, George Brown) of this role for the upper chamber of the federal Parliament that they pressed for a unicameral provincial legislature. Ontario had no need of local bicameralism since the Senate stood ready to come to the aid of threatened minorities.

This is a discursive introduction to a specific proposal: to replace the requirement that senators retire at age seventy-five with an eight-year term. This is a substantive change, since it is possible under existing provisions for a senator appointed at minimum age 30 to sit for 45 years. In reality, such longevity in office is rare; most senators sit in the Chamber for about twelve years. Substantive, yes, but does the proposal found in Bill S-4 qualify, in the words of the Supreme Court of Canada in the Senate Reference of 1980, as a ‘radical change in the nature of one of the component parts of Parliament’? For if it does, the Supreme Court advised a quarter of a century ago such change cannot be

achieved by the government of Canada acting alone to amend the Constitution but rather following consultation and with the support of two-thirds of the provinces and 50 percent of the population. In short, can the government unilaterally replace the age limit with a term limit for senators?

The issue to be determined is whether a term limit appointment compromises the independence of senators. Do term limits conflict with the Senate realizing its role in the political system as a repository of experience and independence? Is a twelve-year term to be preferred to an eight-year term? Is that question moot if term-limit senators might be reappointed? Yet, if they may be reappointed for another term, of whatever limit, does that possibility compromise their independence since their career as senators beyond the initial term depends upon re-nomination by the government.

*If senators may be reappointed for another term, of whatever limit, does that possibility compromise their independence since their career as senators beyond the initial term depends upon re-nomination by the government.*

Before the prime minister appeared here ten days ago and confirmed his government's intention to introduce an electoral component to the appointment process, it might have been possible to argue that a term appointment of substantial length would not undermine the Senate's character as an independent legislative body. (Nonetheless, the argument for the independence of term-limit senators by way of comparison with the independence of term-limit officers-of-Parliament is unpersuasive, if only because senators as legislators do something by way of direct consent or withholding of consent to the government's legislative program; they are not ombudsmen). Election—in whatever form—challenges that assumption, because it links the senator to a constituency to which he or she is accountable. Such a change fundamentally alters the federal system and the arrangement of Parliament's parts as set down by the Fathers of Confederation. Here is one reason why the Supreme Court of Canada needs to be asked for an opinion on the government's course of action.

Another is the constitutional sleight of hand that is being advocated: in the absence of national senatorial elections, the prime minister would recommend to the governor general persons who have won provincial 'advisory'

elections conducted along the lines of earlier such contests in Alberta. How far can the prime minister's prerogative in the selection of senators be alienated to the people under the Constitution? How apt is the analogy sometimes heard that 'advisory' elections, which would dictate the prime minister's senatorial recommendations, are on a par with the conventions that inform the operation of constitutional monarchy? On the contrary, these changes would affect the contribution of the Senate to the legislative process. Would that effect be such as to fall under the prohibition on unilateral action enunciated by the Supreme Court of Canada in 1980 and now reflected in section 42 of *The Constitution Act, 1982*?

Several other uncertainties surround the matter of 'advisory' elections:

- a. Are Senatorial terms to become part of the electoral cycle?
- b. The government has promised to introduce fixed election dates for the other place. What would be the nexus regarding election dates between the two houses of Parliament? Some provinces have talked of holding senatorial elections at the same time as they hold municipal elections.
- c. Would provincial electoral laws, and not the Canada Elections Act, regulate senatorial contests? Although it may not be possible to answer at this time, does the possibility of some provinces moving to a proportional representation electoral system, while others maintain plurality elections present a problem for 'elections' to a chamber of the national Parliament? Would there not be a compelling argument for uniformity in this matter? What laws on campaign financing would apply to Senate elections?
- d. What provisions would regulate the transition to an all-elected or -appointed term-based chamber?
- e. How frequently might senatorial elections be expected in a province like Ontario or Quebec, each of whom has twenty-four seats in the upper chamber?
- f. Are the elections contemplated to be held at large or in districts? What provisions are to be made to accommodate the Constitution's requirements for senators to sit for specified districts in the province of Quebec?

- g. Could an elected Senate force a government to go to the people? If the answer is no, then what principle is being enshrined?

Frustration with the pace and progress of Senate reform is a familiar complaint, although it needs to be said that the push for an elected Senate is less than two decades old. It is a truism bordering on the trite to say that institutions are difficult to change. Yet it is a reality that demands study. The easy responses—that self-interest is at work or that multiple but conflicting interests act to paralyze reform—are incomplete explanations. Even where there is a committed will and a resigned acceptance to the inevitability of institutional change, it still may not happen; or it may become frozen *in medias res*. A prime example is reform of the House of Lords. The government of Tony Blair, in power for nine years and, at its beginning, backed by one of the largest parliamentary majorities in British history, has been unable to carry through its program to transform the Lords. The hereditary Lords are gone, except for a rump, but the representative chamber envisioned by the Wakeham Commission and subscribed to in principle by the Blair Government remains unrealized. Reform takes time and concentration, while a government's perspective is dictated by the electoral cycle and the diffuse and conflicting demands on its attention. When the Blair Government moved on the second stage of Lords reform, after dealing with the peers, its draft legislation came under vehement attack as much from its own ranks as from the Conservative opposition. The reason was intra-Labour division over the government's policy on Iraq.

Moreover, there was no extra-parliamentary, countervailing pressure to keep government on track of reform. In Britain, as in Canada, there is no organized public opinion in support of reform to the upper chamber. This is not to say that public opinion supports the *status quo*, but rather that it has no view on the matter. Unless, of course, the public is specifically asked whether the upper chamber should be changed. Left to their own priorities, the public in Canada and the United Kingdom never volunteer upper chamber reform as a pressing issue.

Nor is this a new phenomenon. It was the lack of a sense of purpose for an upper chamber and of its place in a 'Westminster-type' parliament that explains the extraordinarily long time the Fathers of Confederation spent reaching agreement on the Senate's design. The phrase 'sober second thought' is frequently employed

when describing the role of the Senate. No doubt scrutiny and deliberation are important aspects of the Senate's work, but its *raison d'être* at the beginning—and still—is the protection of minority and sectional interests. Canada is a country historically attuned to societal diversity, especially when 'grounded' in territory. Then, as now, members of Parliament were understood to be tribunes of the people. And the people of Canada in 1867, as today, were distributed unevenly among the federating colonies. A principal attribute of the Senate, in its founders' eyes, was that it would compensate for the leavening effect of rep-by-pop in the lower house. They skilfully achieved their objective not just by agreeing to give smaller provinces more Senators than the 'deserved', when compared with the larger provinces, but by harmonizing the procedure through the invention of Senatorial regions. A variant on this theme— Senatorial districts in Quebec— offered further evidence of the Fathers' constitutional and institutional astuteness, as well as their paramount concern for protecting minority interests.

Contrary to critics of the Senate who label it as partisan and depict its activities as but an extension of the battles in the lower house, partisanism in the upper chamber has from the beginning been comparatively muted. One reason is that it took more than a decade for partisan politics in the new Dominion to take form. The impress of national parties followed Confederation. Another was that the new senators knew they had to make their unique institution work. The experience with the elected Legislative Council of the Parliament of United Canada, introduced in stages after the mid-1850s, had not been propitious (good candidates would not stand; the lure of the Assembly proved too strong). There was a third reason—more compelling over the longer term—why a party analysis of the Senate proved to be flawed: early in its history the Senate developed a corporate loyalty that resisted the claims of party unity coming from the Commons. Rephrasing in Canadian language an observation once made by Disraeli: a prime minister may make senators, but he or she cannot make a Senate.

The foregoing comments are relevant to the contents of Bill S-4 because they provide historical evidence for the proposition that the independence of senators is fundamental to their function. Whether either an appointed term of office (renewable or not) or an elected term of office is consistent with that function, and whether an amendment to the Constitution to effect that change can be carried out under S.44 of the Constitution may authoritatively be answered only by the Supreme Court of Canada.

*There is no evidence to support the link, between numbers of senators a province has in Parliament and the contentment or discontent of its residents with the political system.*

Separate from the preceding remarks on Bill S-4 are the following comments on the motion to amend the Constitution of Canada – Western Provincial Representation. According to the terms of this motion, the present western senatorial region would be divided into 1) a prairie senatorial region, consisting of the three prairie provinces, with twenty-four senators (ten for Alberta, and seven each for Saskatchewan and Manitoba) and 2) a new British Columbia senatorial region with twelve senators. The intent of the motion is to lessen western Canadian discontent at the perceived unfairness in present provincial representation in the Senate. Each of the four western provinces has six senators, the same number as Newfoundland and Labrador, and fewer than the less populous provinces of Nova Scotia and New Brunswick. Yet British Columbia and Alberta are the third and fourth most populous provinces in Canada.

To my knowledge there is no evidence to support the link, which this motion purports, between numbers of senators a province has in Parliament and the contentment or discontent of its residents with the political system. Westerners may complain that federal public policy is inattentive to their needs, yet federal public policy does not emanate from the Senate (or from the House of Commons). On the matter of numbers of senators, the proposed allocation is dictated by the Constitution's requirement that the senatorial regions each have twenty-four senators. Saskatchewan and Manitoba, whose populations are close to static, each receive one additional senator, while Alberta, whose population is growing rapidly and is close to three times that of either of its prairie neighbours, receives an additional four senators. British Columbia's senators double in number, while the new British Columbia senatorial region is half the size of the other senatorial regions.

Half a century ago, British Columbia and the prairie provinces were treated in popular parlance and by such agencies as the then Dominion Bureau of Statistics as separate entities. I suspect this latter practice came about because of the federal government's control of the prairie

provinces' natural resources until 1930. A reading of the Report of the Royal Commission on Dominion-Provincial Finances (Rowell-Sirois), published in 1940, conveys the viewpoint of the day. This perspective began to change after the Second World War in part because of demographic shifts that brought about the urbanization of much of the West's population. More than that, after 1970 the four western provinces began to work together in many areas, transportation being one example. The Western Economic Opportunities Conference called by Prime Minister Trudeau in the early 1970s propelled this shift in perspective, particularly among the governing elites of western Canada. For these reasons, I find the proposal to create a separate senatorial region antique and unrooted in current western economic and organizational practices.

While disparate provincial populations are not the foundation of the motion, they do provide an indirect rationale for the proposal. To the extent that population enters the discussion of Senate reform, it also raises the question of representation by population in the House of Commons. This last has always been carried out within the boundaries of the provinces and has, for a number of reasons, markedly diverged from a strict rep-by-pop standard. The linkage between the two houses in this matter may not be germane to the present discussion, except in one respect: the question of a nexus will undoubtedly be raised at some point if the motion is adopted and proceeds as a proposed amendment to the Constitution.

I do not find the argument in support of this motion compelling. For this reason, I do not think the Committee should recommend its adoption by the Senate.

## BIO

Professor David Smith's book on Canadian Senate, *The Canadian Senate in Bicameral Perspective*, has recently been issued in paperback edition by the University of Toronto Press. Dr. Smith is a Professor of Political Studies at the University of Saskatchewan. He holds degrees from the University of Western Ontario (BA), Duke University (MA and PhD), and the University of Saskatchewan (D.Litt.). He was elected Fellow of the Royal Society of Canada in 1981. In 1994-95 he was President of the Canadian Political Science Association. Professor Smith received the Léger Fellowship in 1992 and a Killam Fellowship in 1995-97. His book *The Republican Option in Canada, Past and Present*, which

appeared in 1999, received the Smiley Prize from the Canadian Political Science Association as the best book in Canadian politics and government for 1998 and 1999. His new book *The People's House of Commons: Theories of Democracies in Contention* will appear in February 2007.

## SUBMISSION TO THE SPECIAL SENATE COMMITTEE

20 SEPTEMBER 2006

JOHN D. WHYTE

This submission consists of three parts. The first part discusses three general features of constitutional change. The second part identifies three lenses through which reform proposals relating to the Senate of Canada might be examined. The third part is a suggestion. This structure of loosely related parts has the virtue of reflecting my view that there is no single analytic progression that leads to inevitable conclusions. Notwithstanding the bravura of the concluding part of this submission, I believe there is no clear course of reform, just possibilities that may conduce to the good Canadian state.

### I General Observations

#### 1. THE PROBLEM OF ACCOUNTABILITY

The first general comment is that Senate reform should be seen as another manifestation of the perennial political anxiety that those forces and institutions that hold sway over us, including corporations, governments, officials, adjudicative bodies and international economic and political agencies, are insufficiently accountable. We want our governance institutions, especially, to respect interests and reflect political virtues, but we do not quite know how to structure responsibilities, powers and relationships to secure those interests and virtues in public government. The temptation is great to choose one political virtue—in fascism, strength, in theocracy, faithfulness, in liberal democracy, popular consent—and cling to that virtue as the sole building block. But governance principles are not so singular; we care also about expertise, legalism, representation, checks against tyranny and so forth. Our structures of accountability and legitimacy always address a complex set of questions: what are office holders accountable for, who are they accountable to, by what processes are they held accountable, and through what criteria is accountability measured.<sup>1</sup>

In the case of the Canadian Senate, the missing ideas of accountability are clear: the lack of an electoral basis for holding legislative office, the presence of misplaced loyalties (historically it has been claimed that senators hold undue loyalty to their appointers and to private institutional interests), lack of transparency (we do not know who senators are, why they were chosen and on what basis they make their legislative choices) and the absence of any public mechanism (electoral or otherwise) to assess their performance. These are, indeed, serious concerns for any democratic state. The case for senate reform is overwhelming; it is not just an idle dream of politicians and intellectuals.

*In the case of the Canadian Senate, the missing ideas of accountability are clear: the lack of an electoral basis for holding legislative office, lack of transparency and the absence of any mechanism to assess their performance are serious concerns for any democratic state. The case for senate reform is overwhelming; it is not just an idle dream of politicians and intellectuals.*

#### 2. RESTRAINING LEGISLATIVE POWERS

The second general comment is that in designing (and re-designing) governance institutions in a liberal democratic state one must decide on the specific purposes of an institution and then reform its composition, powers and relationships with other institutions in a way that achieves those purposes. There is one basic purpose, common to all constitutional design (at least in constitutional democracies), and that is diffusion of power. Even democracy (perhaps, especially democracy) can be tyrannous without the checks provided by such things as legalism and an independent judiciary, independent legislative officers, federal distribution of governmental powers, regimes for protecting rights and mechanisms for ensuring fair elections. In a constitutional democracy the power to govern can never be the power to govern completely.

From this perspective, the current Senate is valuable. It serves to attenuate the legislative power of the Commons and subject it to further legislative review. It is Canada's apparatus for second thoughts on

legislation, an element of legislative design that is remarkably common in democracies. Of course, bicameralism is not a universal legislative feature—it is no longer used in any of the provinces—and one can well ask why another chamber, as opposed to, say, further hurdles in the Commons’ legislative process, is needed to meet the need for sustained careful reflection.<sup>2</sup> The answer to this is twofold. First, another agency with its independent processes and priorities and its separate culture, is far more likely to interrupt the momentum behind legislative initiatives than would simply adding more elaborate processes in a single chamber. Bicameralism is attractive as a legislative check not so much because it provides a second thought but because it causes legislative thinking to start all over again – it can cause reconsideration and refinement of the original legislative idea.

However, the more compelling basis for bicameralism is that the check of the second chamber is not just intellectual or prudential; it is also representational. Second chambers under bicameralism are never purely an opportunity to consider again the legislative plan but to bring into consideration interests and values that the first chamber is, by virtue of its structure and composition, likely to overlook – interests and values that the makers of the constitution concluded ought to be systemically included in the legislative process.<sup>3</sup> There are many interests that constitutional makers may want to privilege in the legislative process: the interests of the wealthy against the power of the mass of the poor, the interests of the ancient and leading families against the power of the newly enfranchised, the interests of the crafts, occupations and professions to enhance legislative respect for labour and productivity, the interests of minority communities against the exclusionary tendencies of the majority, the interests of smaller political factions against the force of the dominant political parties, the interests of the less populous regions against the power of the national majority and, of course, the interests of the provincial political communities against the obsessiveness of national politics.

It would seem sensible that we know the representational purpose of the second chamber in order to design all of its elements: its membership, its mode of selection, the term of office of its members, and its powers. But some will say that the reform process is less complex than this. They will say that the claim for on-going democratic accountability is so dominant at least with respect to a legislative branch that, regardless of legislative purpose, the questions of selection and length of term must be

answered through instituting popular elections for a limited term. Under this view there are two distinct sets of reforms: reforms relating to selection and term that should be shaped by democratic values and reforms relating to composition that can be worked out in light of representational purposes.

But these inquiries are not actually separable. For instance, to make elections and limited terms a necessary starting point runs the risk of converting a legitimacy deficit into a legitimacy surplus thereby altering the political dynamics of the second thought function. The legislative review function can under strong legitimacy conditions become a full veto function, as well as give rise to the power to initiate a full legislative agenda. Or, to adopt a scheme of province-based (and, worse, province administered) senatorial elections may produce such a strong regionalized legislative focus as to lead to governance by logrolling.<sup>4</sup> These results could paralyse legislative reform or, at least, hold it hostage to those interests given special recognition in Senate composition. In other words, Senate reform, like all constitution-making requires a fine balance and in engaging in reform it is wise to know, and to take account of, all of the goals and consequences of reform.

### *3. CONSTITUTIONAL STRUCTURES AND POLITICAL IMPERATIVES*

The great danger of constitutional reform is to miscalculate the effect of changes. This miscalculation most often comes about through failure to recognize that constitutions are usually about relationships between holders of power; a change in the constitutional structure will change how power is understood and exercised.<sup>5</sup> In short, constitutional arrangements produce political imperatives even when the constitutional text contains no explicit mandate.

In the context of Senate reform, as has already been noted, any redress to the problem of democratic legitimacy is bound to lead to increased conflict between the two legislative chambers. This is true even with respect to the slight increase in legitimacy that will follow from limiting the terms of senators to eight years. Those senators will not likely take on the mantle of diffidence and modesty that those appointed to a privileged position for all of their working life are bound to feel.

The change in regional representation underscores a representational duty that is not explicit in the current constitution. This is likely to drive senators to promote regional interests that are now compromised by broader

national interests. In other words, while the current Senate reflects the need for federalist and regionalist perspectives in national governance, enhanced emphasis on regional representation will impel a more forceful pursuit of that element of political calculation.

A higher political confidence in senators, whether from limited terms or from being elected to a limited term, without facing concurrent electoral risks associated with defeating a government's program, means that senators are likely to stick to their principles—stick to their guns—even when the conflict in goals and principles around a specific set of policy options cries out for compromise and accommodation. The second thought function of the current Senate has served to ameliorate political conflict, but under different appointment and tenure conditions they are likely to be minded to be less conciliatory.

*The situation of general discomfort with the current Senate, the apparent small space available for unilateral constitutional amendment, the simple appeal to democratic values, and the mistaken popular sense that the Senate is not terribly significant in national governance, have all worked to license constitutional reform that may be initially appealing, but is being pursued irresponsibly.*

The current proposal seems to create single eight-year terms for senators. If the apparent restriction on renewal were to be carried into the scheme for elected senators (a limitation, by the way, that would violate the spirit of the right to political participation that is guaranteed in section 3 of the Canadian Charter of Rights and Freedoms), senators would have both a high level of political legitimacy and a very low level of political accountability – a condition that is unwise anywhere and that many decry in judges. Judges, however, are limited by the principles of legalism. These senators would not be similarly constrained.

The nearly double term for senators in comparison to the term of the government is likely to cause problems for the operation of responsible government, one of the tenets of which is the government must be capable

of pursuing in Parliament its legislative agenda. While, this problem is present under the current parliamentary structure, the Senate does not frequently flex its legislative muscle to confound the government's legislative program. This carefulness in the use of power will not likely be the hallmark of a Senate comprised of members who have won big elections. One of the virtues of responsible government is that the electorate has a sure basis for evaluating a government. Its failures cannot easily be blamed on other houses and other branches. This feature of democratic accountability will become attenuated if future Senates become powerful and independent.

However, these scenarios cannot be presented as certainties, and the dynamic results of change may be something altogether different. The point is that changes in legitimacy and responsibility will change the sense of power that office holders have. The current program of reform has not been sufficiently thought out. It has not been connected to articulated purposes for the Senate. It has not been explained to Canadians. Apart from its limited first step, it has not been announced except in very general terms. The impact of the initial changes on the wisdom and feasibility of subsequent changes has not been explored and we may be mortgaging sensible future reforms to make less important reforms now. The cumulative effect of the likely changes has not been carefully evaluated.

The situation of general discomfort with the current Senate, the apparent small space available for unilateral constitutional amendment, the simple appeal to democratic values, and the mistaken popular sense that the Senate is not terribly significant in national governance, have all worked to license constitutional reform that may be initially appealing, but is being pursued irresponsibly.

## II Perspectives on Reforming the Senate

Assuming real Senate reform, and assuming that in Canada we want the second chamber of a bicameral legislature to have a distinctive representational function, there are a number of perspectives that could be reflected in a new arrangement for the Senate. In Canada, it would seem that the primary candidates for correcting under-representation in the House of Commons are vulnerable minorities, minority peoples, smaller, discrete political factions and regions and provinces. There are problems with each.

There is likely no social consent for granting strong legislative privileges to systemically excluded communities. Furthermore, of all the initiatives for social inclusion, a special legislative role may be less effective than many other forms of direct social development. Finally, if Canada is to move to elections for senators, it is difficult to create electoral constituencies for disadvantaged communities. In fact, the unlikelihood of an elected Senate serving this representational need was precisely the point of Professor Ned Franks when he identified the virtue of an appointed Senate.<sup>6</sup>

The two minority peoples in Canada that we traditionally seek to have represented in national politics are French-speaking Canadians<sup>7</sup> and the many communities of Indigenous peoples. Canada could certainly construct a second chamber around the idea of the major Canadian distinct peoples but it would certainly be felt that its legislative role should be deeply constrained. It would take a great deal of inventive statecraft to design a national legislative role that corresponded closely to the interests of ethnic and cultural communities. Furthermore, for both of the identified sets of communities, an enhanced Senate role is on a different tack from what has become the more orthodox claim in the politics of recognition – the claim for self-government.

Small political movements and factions could obtain political representation in a chamber whose members were elected by a form of proportional representation and, indeed, when proposals for an elected Senate are developed, this strategy may be adopted. However, insofar as the Senate reform is being promoted in the current moment on the basis of regional or provincial representation, this goal may not be served well by the attenuation of regional identity through a Senate membership that is loyal to broadly distributed political interests – a green party, a peace party, an economic nationalist party, a social democratic party, and so forth. Regional clout is not likely to be enhanced in government circles, or in the major parties, through the promotion of such specialist political programs. When the competing claims of regional representation and enhancing democracy through a form of proportional representation collide, constitution makers will find it difficult to reconcile both aims.

As for regional and provincial representation, there are a number of serious stumbling blocks.<sup>8</sup> The first is the special place of Quebec in the national political structure. Neither equal provincial representation in Senate

membership nor major changes that reflect changes in provincial populations will preserve the clout of Quebec members, traditionally established as about one-quarter of parliamentary members. That share has, of course, diminished slightly as the Senate has increased its size. The question is whether the roughly quarter share of membership represents an essential element of our binational accommodation. It certainly seemed to during the discussions leading to the Charlottetown Accord and one suspects that continued diminishment of the Quebec share, as would be the result of increasing Western representation by twelve members, would be taken as an attack on Quebec's relative strength in national politics. Maybe as a nation we have concluded that the strength of regionalist representation is of greater importance to the legitimacy of national governing than preserving the relative strength of Quebec's representation. For my part, however, I fear the change appears to be a breach of one of the moral foundations of national politics.<sup>9</sup>

The second difficulty in designing the Senate to reflect strongly the federal principle is the strong counter democratic effect of anything close to equal Senate membership for each province. Of course, some degree of compression of population disparities in setting the number of senators from each province may be a tolerable deviation from the one person, one vote principle,<sup>10</sup> but, in Canada, one can reasonably predict that strong disparities in representational clout will exacerbate inter-regional tensions, as well as Quebec/rest-of-Canada tensions. It would be foolish to assume that American comfort with equal representation from states in the United States Senate would translate to Canadian acceptance of such an arrangement.

A third problem of using Senate structure to enhance provincial or regional representation is that it makes little sense to substitute either the major federalist device of specific and separate federal and provincial jurisdictions or the many current instruments for giving voice to regionalism in national politics.<sup>11</sup> Will enhancement of the regional perspective and the creation of a representative duty on senators to speak for provinces and regions impair Canada's elaborate set of intergovernmental practices? We cannot be sure of the answer to this but it seems highly likely that when the legitimacy of the central government's impact on provinces is increased through having a Senate built on the idea of regional representation then the imperatives on all jurisdictions to act collaboratively will diminish. It is simply not clear that the operation of Canada's

federal state will improve through giving the Senate a significant regional representation role.

*A Senate that is structured to introduce strong provincial representation may have a deleterious effect on the efficacy of Parliament as the major instrument of national governance.*

A related concern from the opposite perspective is that a Senate that is structured to introduce strong provincial representation may have a deleterious effect on the efficacy of Parliament as the major instrument of national governance. There are many important political objectives for Canada's national government to pursue and to pursue on the basis of broad national interests – having efficient and competitive markets, promoting public security and safety, developing conditions that lead to success in the global economy, overcoming conditions that produce social exclusion, developing an effective national response to dangerous levels of greenhouse gas emissions, protecting minorities and the list can go on. An elected Senate will lead to greater resort to brokerage politics—or political trading—between the two chambers and, very likely, between the government and the Senate. When this trading of preferences is over competing ideas about the best national policy it may be a tolerable practice (although such trading tends to reduce political choice to satisfying particular interests) but it is not healthy for national political development when vote trading dilutes national interests and promotes regional interests. No effective modern state can afford to become a nation of fiefdoms and Senate reform should not produce that risk.

### III A Reform Suggestion

Is there an answer to these many demands and risks? These concerns over significantly enhanced regionalism in national politics leads to seeking ways, first, to holding elections without vastly increasing legitimacy and, hence, power and, second, not creating incentives for senators to be relentlessly parochial. The obvious devices for their goals are to sustain the political discipline over senators of national political parties and to subject Senate terms to regular nomination and electoral risk. The Senate should be elected and it should be elected under federal election management, not provincial. The term of office should be less than the excessively empowering length of eight years. Incentives to bring national party

discipline to Senate races should be maintained both to impose some degree of party restraint on Senate voting and to tap into parties' interest in choosing strong (and, hopefully, diverse) candidates; certainly some form of proportional representation could be useful in driving the major political parties to attend carefully to the need for diversity in their candidate slates. There needs to be a mechanism so that in extreme situations, such as legislative paralysis, Senate dissolution is possible and Senate incumbents can be put at electoral risk. It may, however, be impossible to describe the constitutionally desperate circumstances in which a Prime Minister could ask the head of state to dissolve the Senate. If so, perhaps electing half the Senate every three years will always make Senate elections imminent enough to produce the political accountability that will dissuade senators from unreasonably frustrating national governance. Regional representation in the Senate should be altered so that slightly less than a quarter (24) of the members come from each of Quebec and Ontario, a third (36) from the West (divided into 12, 12, 6 and 6), a fifth (20) from eastern provinces (divided into 6, 6, 4 and 4)<sup>12</sup> and three from the territories. This prescription of Senate reforms is certainly cursory and partial, and it could be facile. However, it represents an attempt to relate reforms to the purposes of a Senate described in this paper.

Whether Canada has the spirit for improving its Constitution is, of course, an open question. We all recognize the tragic consequences if we were to prove to be a nation that can no longer exercise constitutional self-determination. In the long run, a nation's greatest need is to face up to constitutional shortcomings and act to correct them.

### BIO

Professor John Whyte is a Senior Policy Fellow at the Saskatchewan Institute of Public Policy. His supplementary submission to the Special Senate Committee on Senate Reform dealing with potential legal and constitutional problems with the proposal for limited term appointments can be found at [www.uregina.ca/sipp](http://www.uregina.ca/sipp). It should be noted that in its first report the Special Committee states that: “most Committee members have concluded that there appears to be no need for additional clarity on the constitutionalization of [limited term appointments]”.

## ENDNOTES

<sup>1</sup> On the complexity of state design see, G. Mashaw, “Accountability and institutional design: some thoughts on the grammar of governance” in Michael W. Dowdle (ed.), *Public Accountability: Designs, Dilemma and Experience* (Cambridge: Cambridge University Press, 2006) 115, at 115-117 and 152.

<sup>2</sup> Indeed, there is a constant process of enhancing the influence of members of the Commons and, as this continues, a Senate process of legislative review, at least from the simple perspective of checks and balances, may be less necessary. Changes to empower the Senate through its enhanced legitimation, when coupled with new powers of members of the Commons, might excessively impede Canada’s legislative process.

<sup>3</sup> Some would certainly say that without that purpose – the purpose of introducing into the legislative process perspectives likely to be excluded or ignored in the first chamber – there is no compelling case for bicameralism. I would be reluctant to conclude this, but it may be that I am unduly wedded to the case for the constitutional attenuation of political power.

<sup>4</sup> In case this term is not widely understood, it means trading votes in a legislative process in order to obtain approval for measures that serve the interests of each of the members. It defeats the legislative ideal of each representative acting in the interests of the whole.

<sup>5</sup> The most obvious example of this is the sense of changed judicial mandate that resulted from the displacement of the statutory rights protection of the Canadian Bill of Rights through the entrenchment of constitutional rights in the enactment of *The Constitution Act, 1982*.

<sup>6</sup> See, C.E.S. Franks, “Senate reform: Et tu Stephen?” *Globe and Mail*, September 8, 2006, P. A15.

<sup>7</sup> This description of the Canadian minority “French” community is, of course, both under inclusive and over inclusive.

<sup>8</sup> For an excellent analysis of the issues surrounding regional representation in the Senate – and of many Senate reform issues – see, The Attorney General of Ontario, *Rethinking the Senate: A Discussion Paper*, February 16, 1990 (multilithed).

<sup>9</sup> The phrase “moral foundation” as a description of what is owed Quebec in the national political structure comes from S. LaSelva, *Moral Foundations of Canadian Federalism: Paradoxes, Achievements and Tragedies of Nationhood* (Montreal & Kingston: McGill – Queen’s U.P., 1996).

<sup>10</sup> In Reference re *Provincial Election Boundaries* (Sask.) [1991] 2 S.C.R. 158 a majority of the Supreme Court of Canada gave “effective representation” greater democratic weight than equal representation in allowing a fairly significant population disparity between constituencies.

<sup>11</sup> These are: First Minister’s Conferences, intergovernmental negotiations and contracts at the ministerial level, regional balance in the Supreme Court of Canada, powerful regional spokespersons in the federal Cabinet, negotiation over fiscal arrangements designed to promote horizontal equity, electoral incentives for political parties to accommodate regional voices, the principles of SUFA in the initiation of federal spending programs and the unavoidable need to collaborate with provincial and Aboriginal governments in Aboriginal policy-making.

<sup>12</sup> This represents a decline for every Atlantic province except Prince Edward Island and a decline for the region of ten senators. The representation ratio for the Atlantic region after this reduction is still well over two times greater than population. For the West, the representation ratio is about one and a quarter times population.

# The Saskatchewan Institute of Public Policy

Saskatchewan Institute of Public Policy  
University of Regina, College Avenue Campus  
Gallery Building, 2nd Floor  
Regina, Saskatchewan • S4S 0A2



General Inquiries: 306.585.5777  
Fax: 306.585.5780  
sipp@uregina.ca  
www.uregina.ca/sipp

**T**he Saskatchewan Institute of Public Policy (SIPP) was created in 1998 as a partnership between the University of Regina, the University of Saskatchewan and the Government of Saskatchewan. It is, however, constituted as an institute at the University of Regina. SIPP is committed to expanding knowledge and understanding of the public-policy concerns in Canada with a particular focus on Saskatchewan and Western Canada generally. It is a non-profit, independent, and non-partisan Institute devoted to stimulating public-policy debate and providing expertise, experience, research and analysis on social, economic, fiscal, environmental, educational, and administrative issues related to public policy.

The Institute will assist governments and private business by supporting and encouraging the exchange of ideas and the creation of practical solutions to contemporary policy challenges. The Founding Partners intended the Institute to have considerable flexibility in its programming, research, contracting and administration so as to maximize opportunities for collaboration among scholars in universities and interested parties in the public and private sectors.

SIPP is overseen by a Board of Directors drawn from leading members of the public, private and academic communities. The Board is a source of guidance and support for SIPP's goals in addition to serving a managerial and advisory role. It assists SIPP with fostering partnerships with non-governmental organizations, the private sector and the expanding third sector.

Saskatchewan enjoys a long and successful tradition of building its own solutions to the challenges faced by the province's citizens. In keeping with this tradition, the Saskatchewan Institute of Public Policy will, in concert with scholars and practitioners of public policy, bring the best of the new ideas to the people of Saskatchewan.

---

THE SIPP BRIEFING NOTE series allows the Institute to review and comment on public-policy issues that affect the people of our community. SIPP Briefing Notes are published several times a year and can be used as instrument for further discussion and debate.

#### RECENT SIPP BRIEFING NOTE PUBLICATIONS:

OCTOBER 2006 - Policing the Future: The Changing Demographics of Saskatchewan

JULY 2006 - Coming to the End: Mandatory Retirement in Saskatchewan

MAY 2006 - Religion is about Life: Religious and Political Discursive on the Role of Faith in Politics

NOVEMBER 2005 - Insight for the Future: Saskatchewan's Youth Share Their Thoughts

SEPTEMBER 2005 - Employment Insurance: Once Size Does Not Fit All

MAY 2005 - The Consequential Effects of Canadian Immigration Policy and Anti-terror Legislation on Columbian Refugees

APRIL 2005 - Not in Polite Company: Religious and Political Discursive Formations on Same-Sex Marriage

FEBRUARY 2005 - Aboriginal Economic Development in the New Economy

SEPTEMBER 2004 - More than Bricks and Mortar: The Consequences of Poor Housing Conditions in Regina's Aboriginal Community

Please visit SIPP at [www.uregina.ca/sipp](http://www.uregina.ca/sipp) for a complete listing of all papers in the SIPP Briefing Note series.