Reviving Conference Committees

by Hon. Dan Hays

Canada is a bicameral Parliament that does not have an effective way of resolving disputes between the two Houses. Section 26 of the Constitution Act, 1867 provides for the appointment of a maximum of two additional senators for each of the four senatorial divisions in case of deadlock between the two houses. Used only once in 141 years it is the only constitutional deadlock breaking mechanism but is ineffective in dealing with day to day disagreements between the Houses. This article suggests the use of another technique, conference committees, which are provided for in the Rules of the Senate and the House of Commons but have been unused since 1947.

The history of Canadian parliamentary institutions shows that there has been great concern about avoiding legislative deadlock. The pre-confederation experience of the old colonial legislatures of Upper and Lower Canada is replete with numerous incidents of deadlock between the appointed legislative councils and the popularly elected assemblies. Such deadlock was one of the reasons that Upper and Lower Canada were joined together in 1841 to form the United Province of Canada. However, deadlock appeared again, this time within the legislative assembly of the United Province, and a desire to find a solution to such deadlock became a primary reason the Central Canadian Fathers called for a new parliamentary structure under Confederation.

Although there are important exceptions, our post-Confederation history has largely escaped bicameral deadlock. The Senate, despite having the constitutional power of absolute veto over all legislation, has mostly respected the dictums of responsible government. As Professor Kunz has said in *The Modern Senate of Canada* "it has always been a guiding principle for the Senate to respect which might be called the open and clear mandate…the Senate does not stand in the way of passing legislation once the people have clearly registered their verdict."[1]. As Kunz notes, senators might hum and haw and occasionally thunder, but in the end they show remarkable self-restraint and leave unpopular matters to the responsibility of the House of Commons. The historical average of Senate amendments to Commons bills per session ranges from around five to ten per cent. Bills are sometimes defeated or left to die on the Order Paper but hardly in inordinate numbers. Despite often vigorous debates among themselves, senators do not perform the normal lawmaking role that one would expect within a legislature which holds an absolute veto. While they can and do delay legislation, they seldom formally amend bills and in most cases back down when their amendments are rejected by the Commons. Senators instead attempt to exert legislative influence by other means, such as policy studies, scrutiny of estimates, and the protection of individual charter rights and the rights of minorities.[2]

It is clear that under responsible government there must be a House of Commons bias to any legislation adopted by parliament. However, it is my view that Canada can be better governed if the House of Commons did not have an almost exclusive ownership of the legislative process and senators became more active in openly proposing amendments and pursuing alternative policy choices. The representational role of the Senate would be

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augmented and parliament as a whole would benefit from the policy expertise senators would bring to the debate.

Conference committees are a method of resolving deadlocks which arise over disagreement between the two houses of parliament. They are a very old parliamentary technique which according to *Hatsell's Precedents*[3] date back to the 1500s. They are still part of the present parliamentary process and can be found in the rules of the Senate and the standing orders of the House of Commons. According to accepted parliamentary practice, when there is disagreement as to the amendments to a bill between the Senate and House of Commons, there are two ways of proceeding: either the disagreement is communicated by a formal message or an attempt is made to resolve the disagreement by holding a conference. Either house may request a conference and the conference will be a "a free one", that is there are few restrictions on discussions and the managers who are selected to speak for each house are free "to urge arguments, to offer and combat objections, and, in short, to attempt by personal persuasion and argument to effect an agreement between the two houses."[4] Since confederation there have been 13 conferences, the last one being in 1947. The number of managers has varied for each conference. In the 1903 conference there were 12 members from the House, six from the Senate. In 1919, the numbers were 11 from the House and eight from the Senate. In 1922, eight were members of the House and five were senators, and in 1923 five represented the Commons and three represented the Senate. In all other conferences, the numbers were equal.[5]

Attempts have been made in recent years in the Senate to seek a conference with the Commons such as in 1987 regarding Bill C-22, the Drug Patent Bill and in 1990 with respect to Bill C-21, an unemployment insurance bill, but these were not successful. The usual explanation as to why conference committees have fallen into disuse is that present day procedures now regularly include official messages as to the details of the amendments to which a chamber is objecting and the frequent appearance of ministers before committees of the House and Senate. Such procedures are poor substitutes for a process whereby parliamentarians representing the different social bases of the Canadian polity can meet face to face in an open public forum to discuss concerns on important policy matters. It should be noted that the United Kingdom parliament seriously considered the use of conferences as an alternative to giving the Lords only a suspensive veto on public bills. Shortly after the passage of the *Parliament Act, 1911* which was meant to be a temporary measure pending a more structured reform of the House of Lords, a Conference on the Reform of the Second Chamber consisting of members of both houses of parliament was appointed in 1917. It was chaired by Viscount James Bryce, probably one of the world's greatest authorities on parliamentary institutions[6], and charged with considering the composition and powers of a reformed House of Lords. After a year's study the Bryce Conference recommended that the differences between the two houses should be resolved by a "Free Conference Committee". To ensure a House of Commons bias, the Bryce Conference proposed that in certain circumstances a bill agreed to by the Commons and an adequate majority of the Free Conference might become law without agreement by the second chamber[7]. The British government at the time was preoccupied by war and the Bryce recommendations were never acted upon.

There are many steps the Parliament of Canada could take by itself in accordance with section 44 of the constitution and not subject to provincial approval to renew the present Senate. They consist of adopting a Senate Modernization Bill to, for example, update the antiquated sections of the old *British North America Act,* creating a Senate Appointments Commission, setting term limits for senators, requiring that Senate vacancies be filled within 180 days, and having the Senate elect its own Speaker. I have discussed these in detail in a discussion paper which I tabled in the Senate in May 2007.[8] While these reforms are not as comprehensive as those which would involve discussion with the provinces, such as the redesign of seats, a new method of choosing senators and a restatement of the powers of a reformed Senate, they will make the Senate a more effective institution. Reviving conference committees are an essential component of the phase one initiatives and are within the power of parliament to implement.

A revitalized conference procedure would allow the Senate to engage in a more meaningful and open dialogue with the House of Commons, particularly on controversial legislation. At the present time, there is no direct or public dialogue with members of the other place on pending legislation. Negotiations between the two houses, when they do occur, are behind the scenes. The formal messages which gives the reasons why certain amendments were rejected are often far too cursory and bureaucratic causing the other house to feel its proposals may have been too quickly dismissed. Because relations between the two houses in terms of disagreement on legislative matters are unpredictable and not transparent, senators are reluctant to formally amend legislation – more so than they should be in my opinion. Knowing that the possibility of going to conference exists if the Senate is not satisfied would I believe make senators

more pro-active and effective in the formal legislative process.

However, if the Canadian parliament were to reconsider and revive the conference committee procedure, it may wish to make some modifications. Clearly the process can be undone by partisanship. Unambiguous and fairly short time-line restrictions as to the appointment of the managers, the length of time a conference could meet, and when a conference report must be voted on by the respective houses need to be implemented so that public administration is not unduly delayed. Conference committees should never be viewed as ways to upset the stability and certainty of the parliamentary process. They instead should be looked upon as a procedure to allow senators and members of the House of Commons to exchange views in a more open and meaningful way on public policy matters.

Conclusion

The risk of legislative deadlock between the two houses of parliament is a central concern in any discussion of Senate reform. As one keen observer of reform proposals has noted , the central challenge will be to give the Senate sufficient powers to block without "usurping", to stop or amend legislation "unacceptable to minority regions while, at the same time, it must not have the power to bring about permanent deadlock between the Houses which would impede the capability of governments to govern and undermine the role of the House of Commons." [9]

While it is my view that a revised conference committee procedure with a House of Commons bias is the preferable way to reform our deadlock-breaking mechanism, other models to resolve legislative deadlock are instructive and should be reviewed. Each bicameral parliament differs with their own design to meet their unique circumstances.[10] The double dissolution procedure used in the Australian parliament for instance seems quite draconian and a high cost solution to bicameral disagreements. Entrenching the Senate with only a suspensive veto as was done in the House of Lords could jeopardize the effectiveness of the Senate in influencing public policy and inadvertently delay public administration.

Reviving the conference procedure then, is an important prelude to more comprehensive Senate reform as well as an improved procedure on its own merits. Any serious review of institutional reform must deal with this issue.

Notes

1. F.A. Kunz, *The Modern Senate of Canada 1925-1963: A Re-Appraisal*, University of Toronto Press, Toronto, 1967, p. 378.
2. See Paul G. Thomas, "Comparing the Law Making Roles of the Senate and the House of Commons", in Serge Joyal (ed*), Protecting Canadian Democracy: The Senate You Never Knew*, McGill University Press, Montreal and Kingston, Canadian Centre for Management Development, 2003, pp 189-228.
3. See John Hatsell, *Precedents of Proceedings in the House of Commons,* Rothman Reprints Inc., South Hackensack, N.J., 1971, Volume IV, pp. 1-55.
4. *Bourinot's Parliamentary Procedure*, quoted in Kunz, *op.cit.*, p. 360.
5. See "The Legislative Process", Robert Marleau and Camille Monpetit, *House of Commons Procedure and Practice,* House of Commons and Cheneliere/McGraw Hill, Ottawa and Montreal, 2000. See also Blair Armitage, "Parliamentary Conferences", *Canadian Parliamentary Review*, vol 13, no. 2, 1990, pp.29-30.
6. Bryce was the author of *Modern Democracies* published in 1921.
7. See House of Lords *Briefing: Reform and Proposals for Reform since 1900*, London, AMSO, 2000.
8. See *Renewing the Senate of Canada: A Two-Phase Proposal* by Senator Dan Hays, May 25, 2007.
9. Jack Stilborn, "Forty Years of Not Reforming the Senate", in Serge Joyal (ed.), *Protecting Canadian Democracy: The Senate You Never New*, p. 59.
10. For a description of the powers of the upper houses and the bicameral deadlock breaking mechanisms in the United States, Germany, Australia, France, the United Kingdom, Italy, Spain and Poland, see Samuel C. Patterson and Anthony Mugan, eds., *Senates: Bicameralism in the Contemporary World* Ohio State University Press, Columbus, 1999, pp. 24-26. For a discussion of the problem of deadlock confronting the government led by former Prime Minister Fukuda and the current disagreements between the Upper and Lower Houses of the Japan's National Diet, see *Japan Echo*, August, 2008.