Is Senate Reform a Dead Issue?

by Senator Normand Grimard

The Conservatives formed a majority in the Senate before February 1, 1996. The resignation of Conservative Senator John Sylvain and his replacement by Liberal Shirley Maheu then reversed the proportions. At the time of writing, the political make-up of the Senate is as follows: 51 Liberals, 50 Conservatives and three independents, for a total of 104 senators. While a majority of one or even several votes in the Senate does not necessarily mean a nerve-wracking balancing act, the possibility of defeat is always there, especially in important votes on matters of principle. Party discipline can always break down. This article looks at some recent developments in the Senate and considers whether Senate reform should be put back on the political agenda.

The Senate seems to provoke a mean-spiritedness so obstinate, so close-minded, so doctrinaire, that it verges on caricature, and this is true even when the aim is its reform. Mordecai Richler, an author not often cited by French-speaking Quebeckers, wrote of the Meech Lake Accord that was reached in 1987 and rejected in 1990: "each Canadian province would now have a role in choosing its senators, which is to say it could reward its own superannuated bagmen and other political nonentities rather than those favoured by Ottawa."[1] I begin my remarks on this negative note as a contrast to four or five examples demonstrating just how well Canada's Upper House retains its valuable qualities in the contemporary context.

Over the past year, the Senate has "made the news" (according to people who do not make a practice of covering us) several times. The first was the vote on the Pearson Airport Bill, on June 18, 1996. This bill limited the right of private investors to claim damages as a result of the government's decision to cancel the deal they had made. Because Liberal Senator Herbert O. Sparrow voted

A lawyer, Normand Grimard was appointed to the Senate in 1990. He is author of L'indispensable Sénat : Défense d'une institution mal aimée, Éditions vent d'ouest, Hull.

with the Opposition, the outcome was 48 votes in favour, 48 against, undoing a victory the government majority had assumed to be a foregone conclusion.

A little later, on November 26, 1996, the support of four Liberal senators and two independents gave the Conservative Opposition enough of a majority (46-35) to block the constitutional amendment doing away with the denominational school system in Newfoundland. In constitutional matters, however, rejection by the Senate holds for only six months, as set out in section 47 of the *Constitution Act, 1982*, and the Commons can vote to reverse the Senate's decision. In this instance the Chrétien government requested and got such a vote in the House on December 4, 1996. The loophole provided by section 47 was also used by the Mulroney government in 1987 to revive the Meech Lake Accord, which had been blocked in the Senate by the Liberals one month earlier. As I wrote in 1995, "Although new in law, this provision is no longer a theoretical one."[2]

Was the shift away from denominational schools in Newfoundland a violation of freedom of religion? Governments (not only that of Newfoundland) and churches clashed on this point. It could be argued for a long time. Another reason for the vocal opposition to the measure was probably the fear that abolishing "term 17" in Newfoundland would weaken the rights of official-language minorities in other provinces (such as Quebec). Be that as it may, the Senate once again proved its independence, even though the resolution ultimately, and to no one's surprise, passed by a second vote in the Lower House.

Again in 1996, the Senate served as a lightning rod for both hostile and favourable opinion on the gun control legislation. And heaven knows the fax machines were humming! Bill C-68 passed as well in the end. To go back a little further, the Upper House defeated a bill in 1993 that sought to merge the Canada Council and other cultural funding bodies. In 1991, it blocked Bill C-41, which would have re-criminalized abortion after the Morgentaler decision disallowed the former *Criminal Code* provisions.

That date should be noted. The Mulroney government was still in power, and former Cabinet Minister Pat Carney and five other Conservative Senators voted against the government. Senator Maurice Riel, former Speaker of the Upper House, remarked during the sitting of December 3, 1996:

> The Senate decision on abortion, which was subjected to a free, non-partisan vote in the Senate, is a very good example of the moral and social responsibilities of senators, and hence of the importance of their duties.[3]

I have been a senator since 1990. I am sure I could look further into the past than that and find other breaths of fresh air that have been forgotten, or that have been studiously ignored because they came from the Upper House. But it is clear by now, I think, that not being elected gives senators the advantage of being able to vote more freely, according to their conscience.

Even if they were to be elected, we would have to hope that their ability to make unfettered judgements could be retained, although the electoral mandate would, in my opinion, make this less likely. Obviously I am dealing in a great many "what ifs".

The idea of an elected Senate is definitely a popular one. For example, the leader of the Progressive Conservative Party, Jean Charest, wrote to me towards the end of 1996:

> Senate reform is a very important matter. A number of proposals have been put forward, and I am sure that other people will be addressing the issue. Personally, I am still pondering which option to support, while bearing in mind that our Party's rank and file want to see the Senate modernized.

Mr. Charest is not alone in his attitude: probably a majority of ordinary Canadians, parliamentarians, political leaders, journalists and academics would support the idea of an elected Senate as a way of increasing its credibility. Their opinion is among the more reasoned and moderate. I respect the good faith of all these colleagues and other intelligent individuals.

However, I will continue to believe that a combined formula of election and appointment, half and half, as senators retire or resign their seats, would meet Canada's needs just as well, and perhaps even better.

Combining election and appointment would give us the best features of both systems. I would limit the term for all new senators to ten years. Ten years, not a day over! The number of senators would rise from 104 to 130 because of fairly substantial changes introduced to combat Western Canada's feeling of injustice. My proposals remain purely castles in the air for the moment – I am well aware of this, and it does not bother me.

A Disputatious History

George-Etienne Cartier, the emblematic Montrealer and French Canadian of his day, the friend of John A. Macdonald of Kingston, 290 kilometers to the west, was one of the Fathers of Confederation in 1867. In a biography of Cartier, Brian Young has this to say:

> For years he opposed the abolition of the upper house of the Canadian legislature, on the ground that it acted as a protector of property, and he objected to universal suffrage since in his opinion only the lazy or vicious failed to meet property qualifications.[4]

As a 19th century bourgeois and owner of considerable property, Cartier also opposed the elimination of the provincial upper houses. In Cartier's view, something was needed to keep in check what we can imagine him calling "the excess energy of the Members of the Lower House". Right or wrong in perceiving such a need, he saw an appointed Senate as the required check rein. He even wanted to set the property qualification for becoming a senator at $8,000[5]; as we know, it was finally set at $4,000.

At the dawn of the 21st century, few politicians would argue that the Senate should be the official guardian of private property. But the deluge of criticism began to make itself felt the moment the Senate was created in 1867, and it has not stopped since. There would be no point in denying it. Nor does complaining about it win the slightest sympathy, since some people's minds are so firmly made up, and not just in favour of reforming the Senate either. They want it done away with. The shelves holding studies on the Senate's future – whether public or private, initiated by government task forces or academics, dealing only with the Senate alone or integrated into constitutional revision as a whole – buckle under the weight. To those studies must be added thousands of newspaper articles. Even Senate committee reports as thorough and thought-provoking as *Of Life and Death*, by the Special Senate Committee on Euthanasia and Assisted Suicide, chaired by Senator Joan Neiman, are scarcely given more than lip-service attention.

For the past 35 years, bursts of constitutional enthusiasm have been entangling us in an endless debate over all the possible meanings of some twenty terms: special status, Confederation, cooperative federalism, profitable federalism, renewed federalism, cultural sovereignty, two nations, the principal homeland of French Canadians etc. Quebec independence, and its off-shoot, sovereignty association, are still more drastic ways of posing the problem of the relationship between francophones and anglophones.

But whether one likes it or not, Senate reform is also part of the process of learning to get along together.

Senate reform will determine the scope of the provinces' influence in Ottawa. Will the Senate become the voice of the provinces? Or of the regions? The 1987 Meech Lake Accord would have involved the provinces in the appointment of senators. The Charlottetown Accord, repudiated by referendum in 1992, would for all practical purposes have meant the Triple-E Senate wanted by the West. But neither of these attempts succeeded.

Prime Minister Jean Chrétien now has an easy riposte in the House for the leader of the Reform Party. If Mr. Manning wanted a different kind of Senate, he should have supported one of the two Accords. In the meantime Mr. Chrétien continues to appoint senators in the traditional way. He even appears to have rejected the *pro-Meech*-style consultations with the provinces that former Conservative Prime Minister Brian Mulroney practised.

Moreover, new appointees have been somewhat older than Mr. Mulroney's. On February 1, 1997, the 19 senators appointed by Mr. Chrétien were between 50 and 73. Four[6] of them sworn in at the age of 70, will not even qualify for the parliamentary pension, automatic after six years of service, since senators must retire at 75. Other amendments have resulted from increases in the number of Senate seats due to the entry of new provinces and territories into the federation (a change that could reasonably be expected), from the limited constitutional veto given the Senate in 1982, and from the reform of parliamentary committees, which has been beneficial to the Senate as well as the Commons since 1970.

One question, however, remains: what should the Senate's role be in the legislative process? Can it block legislation? As an unelected body, how far can it go in opposing legislation? When must it give way? What should its attitude be to a piece of legislation it regards as badly constructed or unworthy of a place among Canada's statutes?

I doubt if there is "one" single position to adopt as our guide. Defining such a position should be done by all the parties in turn, taking public opinion into account. Senator Allan MacEachen, who steered the Liberal Opposition in the Senate through the impassioned debate on the GST in 1990, recognized this in his farewell speech of June 19, 1996:

> I believed when I came into the Senate as I do now, that the Senate has a legislative role and the authority to amend and to defeat; but, in doing so, it must make all those careful calculations that will ensure that it is not bringing opprobrium upon itself in so doing.[7]

I regard this cautious attitude as being all the more important where money bills are concerned, given the undisputed role of the elected House. Equally, each time the "less partisan" Upper House becomes more partisan, the result is conflict of the kind that Senator Guy Charbonneau saw at its worst in 1990 during the debate over the GST.

To sum up, the Senate is an unappreciated institution, and as I said in 1995:

> I am writing to describe these feelings but also with the hope that those who come after me will be able to rescue our Upper House from this labyrinth – I doubt that I will see it myself!
>
> Disparaging senators is a common practice. If they worked seven days a week and agreed to have their salaries cut in half they would still be regarded as parasites by a portion of the population, simply because they are not elected. This may seem harsh, but it is a conclusion based on remarks made to me, sometimes even – more woundingly still — by friends.[8]

And I am not the only one to have observed how widespread this negative opinion is. The question that troubles me, however, is this: what are we to think when the Minister of Intergovernmental Affairs, the Honourable Stéphane Dion, can say to a Calgary businessman, "We Quebeckers do not want to hear a word about the Senate"?[9] If the Minister currently responsible for the Constitution does not want to discuss the Senate because that would annoy his province, Quebec, who is going to modernize it?

Far from changing the Prime Minister's attitude, the quasi-defeat in the 1995 Quebec referendum seems hardly to have made a dent in Mr. Chrétien's aversion to talking about the Constitution. And in what may well be an election year, his aversion is unlikely to diminish.

Notes

1. Mordecai Richler, *Oh Canada! Oh Quebec!*, (Toronto: Penguin Books), 1992, pp.151-2.
2. Normand Grimard, *L'indispensable Sénat*, (Hull:, Vents d'Ouest), 1995, p.140.
3. Senate *Debates*, December 3, 1996, p.1253.
4. Brian Young, *George-Etienne Cartier, Montreal Bourgeois*, (Montreal: McGill-Queen's University Press), 1981, p.19.
5. Young, *op.cit.*, p.75.
6. One of them, the Honourable Jean-Louis Roux, appointed at the age of 71, was fated not to draw a pension as Lieutenant-Governor of Quebec either, cf. *Le Journal de Montréal*, November 6, 1996, p.2.
7. Senate *Debates*, June 19, 1996, p.747.
8. Grimard, *op. cit.*, pp.188-9.
9. *Macleans*, January 13, 1997, p. 20.