For a Federal Nominations Bill

by Senator Terry Stratton

A Bill designed to provide for increased transparency and objectivity in the selection of suitable individuals to be appointed to high public office was introduced in the Senate in March 2001. This article is a slightly edited version of a speech by the sponsor of the Bill opening debate on second reading.

I believe that Parliament has essentially been neutered by two events that have made the House and the Senate far less dynamic and critical in the eyes of Canadians.

The first event is the management of the affairs of Parliament by the Prime Minister's Office and by three Prime Ministers starting with Pierre Trudeau, followed by Brian Mulroney and continuing today with Jean Chrétien. Management has made the backbenchers no more than puppets who stand up when called on to vote. This is magnified by the fact of having virtually no effective opposition.

The second event, the *Charter of Rights and Freedoms,* has made the Supreme Court of Canada all-powerful. The court, not Parliament, has the final say in determining the laws of the land. Yes, one can argue that we have the "notwithstanding" clause, but it has not been used by any federal government, to my knowledge.

It is time to bring some sunshine into the appointment process to ensure transparency and objectivity in the selection of individuals to be appointed by Order in Council to certain high public positions in Canada, particularly the Supreme Court of Canada. One may ask why the Senate of Canada, an appointed body is introducing this Bill? If not us, who then? Why should we not re-establish for now, in a small way, our role in determining the players in the game, even though that role is advisory? Remember that the PMO is now deliberately leaving this place, the Senate, out of legislation. That is how powerful they have become.

This bill establishes in statutory form a committee of the Queen's Privy Council for Canada to develop public criteria and procedures, to devise a process to identify and assess candidates and to provide for parliamentary review of these appointments through appearance before the Senate Committee of the Whole.

The idea for this bill had its origins as I sat in the audience in Winnipeg last year listening to Senator John Lynch-Staunton, talk about parliamentary reform. His emphasis at that time, and I am sure still is today, is that while people talk at length about Senate reform, they ignore the real problem: that Parliament, the House of Commons and the Senate are becoming increasingly irrelevant as more and more power becomes concentrated in the Prime Minister's Office. Here, I am referring specifically to the power of appointment possessed by the Prime Minister.

The Prime Minister has powers that make him the envy of other leaders of government, not the least of whom is the President of the United States. The Prime Minister chooses the cabinet without any vetting process such as the President of the United States has to endure. He chooses every deputy minister of every department, who are responsible to the Clerk of the Privy Council, who in turn reports directly to the Prime Minister.

Senator Terry Stratton was appointed to the Senate March 25, 1993.

The Prime Minister appoints all Supreme Court and other federal judges. He appoints heads of Crown corporations. He appoints directors of these corporations and all other government agencies. He appoints the head of the RCMP. He appoints the Chief of Defence Staff and immediate associates. He appoints ambassadors and other senior representatives abroad, and of course he appoints members of the Senate.

Perhaps, even in a small, modest way, this bill represents the beginning of an attempt at reforming our parliamentary process so that the power is shared.

While the idea of this bill may be new, the concept of some parliamentary involvement in Order-in-Council appointments is not. Senators who have been members of the other place or who have been here for a while may remember the 1985 report of the Special Committee on the Reform of the House of Commons, a committee chaired by James McGrath. During the 1984 federal election, scrutiny of appointments became an issue. Chapter 5 of the special committee's report is an attempt to offer solutions to the issues of transparency and review. The chapter reveals the difficulty that the committee had coming to grips with this subject. How does one balance the prerogative of government with the scrutiny and the exercise of those prerogatives? That was the question.

The report deals at length with the pitfalls of the American system but also with the benefits achieved with some level of ensured parliamentary, or in the case of the United States, congressional, or senatorial scrutiny. The committee lists as criticisms that there are too many such appointments that in theory could be scrutinized. The thoroughness and intensity of the scrutiny varies from committee to committee in the U.S. Senate. Supposedly qualified people are discouraged from offering themselves for public office because of the possibility of the scrutiny and the spotlight that is focused on them during the confirmation process.

The House of Commons special committee accepted these as potentially valid criticisms, with the hope that by recommending a mixed process of scrutiny for some appointments and confirmation for others there would be more consultation by government before appointments were made and more openness in the process.

The committee set out various processes for reviewing a great number of Order-in-Council appointments. However, when these recommendations were translated into the House of Commons *Standing Rules and Orders*, members found that there were too many appointments being referred for scrutiny, and these appointments were not the ones where scrutiny would be really helpful. The process envisaged by the McGrath committee never worked all that well.

The purpose of this bill is to move us toward parliamentary reform. It counters the centralizing tendency of the PMO and lets sun shine in on the Order-in-Council appointment process for a limited number of positions that can be added to later.

My bill attempts to address some of the shortcomings of the McGrath recommendations by putting in place a process that would involve meaningful scrutiny of a few senior positions based on order of precedence. We are trying to make this a manageable process, and when it is successful, we can add other positions later. We are starting with a small number deliberately, by order of precedence, and adding later upon success.

Turning to the bill itself, clauses 3 through 5 would establish in statutory form a nomination committee of the Privy Council cabinet. It is to be composed of the president and such other members of the Queen's Privy Council as are nominated from time to time. It becomes, in reality, the selection or nomination committee for the Order-in-Council appointments listed in the bill.

This committee, under clause 6, is to develop and publish criteria for the positions in question. Clause 7 allows the committee to seek out and to assess potential candidates for each position listed in the schedule and to make recommendations to cabinet.

Clause 8 requires ministers, when intending to fill a listed position, to choose from among candidates recommended as eligible. Clause 9 requires the minister who recommends an appointment for a listed position to give notice in both Houses of Parliament or by publication in the Canada *Gazette*.

Clauses 10 through 12 provide for parliamentary review. Here the class of nominees has been divided so that the Senate is not required to deal with all federally appointed judges, only the ones it wants to hear. However, for the positions listed in Part 1 of the schedule attached to the bill there would be review provided an invitation was issued by the Senate during the allotted time period.

I decided that review in Committee of the Whole by the Senate was preferable to any other alternative. The Senate is less political than the House of Commons, represents the regions of Canada and has proven in the past to be very effective when dealing with federal officials appearing in the Committee of the Whole, especially in relation to their annual reports.

Clause 11 provides that appointments that need to be made in a hurry can be made, where the delay of a Senate

hearing would be harmful, in order that the Crown prerogative is not interfered with. However, even in this case, a hearing can be held after the appointment is made.

Clause 13, the last clause of the bill, establishes that ministers of the Crown are to recommend an individual for an appointment covered under this bill only if the nominations committee has recommended the individual for appointment; the individual has attended, if invited, a hearing before the Senate Committee of the Whole; and each House of Parliament has sat for seven days following the hearing, giving Parliament time to comment on the appointment.

The criteria are public; the nomination is public; the process is transparent; and Parliament, through a televised hearing in the Senate Committee of the Whole, is given the opportunity to question the person. The person becomes whole; there is a face attached to the name; there is a personality attached to the face.

I know there are many here, including some on this side, who would be against this type of scrutiny for Supreme Court of Canada appointments. Not being a lawyer, not being part of the club, I believe otherwise. I read and thoroughly agree with Professor Jacob Ziegel's arguments contained in a June 1999 Institute for Research on Public Policy publication entitled "Merit Selection and Democratization of Appointments to the Supreme Court of Canada." It is Professor Ziegel's opinion and, indeed, the opinion of many others, that the Supreme Court's role in public policy-making, especially since the Charter of Rights and Freedoms, is so crucial that the public is entitled to know about the beliefs of the men and women who are to be appointed to this court. As Ziegel points out, those who offer themselves to public office by running for the House of Commons in a general election have their beliefs and backgrounds displayed openly for all to see, and they do not have anywhere near the kind of influence Supreme Court judges have on public policy.

Editor's Note: On June 5, 2001, Senator Serge Joyal raised a point of order with respect to this Bill. His contention was that because the bill seeks to establish compulsory procedures that ministers must follow when nominating someone to fill certain high-profile public positions, it would affect the prerogative of the Crown. Accordingly, the senator maintained that it appeared that the Bill required Royal Consent.

In his ruling Speaker Dan Hays noted that Royal Consent is part of the unwritten rules and customs of the House of Commons of Canada. Any legislation that affects the prerogatives, hereditary revenues, property or interests of the Crown requires Royal Consent, that is, the consent of the Governor General in his or her capacity as representative of the Sovereign. This consent may be given at any stage before final passage, and is always necessary in matters involving the rights of the Crown, its patronage, or its prerogatives. He ruled that the operation of Bill S-20 could give rise to situations in which the Crown would be deprived of the ability to make an appointment on advice. Therefore the Bill affects the exercise of the prerogative and requires Royal Consent which normally is transmitted by a Minister who rises in the House and states: "Her Excellency the Governor General has been informed of the purport of this bill and has given her consent, as far as Her Majesty's prerogatives are affected, to the consideration by Parliament of the bill, that Parliament may do therein as it thinks fit."

He further ruled that although Royal Consent is required, debate on the Bill could proceed since unlike Westminster there is, in Canada, no binding precedent the Royal Consent be signified in each House of Parliament.