Feature

# *Some Suggestions for Incremental Reform of the Senate*

The provisions of the *Constitution Act, 1867* respecting the qualification and disqualification of Senators are outdated. They can be modernized without controversy and early action to accomplish that could be the impetus for Parliament and the Legislatures to address more significant aspects of Senate reform.
**Subsequent to the acceptance of this article for publication and immediately prior to publication, on March 10, 2016 Senator Dennis Glen Patterson introduced Bill S-221 and gave notice of a constitutional amendment resolution the combined effect of which, if adopted, will be to substantially effect the first three changes suggested by the author.*

**Ronald Stevenson**

In any discussion of Senate reform there are four givens –

First, all ten provincial legislatures will not agree to a proposal to abolish the Senate.

Second, Prime Ministers will not relinquish their constitutional prerogative and duty to advise the Governor General about who will become Senators.

Third, the six eastern provinces will not agree to any reduction in the number of Senators representing those provinces.

Fourth, the four Atlantic Provinces will not agree to removal of the Constitutional provision[1] that guarantees that no province will have fewer seats in the House of Commons than it has in the Senate. The so-called 'Senate floor' already applies to all four of those provinces[2] and will become increasingly significant to them as their populations remain static or decline while populations in other provinces continue to grow.

Whether public respect for and confidence in the Senate will be restored depends on how present and new senators conduct themselves and Senate business in the short term. Two hopeful factors are the advent of a committee to implement a non-partisan, merit-based process to advise the Prime Minister on Senate appointments and the prospect of a less partisan atmosphere in the Senate.

Neither of those reforms will address the imbalance of western representation in the Senate. As Ronald Watts wrote in *Protecting Canadian Democracy: The Senate You Never Knew*, "That some relatively populous provinces like British Columbia and Alberta have only six senators each, while the much smaller provinces of Nova Scotia and New Brunswick have substantially more with 10 senators each [is] a factor further eroding the legitimacy of the Senate in the eyes of the residents of the western provinces".[3] In the same volume Lowell Murray suggested that "The only constitutional amendment that might conceivably stand a ghost of a chance is one that would redress the underrepresentation of the western provinces in the Chamber."[4]

The number 24 figures prominently in the structure of the Senate and has a historic derivation. Because representation in the House of Commons would be based on population, Lower Canada and the Maritime Provinces insisted on equal representation in the Senate as a counterweight to the numerical advantage Ontario would have in the House of Commons.[5] The choice of 24 as the number of Senators allotted to each of the three original divisions (Ontario, Quebec and the Maritime Provinces) was probably made because in the Legislative Council of the United Province of Canada each of Lower Canada and Upper Canada had been represented by 24 Councillors. As the four western provinces became part of the federation they were given 2, 3 or 4 senators until 1915 when

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the *Constitution Act, 1867* was amended to create a fourth regional division consisting of the four Western Provinces with six senators each, again a regional number of 24. Subsequently Newfoundland and Labrador and the Territories were given "non-regional" representation.

There is no appetite for a full scale reopening of the Constitution, but a federal-provincial constitutional conference is not a prerequisite to constitutional amendment. Part V of the *Constitution Act, 1982* prescribes the procedures for amending the Constitution. There is no obstacle to informal discussion and negotiation about how the inadequate representation of the West might be corrected. The provincial premiers might devise a formula acceptable to all provinces. Or senators themselves might devise a formula acceptable to the provinces.

Assuming, for the purpose of discussion, that a formula is agreed upon, how would it be implemented? Under the constitutionally prescribed procedures any provincial Legislature, the House of Commons or the Senate, and by extension any member of those bodies, can initiate a resolution to amend the Constitution. Once such a resolution is adopted by one of those bodies it is open for adoption by the requisite others for three years. Thus any member of the Senate, the House of Commons or a provincial Legislature may initiate the process.

*Library of Parliament / Karen Cooper, 2011*

**Some incremental reforms to the Senate could open the doors to more substantive reforms in the future.**

Parliament and the Legislatures of Alberta and British Columbia have purported to impose internal restrictions on the initiation or adoption of such resolutions. Those restrictions are discussed below.

Leaving aside the issue of increasing western representation in the Senate, there are provisions in the *Constitution Act, 1867* respecting Senators that are outdated. Some should be repealed and some amended. Those changes would be so innocuous that it is difficult to conceive of any opposition.

First, remove the $4,000 property requirement found in sections 23(3) and (4) of the *Constitution Act, 1867*.[6] Like the number 24, the property qualification can be traced to the requirements for Legislative Councillors in the United Province of Canada. In fact what was an $8,000 property requirement for Legislative Councillors was reduced to $4,000 for Senators.

Second, remove the requirement that each Senator from Quebec must be appointed for one of 24 electoral divisions of Lower Canada specified in an early Act adopted by the Legislature of the United Province of Canada.[7] Those 24 divisions were defined for the purpose of choosing Legislative Councillors and only encompassed the area of Lower Canada (Quebec) as it existed in the 1840s. Some of those divisions were designed to guarantee representation of the Anglo-Protestant minority in Lower Canada.[8] The vast area of northern Quebec is not represented in the Senate unless Senators who reside there have purchased property worth $4,000 in one of the prescribed districts in the southern part of the province. Indeed, in order to qualify for appointment many Quebec Senators have had to buy property in districts in which they did not reside. There is a story, perhaps apocryphal, of a Senator-designate who went to the district for which he was about to be appointed in search of a suitable property. Seeing a For Sale sign on a rural property he approached the owner and asked what the selling price was. When the owner asked for $2,000, the Senator-designate asked if the owner would accept $4,000.

*Library of Parliament / Marc Fowler, 2009*

**There are antiquated provisions of the Constitution respecting the qualification and disqualification of Senators that can be modernized without controversy. These could be a catalyst for discussion and resolution of the issue of western representation and perhaps more contentious reforms such as term limits.**

Third, remove the requirement for Senators to make a Declaration of Qualification[9] that really only relates to the property qualification. Similarly, delete the reference to Property in section 31(5).

Fourth, substitute Canadian citizenship for the antiquated qualification found in section 23(2) of the *Constitution, Act, 1867*.[10]

Fifth, update the disqualification in section 31(3)[11] to use language related to the *Bankruptcy and Insolvency Act*.[12]

Sixth, update the disqualification in section 31(4).[13] The terms "attainment of Treason", "Felony" and "infamous Crime" no longer have the legal meaning or significance they had in 1867.[14]

With respect to the first two of those changes, the Supreme Court has given its opinion that it is within the legislative authority of Parliament to repeal subsection 23(4) of the *Constitution Act, 1867* but that a full repeal of subsection 23(3) also requires a resolution of the Legislative Assembly of Quebec. It follows that the third suggested change would also require the concurrence of the National Assembly.

The other three suggested changes would not alter the fundamental nature and role of the Senate and could be unilaterally adopted by the two Houses of Parliament.[15]

Early adoption of those innocuous changes could be the catalyst for subsequent discussion and resolution of the issue of western representation. Successful revision of provincial representation could in turn open the door for resolution of other contentious issues, for example, whether there should be term limits for Senators.

I turn now to the supplementary provisions that Parliament and the Alberta and British Columbia Legislatures have attempted to superimpose on the amending procedures set out in Part V of the *Constitution Act, 1982.*

A 1996 Act of Parliament entitled *An Act respecting constitutional amendments*[16] restricts the right of Ministers of the Crown to propose resolutions to authorize some categories of constitutional amendments. The restriction does not apply to members of the House of Commons or the Senate who are not Ministers.

In British Columbia the *Constitutional Amendment Approval Act*[17]says that *the government* must not introduce a motion for a resolution of the Legislative Assembly authorizing an amendment to the Constitution unless a referendum has first been conducted with respect to the subject matter of the resolution. Again the restriction does not apply to members of the Assembly who are not members of the government. And the *Act* does not explicitly require that the referendum has resulted in an affirmation of the proposed amendment.

In Alberta the *Constitutional Referendum Act*[18]requires that a referendum be held before a resolution is *voted on* by the Legislative Assembly. The result of such a referendum is binding on *the government that initiated the resolution.* The result is not explicitly binding if the resolution has been introduced by an MLA who is not a member of the government.

Are such Acts constitutional? An amendment to Part V of the *Constitution Act, 1982* can only be made when authorized by resolutions of the Senate and House of Commons and of the Legislative Assembly of each province. Furthermore, section 52 of the *Constitution Act, 1982* provides that any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. Do the three Acts purport to amend Part V? Are they inconsistent with Part V?

A requirement for a referendum could result in an unintended consequence. Suppose that the federal and provincial governments, each with the support of a majority in its elected legislature, agree on a formula to redress western underrepresentation in the Senate. Adoption of the formula could be frustrated by a negative vote in a referendum if the voters in either or both Alberta and British Columbia feel that a proposed allocation of seats falls short of their aspirations.

Major constitutional changes respecting the Senate, including redressing the imbalance of western representation and term limits, will remain on the national agenda as we approach the sesquicentennial of Confederation. In the near term the antiquated provisions of the Constitution respecting the qualification and disqualification of Senators can be modernized without controversy. As former Senator Dan Hays said in an article in the Canadian Parliamentary Review advocating similar amendments, "[Their] adoption could be an important step in encouraging the federal and provincial governments, parliament and the provincial legislatures, and all relevant stakeholders to renew [the] Senate in a more in-depth way and providing it with a new institutional design to better serve Canadians."[19]

**Notes**

1 "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." Section 51A of the *Constitution Act, 1867*, enacted by *The British North America Act, 1915*.

2 http://www.elections.ca/content.aspx?section=res&dir=cir/red/allo&document=index&lang=e

3 "Bicameralism in Federal Parliamentary Systems," 82, in Serge Joyal, ed. *Protecting Canadian Democracy: The Senate You Never Knew*. Toronto: Dundurn Press, 2003.

4 *Protecting Canadian Democracy: The Senate You Never Knew*, 149.

5 *Protecting Canadian Democracy: The Senate You Never Knew*, Lowell Murray at 133.

6 S.23(3) He shall be legally or equitably seised as of Freehold for his own Use and Benefit of Lands or Tenements held in Free and Common Socage, or seised or possessed for his own Use and Benefit of Lands or Tenements held in Franc-alleu or in Roture, within the Province for which he is appointed, of the Value of

Four thousand Dollars, over and above all Rents, Dues, Debts, Charges, Mortgages, and Incumbrances due or payable out of or charged on or affecting the same. (4) His Real and Personal Property shall be together worth Four thousand Dollars over and above his Debts and Liabilities.

7 "In the Case of Quebec each of the Twenty-four Senators representing that Province shall be appointed for One of the Twenty-four Electoral Divisions of Lower Canada specified in Schedule A. to Chapter One of the Consolidated Statutes of Canada." (Section 22).

23(6)In the Case of Quebec he shall have his Real Property Qualification in the Electoral Division for which he is appointed, or shall be resident in that Division.

8 *Protecting Canadian Democracy: The Senate You Never Knew*, Serge Joyal at 274

9 128. Every Member of the Senate . . . shall before taking his Seat therein take and subscribe before the Governor General or some Person authorized by him the Oath of Allegiance contained in the Fifth Schedule to this Act; and every Member of the Senate of Canada, before taking his Seat therein, take and subscribe before the Governor General, or some Person authorized by him, the Declaration of Qualification contained in the same Schedule.

DECLARATION OF QUALIFICATION

I A.B. do declare and testify, That I am by Law duly qualified to be appointed a Member of the Senate of Canada [or as the Case may be], and that I am legally or equitably seised as of Freehold for my own Use and Benefit of Lands or Tenements held in Free and Common Socage [or seised or possessed for my own Use and Benefit of Lands or Tenements held in Franc-alleu or in Roture (as the Case may be),] in the Province of Nova Scotia [or as the Case may be] of the Value of Four thousand Dollars over and above all Rents, Dues, Debts, Mortgages, Charges, and Incumbrances due or payable out of or charged on or affecting the same, and that I have not collusively or colourably obtained a Title to or become possessed of the said Lands and Tenements or any Part thereof for the Purpose of enabling me to become a Member of the Senate of Canada [or as the Case may be], and that my Real and Personal Property are together worth Four thousand Dollars over and above my Debts and Liabilities.

10 "He shall be either a natural-born Subject of the Queen, or a Subject of the Queen naturalized by an Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of One of the Provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, before the Union, or of the Parliament of Canada after the Union."

11 "If he is adjudged Bankrupt or Insolvent, or applies for the Benefit of any Law relating to Insolvent Debtors, or becomes a public Defaulter."

12 "Bankrupt" means a person who has made an assignment or against whom a bankruptcy order has been made or the legal status of that person. "Insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and(*a*) who is for any reason unable to meet his obligations as they generally become due,(*b*) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or (*c*) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due".

13 "If he is attainted of Treason or convicted of Felony or of any infamous Crime." See Edward McWhinney, "Forfeiture of Office on Conviction of an 'Infamous Crime,' *Canadian Parliamentary Review* Vol. 12 No. 1. (1989)- http://www.revparl.ca/english/issue.asp?param=128&art=300

14 The language in sections 31(3) and (4) can be traced to section VII of the 1840 *Act of Union*.

15 Paragraph 75 of the Supreme Court decision in Reference re Senate Reform, [2014] S.C.J. No.32 – "Section 44, as an exception to the general procedure, encompasses measures that maintain or change the Senate without altering its fundamental nature and role."

16 SC 1996, c.1.

17 RSBC 1996, c. 67.

18 RSA 2000, c. C-25.

19 Dan Hays, "Updating Some Antiquated Constitutional Provisions Relating to the Senate", *Canadian Parliamentary Review* Vol 32 No. 1 (1999) -http://www.revparl.ca/english/issue.asp?param=192&art=1321