
Senate Reform and Francophone Minorities

by Senator Claudette Tardif and Chantal Terrien

This article looks at recent government proposals for Senate reform and focuses on the impact these proposals could have on the representation of francophone minority communities in the Senate. The study looks at the Senate's historical and constitutional context and its role in order to analyze the representation Canada's francophone minority communities have traditionally had in the Senate. Using international comparisons with other federal and multinational states, the article offers insights on the best ways to reform the Senate, if necessary, so that it can continue adequately representing francophone minority communities.



Walter Bagehot, an English journalist who wrote about the British parliamentary system, said, "If we had an ideal House of Commons... it is certain we should not need a higher Chamber." The Canadian Senate is a necessary and useful institution, and yet it is today probably one of the least well understood institutions in the country.

How many Canadians have asked, "But what does the Senate do?", or "Do we really need a Senate and senators?", or "Why aren't senators elected, just like MPs?" These are serious questions that constitute starting points for the debate on Senate reform in Canada.

Current Context and Recent Reforms

After a number of years Senate reform is on the agenda again. On May 30, 2006, the government introduced in the Senate Bill S-4, limiting senators' terms to eight years. The bill, which became C-19 in

the subsequent session of Parliament, was studied in depth by two Senate committees. When he appeared before the Special Senate Committee on Senate Reform on September 7, 2006, Prime Minister Harper himself told the Committee that Bill S-4 constituted a first step in the process of reforming the Senate.¹

Some months later, in December 2006, the government introduced in the House of Commons Bill C-43, which became C-20 in the subsequent session. The bill proposed the introduction of a full electoral system applicable to the selection of senators. When Parliament was dissolved in September 2008, Bill C-20 was before the House of Commons Legislative Committee called to study this Bill. With these two bills, the federal government hoped to make significant changes to the Senate strictly by means of legislation. In the Speech from the Throne of November 2008, the government reaffirmed its intention to introduce a bill proposing an elected Senate limiting senators' terms to eight years. The introduction of these bills will continue to fuel debate and raise a number of questions both among federal and provincial parliamentarians and among Canadians.

It is certainly worthwhile to think about ways of renewing the Senate and all our institutions. But it is essential that the discussions be based on a clear understanding of the Senate, and to achieve this we must look at its historical and constitutional basis and

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at the role that the Fathers of Confederation planned for it.

Historical and Constitutional Foundations

In the current debate, people seem to have forgotten that without the inclusion of an upper house able to represent and defend regional and minority interests, there would have been no Confederation in 1867. As a number of authors have pointed out (e.g., Ajzenstat, 2003; MacKay, 1927; Woerhling, 1992), the Senate was a hotly debated topic at the Quebec Conference in 1864, and one on which the Fathers of Confederation had difficulty reaching agreement.² To quote George Brown, "Our Lower Canadian friends have agreed to give us representation by population in the lower House, on the express condition that they could have equality in the upper House. On no other condition could we have advanced a step."³ Without this protection for regional and minority interests, Quebec would not have agreed to unite with the other colonies.

In his book *Protecting Canadian Democracy: The Senate You Never Knew*, Senator Serge Joyal gives a summary of the Supreme Court's 1998 opinion in the Quebec Secession Reference, which sets out clearly the key organizing principles of our constitutional architecture: federalism, democracy, constitutionalism and the rule of law, and respect for minorities.⁴ We are primarily concerned in this paper with the principles of federalism and respect for minorities.

The Principle of Federalism

The principle of federalism shapes our constitutional structure. As Senator Joyal puts it,

[Federalism] is, in concrete terms, the recognition of the diverse nature... of our federation. The principle of federalism is essentially the recognition of the linguistic, religious and socioeconomic differences of Canada's regions and provinces. At its inception, the federal system of government in Canada was devised to accommodate the various needs and bolster the respective strengths of the original partners in Confederation...

The Senate was an integral part of the compromise of 1867 because it was seen, in conjunction with the principle of federalism, as a way of accommodating the deep differences between the regions and provinces forming the new federation. The Quebec government recently reiterated this point in a brief that it submitted to the Standing Senate Committee on Legal and Constitutional Affairs on May 31, 2007. It recalled that the Senate was an integral component

of the compromise that resulted in the birth of Canada in 1867.⁵

Moreover, many political scientists consider that federalism is the mechanism that makes it possible to accommodate minorities within a state and its institutions. As Gagnon explains in his recent study on asymmetrical federalism in Canada,

The literature on this subject generally agrees that federalism is an advanced institutional form that allows the establishment of complex democratic practices more respectful of the preferences of the various communities that share the territory of a given nation state.⁶

In another study published in the same book, Rocher writes:

The recognition and preservation of the various communities that make up the federation must result in specific institutional structures for achieving this initial objective.⁷

Respect for Minorities

The principle of respect for minorities is another fundamental constitutional principle defined by the Supreme Court in the 1998 Quebec Secession Reference. The Court's decision confirms that minority rights were "an essential consideration in the design of our constitutional structure even at the time of Confederation."

Although the *British North America Act* embodied a compromise by which the original provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation on which the whole structure was subsequently erected. The adoption of the *Canadian Charter of Rights and Freedoms* in 1982 confirmed and expanded this protection for minorities. According to Senator Joyal, "as these new categories of rights [were] added to the Constitution, the role of the Senate as the chamber for the expression of minority rights and human rights within Parliament has been confirmed, broadened and strengthened."

The issue of minority representation in the Senate and within parliamentary institutions is conspicuously absent from the current debate on Senate reform. While in the beginning, as Ajzenstat points out, the Fathers of Confederation assumed that the Senate would protect political dissent and respect for the rights of political minorities,⁸ our idea of what constitutes a minority has changed over the years. Today, as Smith points out, senators tend to represent the groups in society that are underrepresented in the House of Commons,⁹ including women, Aboriginal people, visible minorities

and official-language minority communities. In the current debate the complete neglect of minority representation, and more particularly of representation of francophone minority communities, concerns us.

Representation of Francophone Minorities

The Senate has historically played a vital role in the representation of this country's linguistic minorities, including the francophones outside Quebec and the anglophones in Quebec. In 2007, only 4.3% of the members of the House of Commons were minority francophones, while in the Senate the proportion was 9.1%.¹⁰ A review of the historical data on senators shows that francophones in minority settings from Alberta, Manitoba, Ontario, New Brunswick and Nova Scotia have been almost continuously represented in the Senate, with a few exceptions (see Table 1).

Manitoba, for its part, has had almost unbroken francophone representation since 1871. Saskatchewan and Prince Edward Island have also from time to time sent members of their francophone minorities to the Senate.

Alberta's francophone community was represented in the Senate from 1906 to 1931, and from 1940 to 1964, and has again been represented there since 2005. Apart from a few short intervals, Ontario has always had at least one and often two francophone representatives in the Senate. Such illustrious Franco-Ontarian senators as Napoléon-Antoine Belcourt, Gustave Lacasse and more recently Jean-Robert Gauthier were very active in

the Franco-Ontarian community and played a part in some of the great linguistic debates of their respective eras.

Although there is currently no official mechanism requiring a Prime Minister to appoint senators from the francophone and Acadian communities, there is a long-standing tradition of which francophones from minority settings are well aware.

According to Kunz, in his book *The Modern Senate of Canada 1923-1965*, the Senate representation called for by Acadians, Franco-Ontarians and western Canadian francophones, as well as the English-language community in Quebec, "forms part of the principles governing appointments."¹¹ Kunz describes how, from the very earliest years after Confederation, John A. MacDonald judged it to be probably desirable, and even necessary, to give francophones and Acadians representation in the Senate. The historical data shows that subsequent prime ministers have also deemed it wise to appoint senators from francophone communities outside Quebec. In a recent study on political involvement by francophones outside Quebec, Cardinal says "[Prime ministers], because of their power to appoint, can increase minority francophone numbers in the Senate, but there is nothing requiring them to do so."¹² The appointment of francophone senators from minority settings thus depends on the one hand on the prime minister's good will, and on the other on the

Table 1: Francophone Senators from Minority Communities, by Province

Province	First Francophone Senator	Trends
British Columbia	N/A	No Francophone senators
Alberta	1906	Almost continuously, except from 1931 to 1940, and from 1964 to 2005
Saskatchewan	1931	Continuously from 1931 to 1976
Manitoba	1871	Almost continuously since 1871
Ontario	1887	Almost continuously since 1887
New Brunswick	1885	Almost continuously since 1885
Nova Scotia	1907	Almost continuously, except from 1968 to 1974
Prince Edward Island	1895	Only one Acadian senator from 1895 to 1897
Newfoundland and Labrador	N/A	No Francophone senators

Source: <http://www2.parl.gc.ca/Parlinfo/lists/senators.aspx?Language=E&Parliament=0d5d5236-70f0-4a7e-8c96-68f985128af9>

ability of francophone communities to influence the prime minister's political decisions.

As Kunz says, francophone minority communities saw the appointment of francophone senators as "a recognition of their relative importance in the social and political system of the country."¹³ Appointing a francophone senator from an anglophone province often constituted a highly symbolic gesture: it meant that the contribution and participation by francophones in their community's political and economic life was at least partially recognized.

Contributions by Francophone Senators

The archives of provincial francophone associations¹⁴ show that a number of francophone senators used their position in the Senate to highlight serious injustices perpetrated on francophone minority communities.

Senators Belcourt and Lacasse spoke repeatedly in the Senate about the situation of French in Ontario in the wake of the battle over Regulation 17. Senators Jean-Maurice Simard and Jean-Robert Gauthier, among others, also used the Senate as a platform for voicing their disapproval of certain provincial and/or federal measures. During the long fight to prevent the closing of the Montfort Hospital in Ottawa, Senator Gauthier spoke in the Senate to draw attention to the serious injustice that the Franco-Ontarian community would suffer if the province's only French-language teaching hospital were closed.

Other senators also spoke on the subject, and the Senate unanimously adopted a motion, on April 24, 1997, urging the federal and Ontario governments to find a solution so that Montfort could remain open. In 1999, Acadian Senator Jean-Maurice Simard used his position as a senator to publish a report entitled *Bridging the Gap: From Oblivion to the Rule of Law*, on the implementation of the *Official Languages Act*.

Over the last few years, the Senate Standing Committee on Official Languages has also published a number of studies and reports dealing with issues of importance for francophone minority communities – the role of education in minority settings, the impact of the relocation of head offices from designated bilingual regions to unilingual ones and the place of French at the 2010 Olympic Games in Vancouver.

The Senate can also play an important legislative role. We must certainly not forget Senator Gauthier's four attempts, ultimately successful, to have significant amendments made to Part VII of the *Official Languages Act*. Part VII was strengthened and improved by the

passage of Bill S-3 in November 2005 because of the perseverance of a senator who wanted to improve the lot of official-language minority communities. Although the Senate has not always been able to act to protect the rights of Canada's francophone minorities, it has from the beginning served as a key forum where francophones could highlight their concerns about what their governments were doing. In addition, we find in the archival holdings of provincial francophone associations clear evidence that most francophones from minority settings appointed to the Senate were actively involved in the development of their community and were in fact appointed because of their community's support.

The Impact of Electing Senators

In its Bulletin francophone newsletter of February 2007, the Fédération des communautés francophones et acadiennes (FCFA) argued that any proposed change to the Senate should, among other things, take into account representation of official-language minority communities.¹⁵

Francophones were involved in all debates over reform early on: as soon as Bill C-60 was introduced in 1978, for example, the Fédération des francophones hors Québec (FFHQ, later the FCFA) started voicing concerns. As Linda Cardinal points out in her recent study on the involvement of francophone minorities outside Quebec in Canada's political life, during the constitutional debates of the 1980s, the FFHQ was calling for guaranteed representation in the Senate of francophones from outside Quebec.¹⁶ Cardinal notes that the FFHQ was involved in the debates over the Meech Lake Accord and the Charlottetown Accord, to ensure that the concerns of the francophone and Acadian communities would be taken into consideration if an elected Senate were introduced. In light of the proposals that the current government has put forward in the House of Commons and in its most recent Speech from the Throne, it is important that this reflection continue.

The measures proposed by the current government do not in any way take into account the impact on the representation of minorities, and especially of the francophone minorities. When Prime Minister Harper appeared before the Special Senate Committee on Senate Reform on September 7, 2006, he replied to a question from Senator Maria Chaput of Manitoba, about the impact on minority representation of a shift to an electoral procedure, by saying,

This is a debate we will have during the next step. The government is going to introduce a bill and I presume there will be discussions on this point. I

think there are ways to encourage the election of individuals who represent Canada's diversity. However, the nature of an election process is such that we cannot dictate voters' choice.¹⁷

We take the Prime Minister to mean that the proposal for Senate elections that he tabled before the House of Commons gives no thought at all to the representation of official-language minority communities. The only politician so far to indicate that proposals for Senate reform must take into account minorities' concerns and Canadian duality was Quebec's former Intergovernmental Affairs Minister, Benoît Pelletier. When he appeared before the Special Senate Committee on Senate Reform on September 21, 2006, Mr. Pelletier said,

In my presentation on behalf of the Quebec government, we set out some guidelines for a future Senate reform when I said, "Any future Senate reform must take into consideration, above all, Quebec's specific interests, which are historic ones; second, Canadian duality; and thirdly, minority interests."¹⁸

If we proceed with the election of senators, representation of minority francophone communities will probably suffer. First, we will run the risk of losing what has been gained so far – the representation francophone minorities now enjoy – unless it is placed on an official footing by either legislation or some other means. Second, if in an election the voters of the provinces and territories are called upon to choose one or more candidates from a list, there is absolutely no mechanism to ensure that there will be francophones on that list, unless minority communities continue to exert pressure to bring this about. Furthermore, if all the voters of a province and/or territory are called upon to express a preference, this will certainly diminish the impact that the francophone community can have on the final result, since it is a minority of the provincial and territorial populations.

As the FCFA explained in its February 2007 issue of the Bulletin francophone, the type of procedure being proposed could mean that seats like the one held by Senator Gauthier in Ontario would no longer be filled by francophones. There could be major losses in the representation of francophone minorities in the Senate. Massicotte's study confirms that official-language minorities have little to gain and a great deal to lose if the method of selecting senators is changed.¹⁹ In provinces where francophones have historically enjoyed representation, there would be no mechanism facilitating, still less ensuring, adequate representation of the francophone minority. The question we must ask ourselves, and to which we must strive to find an answer, is the following: How can we ensure that in

any proposal for Senate reform francophone minority communities will not see their gains whittled away? And is it possible to make further gains?

Possible Representation Mechanisms

Over the years, a number of proposals for reforming the Senate have mentioned or proposed the adoption of a double majority rule in order to ensure additional protection for the French language and culture in this country: Bill C-60 in 1978, the Molgat-Cosgrove report, the MacDonald Commission, the Beaudoin-Dobbie Committee and the Charlottetown Accord. Bill C-60 originated the idea of compensating for the decline of francophones in the Senate by giving a veto to parliamentarians representing linguistic minorities. For its part, the Charlottetown Accord provided that the Senate would have an absolute veto on linguistic and cultural matters and that any bill involving linguistic or cultural matters would have to be adopted not only by a majority of senators but also by a majority of francophone senators.

Giving the Senate an absolute veto on linguistic and cultural matters and making bills subject to a double majority in the Senate are probably two of the best means by which an elected Senate could have some influence on linguistic and cultural matters of interest to francophone minorities. It would be important, however, to ensure that the current francophone representation in the Senate is at the very least maintained or possibly increased. This would complement Quebec's mostly francophone representation and ensure that the entire Canadian francophonie was represented. These two mechanisms combined would take into account the constitutional principle of protecting minorities Joyal spoke about.

In a system where senators were elected, it would also be necessary to well define electoral districts within each province. This could mean that francophones, despite being minorities on the provincial scale, might be able to have some influence on the results of the vote. In his study on Franco-Ontarian voting patterns, Martin Joyal affirms that francophones are elected mainly in ridings where they constitute at least 30% of the population.²⁰ He also notes that ridings that have a proportion of francophone residents above 30% are becoming rarer because of Ontario's demographic changes. The same applies to most regions of the country. For Franco-Manitobans and Franco-Albertans, a province-wide election could mean the loss of their current representation.

Several countries with bicameral parliaments have established mechanisms for representation of minor-

ities, via either indirect election or the appointment of a fixed number of members, in order to ensure adequate representation of linguistic or ethnic minorities in the upper house and in Parliament generally. These are generally countries where the upper house is wholly or partially appointed.

South Africa is a country that ensures a fair representation of its minorities in Parliament. According to the 2007 report of the Minority Rights Group International, South Africa ranks first in the world for parliamentary representation of minorities. Whites, for example, who make up 14% of the population, are given 29.3% of the seats, and most of the other minorities, including “Coloureds” and Indians, are overrepresented in Parliament. As well, there are 11 official languages in South Africa, and the Constitution provides for flexible mechanisms to ensure their equitable representation, in particular that of the nine indigenous languages (in addition to Afrikaans and English). Thanks to an active policy of including linguistic and ethnic minorities, introduced after the abolition of the apartheid regime, the South African Parliament has become the most ethnically representative parliament in the world.

A voting system such as proportional representation might be one of the ideas we should be looking at to ensure adequate representation of francophone minority communities in the Senate. However, an important distinction must be made. Proportional representation primarily guarantees the representation of minority parties, meaning that the presence of linguistic minorities would not necessarily be ensured. It would depend on how the parties chose to submit nominations.

It should be noted that in other countries with mechanisms for minority representation, these usually involve either a mixed system (in other words, a combination of appointed and elected senators), or proportional representation. The Annual Report of the Minority Rights Group International *State of the World's Minorities* shows that in 2007 a majority of the world's bicameral systems with guaranteed upper-house representation for minorities use some form of proportional representation. In Canada, however, there has not been a great deal of support for a move in this direction. British Columbia and recently Ontario have both rejected by means of a referendum the introduction of proportional representation into the electoral system. There are also some countries that use a preferential voting system, or that appoint some members of the upper house. These are certainly

options to be looked into carefully if we want to influence the debate on Senate reform bills.

Conclusion

The important thing to bear in mind about these few examples is that they show there are mechanisms that the francophone minority communities could use as a model and adapt to their needs for representation in the Senate. However, as the premiers of Quebec and Ontario made clear in a Canadian Press article on November 27, 2007, this type of fundamental change in the Senate must be undertaken in consultation with the provinces and cannot be carried out unilaterally by the federal government. On October 7, 2007, the Quebec National Assembly unanimously adopted a resolution reaffirming that any change to the Senate of Canada could only be made with the consent of Quebec's government and National Assembly.

Furthermore, as our study has shown, a convention has been established that francophone minority communities of several provinces have almost always enjoyed representation in the Senate. Not only have these communities been represented in the Senate, but they have also been represented by senators who championed their rights and causes. Current Senate reform proposals could reduce the representation of francophone minority communities in the Senate. We must therefore seriously consider the negative consequences a reform resulting in an elected Senate could have on minority representation. Such a reform would put francophone minorities at risk of losing important vested rights that have been cornerstones of Canada's constitutional structure since this country was formed. As Smith so aptly put it:

Simply stated, the reformers' approach puts the cart before the horse. They are attempting to remodel the institution without studying the original constitutional blueprint, without considering how the existing legal/political architecture will be affected, and even without having a fully formed conception of what the end product of their efforts will be. Such a strategy is most unlikely to improve the working of the Senate and indeed risks worsening the situation.²¹

Before proceeding with a piecemeal or in-depth reform of our Senate and parliamentary institutions, we need to ensure that francophone minorities do not lose their rights. We must study proposals for Senate reform by taking into account parliamentary institutions as a whole and their underlying values, or else some Canadians, especially francophone

minorities, could end up with institutions that do not reflect their reality or concerns.

Notes

1. Stephen Harper. Proceedings of the Special Senate Committee on Senate Reform, 7 September 2006, Issue No. 2, p. 8.
2. José Woehrling, "Les enjeux de la réforme du Sénat canadien", *Revue générale de droit*, No 23, vol. 1, 1992, p. 84. See also Janet Ajzenstat, "Bicameralism and Canada's Founders: The origins of the Canadian Senate" in *Protecting Canadian Democracy: The Senate You Never Knew*, ed. Serge Joyal, McGill Queen's University Press, Montreal, 2003.
3. This statement by George Brown was cited in Robert A MacKay, *The Unreformed Senate of Canada*, Carleton Library, Toronto, 1927, p. 38.
4. Serge Joyal, "The Senate as the Embodiment of the Federal Principle", *Protecting Canadian Democracy: The Senate You Never Knew*, ed. Serge Joyal, McGill Queens University Press, Montreal, 2003, p. 291.
5. Government of Quebec, "Mémoire du gouvernement du Québec concernant les projets législatifs fédéraux sur le Sénat", 31 May 2007, Standing Senate Committee on Legal and Constitutional Affairs, 2007, p. 8.
6. Alain-G. Gagnon, "Le fédéralisme asymétrique au Canada", *Le fédéralisme canadien contemporain : Fondements, traditions institutions*, ed. Alain-G. Gagnon, Presses de l'Université de Montréal, Montreal, 2006, p. 289.
7. François Rocher, "La dynamique Québec-Canada ou le refus de l'idéal fédéral", in Gagnon *op. cit.* p. 97.
8. Janet Ajzenstat, "Bicameralism and Canada's Founders: The origins of the Canadian Senate", in Joyal *op. cit.* p. 3.
9. David E. Smith, "The Improvement of the Senate by Non-Constitutional Means", in Joyal *op. cit.* p. 260.
10. Linda Cardinal, *La participation des minorités francophones hors Québec à la vie politique au Canada : comment combler le déficit démocratique?*, Ottawa, 2007, p. 7.
11. F.A. Kunz, *The Modern Senate of Canada*, 1923-1965, Toronto, University of Toronto Press, 1965, p. 47.
12. Linda Cardinal, *op. cit.* p. 6
13. F.A. Kunz, *op. cit.* p. 46.
14. See the archival holdings of the ACFA in the Provincial Archives of Alberta (PAA): ACFA, La représentation franco-albertaine au Sénat, correspondance et documentation, 1936-1968 (PR.1980.0226/204 box 11). See also the archival holdings of the ACFÉO in the Centre for Research on French-Canadian Culture at the University of Ottawa.
15. FCFA, "Vers une réforme du Sénat : de quoi inquiéter la FCFA". *Le bulletin francophone*, Ottawa, vol. 17, no 1, 2007, p. 3.
16. Linda Cardinal, *op. cit.* p. 12.
17. Stephen Harper, *op. cit.* p. 19.
18. Benoît Pelletier, Canada, 2006, Proceedings of the Special Senate Committee on Senate Reform, 21 September 2006, Issue no. 5, p. 96.
19. Louis Massicotte, Possible Repercussions of an Elected Senate on Official Language Minorities in Canada, Study by the Office of the Commissioner of Official Languages, Washington, 2007, 6 March 2007, p. 17.
20. Cited in Linda Cardinal, *op. cit.* p. 12
21. David E. Smith, "The Improvement of the Senate by Non-Constitutional Means", in Joyal *op. cit.* p. 247.