The Impact of Senate Reform on the Functioning of Committees

by Gary O'Brien

In May 2006, the Government introduced Bill S-4 to limit the tenure of Senators to eight years instead of to age 75. A Special Senate Committee considered the subject matter of this bill and presented its report in October 2006. In December the Senate Appointments Consultations Act (Bill C-43) was introduced in the House of Commons. It provides an opportunity for voters to indicate a preference during federal elections for who they would like to see appointed to the Senate. Although neither law has yet been adopted, this article considers the impact of the proposed changes on the functioning of committees of the Upper House.

The work of Senate committees is often explained through use of a constitutional model. Under this model, the Senate has three essential characteristics: (1) senators are not elected: therefore any claim by Senate committees to political authority is weak; (2) the Senate is not a confidence chamber and the government is not accountable to it: therefore Senate committees focus on policy studies not partisan politics; and (3) the financial initiative is legally awarded to the House of Commons: therefore Senate committees usually restrict themselves to technical as opposed to substantial amendments to bills. One should expect if the constitutional model of the Senate is altered in any significant way either formally or informally, it will have an impact on how committees function.

It must be kept in mind that change to the committee system can come about without formal constitutional amendment. For example, in the early 1960s only two or three Senate committees had regular meetings and called only a few hundred witnesses each year mostly public servants. Today there are approximately 20 active Senate committees which call on average 1200 witnesses each year, over two thirds being from the non-governmental sector. These differences resulted not from constitutional amendment but from changes to Senate practice and attitude toward the importance of committee work.

However, our legislative history reminds us that altering the constitutional model can have an impact on committees. Before the coming of responsible government, both Upper and Lower Canada had an elaborate system of committees. In the 1820-21 session, the House of Assembly of Lower Canada created 100 select committees. In 1825, the legislature of Upper Canada established 58. One of the first actions taken by the United Province of Canada in 1841 was to abolish the previous system of standing committees. The Attorney General of the day said "that he looked upon the appointment of standing committees as an absolute departure from the practice of what the house chose to call responsible government. Committees of privilege and contingencies, ministers did not object to – but if ministers were to carry out the principles of responsible government then the important objects of trade and commerce should be submitted to them". A backbencher (Mr. Durand) in a response that captured the dilemma of parliamentary government for many years to come replied that "from what had fallen from the honourable and learned gentlemen, he would suppose that it is the intention of the Attorney General to monopolize the whole business of the House. If this was

Gary O'Brien is former Deputy Clerk of the Senate of Canada.

going to be the case, he was convinced that the system of responsible government would not work well".[1]

As is described in the literature on the Senate[2], the defining characteristics of Senate committees are the following. Many senators are quite knowledgeable about their work. They are not just policy generalists but experts in their fields and can recognize the potential impact of legislation. For most, committee work is their first priority. Senators come from diverse backgrounds and are very active representing minority interests which is demonstrated in the questioning of witnesses and the choice of orders of reference. Their 'workways' are efficient because (1) they have more time to devote to committee studies (2) they do not adopt restrictive procedures and (3) the Senate has only two recognized parties allowing greater flexibility in arranging committee business. Senators as well have an independent mind set and a history of more voting against their party than is the case in the House of Commons. Finally, based on their track record, committees have a good reputation: the Beaudoin-Dobbie Joint Committee on the proposed 1991 constitutional amendments applauded the Senate's investigative role and proposed its continuation in a reformed institution.

On May 30, 2006 the Leader of the Government in the Senate introduced Bill S-4, *An Act to amend the Constitution Act, 1867* (Senate tenure), a bill designed to change the term senators could serve to 8 years. At present, senators can hold their seats until the age of 75. The legislation was silent as to whether the term limits would be renewable. On December 13, 2006, the government introduced Bill C-43, *An Act to provide for consultations with electors on their preferences for appointments to the Senate*. The bill specified that the consultation would be held concurrently with elections under the *Canada Elections Act* and that a preferential voting system would be used. In his appearance on September 7, 2006 before the Special Committee on Senate Reform, Prime Minister Stephen Harper indicated that any consultations with the public would be permissive in nature and it will allow the government to evaluate how that is affecting the system and what is happening over a period of time.[3]

Before either measure is adopted, it may be worthwhile to pause and identify some of the variables which may or may not be impacted upon by these attempts to reform the Senate. Under S-4 there is very little change to the constitutional model. Senators would vacate their seats after 8 years, not a great change since under the present system senators serve on average 12 years. There is however a risk that important corporate knowledge will be lost as it will no longer be possible for senators to serve twenty or thirty years. Long-serving senators who later in their careers often occupied leadership positions brought invaluable experience to the legislative process and this will be missed. On the other hand, Senate membership will be renewed more often and hence be better attuned to the issues of the day. If the term limit is not renewable, the independent mindset which senators exhibit is less likely to change. It is doubtful if their methods of operating would be much different either. Senators most likely will still make committee work their first priority and the good reputation of Senate committees should continue if not improve.

With respect to C-43, it would appear that while there is no formal amendment to the constitutional model, there is a chance that committee operations could undergo profound change if the government is committed to recommending for appointment those who win the elections. It is not clear if the expert knowledge factor would be affected although it is reasonable to speculate that senators would revert to being more policy generalists like most members of the House of Commons as opposed to experts. Nor is it clear if the present diversity of the Senate would be threatened: it is hoped that the committee charged with studying C-43 would focus on this question. Preliminary views are that preferential voting systems are merely variations of the first-past-the-post systems. If so, it is doubtful if special attention would be given to minority representation as is presently the case with Senate appointments. Since the Senate would still not be a confidence chamber, the independent mindset of senators most likely would be strengthened resulting in important changes to the party system.

What is perhaps the most significant change concerns the workways of senators. If they have greater representational obligations, senators may not have as much time to devote to normal committee business. Since the demands on their time will increase, the flexibility of committee operations may be restricted and more formal procedures adopted. Committees will have to sit while the Senate is sitting. Quorums may be a problem and the need for substitutions greater. There will be less diffidence shown to the other place. If through public consultation on appointments the legitimacy of the Senate increases so will the political utility of committees. They will become even more of an access point for those disaffected groups who were unsuccessful in the House of Commons. They may bargain much more vigorously with the cabinet and the Commons showing more propensity to fight, more desire to take risks and more willingness to wait. As the experience with bargaining models show, the "bargainer who is willing to wait longer…will be more successful…Very often the strategic essence of negotiating is…a waiting game."[4]

Under S-4, one should expect little change from the way committees function since the constitutional model will remain basically the same assuming that the terms are not renewable. Senate committees should still be defenders of minority interests and continue to carry out their independent investigative and policy studies as they will have the time and expert knowledge to do so. Under the *Senate Appointment Consultations Act* (C-43), the constitutional model will undergo informal change which may have significant impact on the behaviour of committees. Senators may not be able to represent minority interests as effectively, they may not have the same amount of time to devote to committee work and their workways will change. They most likely will exhibit more political independence from their parties. Committees may shift their focus from policy studies to partisan politics and become more encouraged to assume bargaining positions which will bring them into conflict with the House of Commons.

This is not to say that consultation will engulf the Canadian parliament into hopeless deadlock or bring on divided government. Barring any constitutional amendment to the powers of the Senate with respect to legislation, there are practices which presently exist which if used effectively could diffuse tensions within the parliamentary system. As has been the experience in the United States Congress, conference committees have been found to be a useful practice in managing disagreements in bicameral institutions, particularly those where the legislative power is pretty much co-equal. Free conferences which are meetings of managers appointed by each house separately who attempt by discussion to reach an agreement on a bill, already exist in the recognized procedures of the Senate and House of Commons. Since most congressional conference committees do reach agreement, it is not impossible that Canadian conference committees would do the same. There may be a need to clarify the procedural rules for conference committees in more detail, but they do offer an effective mechanism to achieve stability on important legislation.

Notes

1. *Parliamentary Debates,* 1841, United Province of Canada, pp. 144-5.
2. See C.E.S. Franks, *The Parliament of Canada* (Toronto: University of Toronto Press, 1987), pp. 168-9; Serge Joyal (ed.), *Protecting Canadian Democracy: The Senate You Never Knew* (Canadian Centre for Management Development, 2003); Samuel Patterson and Anthony Mughan, *Senates: Bicameralism in the Contemporary World* (Columbus: Ohio State University Press, 1999), pp. 120-161.
3. See *Proceedings of the Special Senate Committee on Senate Reform* September 7, 2006.
4. Howard Rauffa, *The Art and Science of Negotiating* (Cambridge: Harvard University Press, 1982), p. 78. See also Gary O'Brien, Legislative Influence of Parliamentary Committees: The Case of the Senate of Canada, 1984-91. Paper Presented to the Annual Meeting of the Canadian Political Science Association, 1994.