

The Modern Senate of Canada: A Study in Functional Adaptability.

The Senate of Canada was a defining element, or “deal breaker,” in the negotiations that led to the creation of our country in 1867, since Confederation would not have been taken place without it.¹ Indeed, as Senator Lowell Murray has said:

“Quebec and the Maritimes insisted on an Upper House with equal representation from the three regions as a counterweight to Ontario’s numerical advantage in the House of Commons. The Fathers of Confederation wanted to create a further check on the executive and its elected Commons majority. They decided this would best be accomplished by an appointed Senate whose members had life tenure.”²

And since its creation in 1867, the Senate of Canada has evolved into a modern and efficient legislative body. Although it remains a rare example of an unelected second chamber, along with Great Britain’s House of Lords³, it has adapted to changing times through a variety of administrative reforms that have allowed it to better play its legislative role and represent the interests of all Canadians more effectively. And even if it has been the subject of 28 major reform proposals over the past 30 years⁴ – all of which have failed to produce the changes sought – it continues to make an important and valuable contribution to public debate, and remains a cornerstone of Canada’s system of government.

The failure of these proposals is likely due to the absence of a broad consensus on precisely how to reform the Senate, and to the considerable difficulty of amending Canada’s constitution. However, the failure of constitutional proposals for Senate reform does not mean that the institution has not evolved. As Senator Serge Joyal has written:

“To advance the debate, we must set aside the intellectual straight-jacket of the Constitution and contemplate the ways in which Canadian institutions might effectively meet contemporary needs through traditional self-adaptation.”⁵

And the Senate has done considerable adapting over the years, streamlining its operations and giving itself the tools it needs to perform its legislative, investigative and representative functions more efficiently. Among the changes that have helped to modernize the institution are the creation of research and discretionary budgets for individual senators during the eighties; significant modifications to the rules governing

¹ For an interesting discussion on the origins of Canada, see Christopher Moore, *1867: How the Fathers Made a Deal*, McClelland and Stewart, Toronto, 1997.

² Lowell Murray, “Which Criticisms are Founded?” in *Protecting Canadian Democracy: The Senate You Never Knew*, edited by Serge Joyal, McGill-Queen’s University Press, Montreal and Kingston, 2003, p. 133. Note: life tenure was replaced by mandatory retirement at age 75 in 1965.

³ An interesting debate is taking place in the United Kingdom concerning the abolition of the office of the Lord Chancellor and the creation of a speakership independent of the executive. Please see the consultation document titled: “Constitutional Reform: Next Step for the House of Lords, September 2003, <http://www.dca.gov.uk/consult/holref/#part3>.

⁴ Jack Stillborn, “Forty Years of Not Reforming the Senate,” in *Ibid.*, pp. 31-66.

⁵ Serge Joyal, “Reflections on the Path to Senate Reform,” *Canadian Parliamentary Review*, vol. 22, no 3, autumn 1999.

proceedings; the television broadcast of committee deliberations; and reform of the Royal Assent ceremony. Besides, the debate concerning Senate modernization is ongoing, and proposed reforms include the broadcast of proceedings in the Chamber, as well as the election of the Speaker.⁶

With the growing demands placed on it by an informed, educated and participative population, and the increasing complexity of issues it must address, the Senate of Canada has had to provide its members with more and better tools to perform their duties. Like their counterparts in the Commons, senators have a heavy workload. It consists, in part, in doing research, preparing speeches, questions, briefing notes and reports, initiating private bills and motions, studying legislation and examining draft committee reports, engaging in political activity,⁷ maintaining relations with various interest groups, correspondence and dealing with inquiries. As well, from time to time, it requires the preparation of strategies to deal with the media to either bring an important issue to public attention or to comment on a government policy. And in some cases, like mine, senators hire assistants in their regions, as do their Commons' counterparts, to deal with local and national issues.⁸ Therefore, to perform these tasks adequately, and on a broad range of issues, senators must be able to count on experienced, professional and dedicated assistants, and have the resources to hire them.

To make the point, when I came to the Senate in 1984, and in fact until 1987, senators had no research or discretionary budgets and were limited to one staff member, which greatly restricted the range of the issues they could consider, as well as the impact they could have on the nation's business. By comparison, members of the Commons have been able to hire a second assistant since 1974.⁹ And so, with the creation of a \$3,077 discretionary budget in 1987, a process began that would lead to an unprecedented modernization of senators' offices.

Among the leading advocates of this process were former Senate Majority Leader Allan MacEachen and former Speaker Roméo Le Blanc. The latter, as Chairman of the Internal Economy Committee, proposed and implemented many necessary changes and improvements.¹⁰ In fact, Le Blanc has said that one of his proudest achievements while in the Senate was helping to provide senators with the tools they needed to do their jobs as legislators.¹¹

By 1988-1989, discretionary budgets had been increased to \$10,000 and senators were provided with a second budget for research contracts up to a maximum of \$30,000 per senator. Many of them took advantage of this to hire assistants on a contractual basis,

⁶ Senator Don Oliver currently has a bill (S-3) concerning the Speaker's election on the Senate Order Paper. See Senate Debates, March 9, 2004, pp. 470-474.

⁷ Such activities include, for example, being president of a party, a role I played as Liberal Party President from 1994 to 1998.

⁸ See the current issue of my Speaker's Report by visiting my Web site at: www.sen.parl.gc.ca/dhays.

⁹ *House of Commons Procedure and Practice*, edited by Robert Marleau and Camille Montpetit, Chenelière/McGraw-Hill, Montreal, 2000, p. 201.

¹⁰ Other committee members included Senators Eymard Corbin, William Doody, Colin Kenny, the late Tom Lefebvre,

¹¹ Remarks given by the Right Honourable Roméo Le Blanc at the unveiling of his portrait in the Senate lobby, December 4, 2002.

And in 1996, research assistants achieved full-time employee status and began receiving comprehensive benefits.

In 1997-1998, global budgets for senators' offices were created, and set at \$90,000, by merging the secretary budget with the research and office expenses budget. Today, the global budget stands at \$130,700.¹² At about half the amount of the members' office budget in the House of Commons, which ranges from \$234,600 to \$251,400 – depending on whether the riding is urban or rural or located in a remote area – senators' global budgets provide value for the money by enabling members of the Upper House to perform their various duties with help from administrative and research staff.¹³

Although the evolution of global budgets has had a profound impact on the ability of senators to do their jobs, and on the effectiveness of the Senate in general, changes in the chamber's rules and procedures have also made a significant contribution to modernizing the institution's operations.

The rules for the Senate of Canada were originally adapted from the Standing Orders which governed the Legislative Council of Canada prior to Confederation. These, in turn bore the “imprint of the Standing Orders which governed the House of Lords.”¹⁴ However, since their adoption in 1867, Senate rules and procedures have undergone numerous changes that have streamlined the operations of the Chamber. Although there was a time when the Senate conducted its business with a great deal of flexibility and under suspended rules¹⁵ – in the same manner as in the House of Lords, which values its self-regulating capacity to this day – circumstances have determined that it needed to organize and conduct its business in a more structured and orderly fashion.

The first major change in the rules occurred in 1906, and among the more significant amendments was the creation of notices of inquiries and inquiries. Inquiries appear unique to the Senate of Canada; they encourage debate on issues without a question having to be submitted to the House for decision, and “sometimes result in the establishment of a committee on the subject matter of the inquiry or the introduction of legislation.”¹⁶

However, the most far-reaching amendment brought about in 1906 was the introduction of rule 16, which granted new powers to the Speaker. As Professor W.F. Dawson has written:

“The 1906 revision [...] added a new rule which placed the Speaker in much the same position as his Commons' counterpart. For the first time, the rules gave the Speaker specific authority to preserve order in the House.”¹⁷

¹² History of Senators' Research and Office Expenses Budget, Senate Finance Directorate, Ottawa, 2004.

¹³ Members' Office Budget, Library of Parliament's Web site: <http://intraparl.parl.gc.ca>.

¹⁴ Brian Creamer, “Notes on Rules of the Senate Relating to the Powers and Position of the Speaker,” Library of Parliament, Ottawa, 1985, p. 4.

¹⁵ *The Modern Senate of Canada*, F. A. Kunz, University of Toronto Press, Toronto, 1965, p. 146.

¹⁶ Gary W. O'Brien, “The Senate Order Paper,” *Canadian Parliamentary Review*, vol. 4, no. 4, 1981.

¹⁷ W.F. Dawson, “The Speaker of the Senate of Canada,” unpublished manuscript, 1967, p. 20.

Previous to the creation of this rule, it had not been the tradition in the Senate for the Speaker to maintain the dignity of the House or deciding on points of order unless another senator asked him to do so. Although this measure was a watershed in the evolution of Senate rules, it appears to have had little immediate affect on proceedings and remained unused for some time. This situation may very well have been attributable to the Senate's traditionally reserved and respectful nature. As James R. Robertson has noted:

“Without the same media and public attention as the Commons, and without the same need to impress voters and, therefore, to engage in partisan activities, there has perhaps not been the same need for the Speaker to intervene, except in extraordinary circumstances.”¹⁸

Such extraordinary circumstances, however, were provided in 1991, as a result of the debate over the creation of the Goods and Services Tax, and would lead to the most comprehensive overhaul of Senate rules since 1906. Debate on the GST had been so contentious, with Liberals firm in their belief the tax had to be opposed, and using every means at their disposal to do so, and with Conservatives just as resolved that it had to pass, that it led one journalist to sum up the issue as follows:

“The root problem is that present rules place no limit on how long or how often any senator is allowed to speak. There is no provision for what is called, in the Commons, ‘time allocation’ – that is a set length of time for debate after which a vote must be taken. [...] Every modern legislature has some rule to limit debate. The alternative is the absurdity now possible: Liberal senators could just keep talking forever, filibustering the GST or any other legislation until the government is forced to call a general election.”¹⁹

Though many of the new rules were necessary and non-controversial, opposition senators vehemently opposed others, since they eliminated several of the measures they could use to slow the progress of government business.²⁰ Chief among these controversial amendments were rules 38, 39 and 40. Rule 38 introduced a time limit on senators' speeches, and was a major departure from previous practice. As for Rules 39 and 40, they introduced the concept of time allocation in the Senate, with the former governing cases where there is agreement among the parties to allot a specified number of days or hours to items of government business, and the latter providing for time allocation when there is no agreement among parties.

These measures were very contentious at the time, but have since helped the Senate run more effectively and deal with business more expeditiously, as well as keep pace with other modern legislatures. As Robertson has noted:

¹⁸ James R. Robertson, “The Rules of the Senate: 1991 Amendments,” Library of Parliament, June 1991, p. 15.

¹⁹ William Johnson, “Obstructionist Senate must reform itself,” Montreal Gazette, October 20, 1990.

²⁰ In fact, Liberal senators boycotted all meetings of the Rules Committee where these changes were discussed. However, since taking power in 1993, the Liberals have accepted and used the new rules.

“[Before 1991] the Senate operated without any specific rules regarding time allocation or closure. Complete freedom of debate may be the ideal, but it can be less than efficient, and can be easily abused. Some restraints need to be exercised, or accommodation reached, for a legislative chamber to conduct its business within a reasonable time frame.”²¹

The adoption of Rule 18 was another major 1991 amendment, and it concerned the Speaker’s authority. Although very similar to the Rule 16 of 1906, which allowed the Speaker to preserve order and decorum, it clarified and enhanced that right. As well, rule 18 (3) provides the Speaker with the authority to determine when sufficient arguments have been made before he or she decides any question of privilege or point of order. These changes, though not radical, represent a “continued evolution towards a more powerful role [for the Speaker]”²² and significantly contributed to the orderliness of proceedings in the Chamber.

Over the years, changes to the rules have increased the similarity between the Speaker of the Senate and his Commons’ counterpart. However, there are still significant differences, which include the right of senators to appeal decisions of the Speaker (Rule 18(4)), the Speaker’s right to participate in debate (Rule 56(2)), and the Speaker’s right to vote like any other senator (Constitution Act, 1867, s. 36 and Rule 66(5)).²³

Another significant example of the Senate’s modernization is the major restructuring of committees that took place in 1968. In an effort to streamline committee operations, the terms of reference and areas of jurisdiction were more clearly defined. Some committees were abolished, such as Divorce, Railways, Telegraphs and Harbours, and Miscellaneous Private Bills, while others were created, such as Transport and Communications, and Legal and Constitutional Affairs. As well, membership was greatly reduced from the 25-member norm that had previously been the case (some committees had grown to as many as 50 members). The result of this reform has been a committee system that is far more manageable and attentive to issues that concern Canadians.

In addition to the modernization of the Senate’s rules and procedures, and the restructuring of committees, the introduction of television coverage to the Upper House is another important factor in the institution’s continuing evolution. I believe that this initiative holds the potential for demonstrating the important and necessary contribution of the Senate to the better conduct of our nation’s business, and for helping Canadians better understand the institution.

Speaking on a motion to authorize the television broadcast of Senate proceedings, Senator Keith Davey best summarized the rationale for doing so nearly 20 years ago. He said that television would simply be an “electronic extension of the public gallery,” arguing that it would bring senators directly into the homes and lives of ordinary Canadians, so that they could see for themselves the valuable work conducted in the

²¹ Robertson, *Ibid.*, p. 21.

²² Robertson, *Ibid.*, p. 11.

²³ Another important rule change I would like to highlight in passing is the creation of question period in 1968. Previous to this, questions were asked when documents were tabled or before Orders of the Day were read. However, compared with today, few senators availed themselves of this opportunity.

Upper Chamber.²⁴ As, well, Senator Davey underlined that television had been a great success in the Commons, where it had been introduced in 1977. In fact, the Lower House was a pioneer in the broadcasting of its proceedings, and the work it has done in this area has provided the model for other legislatures around the world.²⁵

Although Senator Davey made his argument in favour of televising Senate proceedings in 1985, it was only in 1998 that the deliberations of Senate committees began to be regularly broadcast.²⁶ It was then that a six-month agreement was signed with the Canadian Public Affairs Channel (CPAC), whereby 8 hours per week of committee deliberations would be televised. And this situation has changed a great deal since: “Between April 2001 and March 2002, the Senate produced more than 375 hours of committee proceedings, including a record 98 hours of original coverage in October 2001.”²⁷

However, even if the Senate produced this material, CPAC either did not broadcast all of it or scheduled it in unfavourable time slots. To ensure that the broadcasting of Senate committees would receive fair treatment and be part of CPAC’s mandate, in 2002, the Senate intervened before the Canadian Radio Television and Telecommunications Commission (CRTC), Canada’s regulatory body for broadcasters. This effort was successful and in April 2004, a new agreement was signed between CPAC and the Senate. CPAC has now agreed to broadcast twenty hours of Senate proceedings per week when the Senate is sitting. This represents twelve additional hours of coverage per week. Announcing this new arrangement in the Senate on April 29, 2004, the Chair of the Internal Economy Committee, Senator Lise Bacon, said that:

“[This agreement] represents eight hours of programming in the evening and twelve hours during the day. Moreover – and this is well known – having fixed blocks in the schedule is conducive to building up a faithful audience. Now more than ever we will be able to promote the excellent work done by our committees to the Canadian public.”

As well, CPAC has made a commitment that will allow senators to continue participating in the network’s public affairs programs to showcase work done by the Senate, and it has agreed to consider the Senate in its plan to develop continuous transmission Internet channels.

The broadcast of Senate committee deliberations has evolved significantly over the last few years; however, that of Chamber proceedings remains at the conceptual stage because a broad consensus among senators has yet to emerge on the issue. The debate is

²⁴ Senate Debates, May 14, 1985, pp. 905-906.

²⁵ James R. Robertson, “Television and the House of Commons,” background paper, Library of Parliament, December 1998, p. 1.

²⁶ In fact, I had the privilege of chairing the Standing Committee on Energy and Natural Resources, when the first-ever Senate committee meeting was televised on November 6, 1989. The occasion was the committee’s study on Petro-Canada; the location was Calgary and the broadcaster was Shaw Cable TV. CPAC’s first such broadcast, on October 21, 1992, featured a roundtable meeting of the Committee on Energy, the Environment and Natural Resources, which I also had the pleasure to chair.

²⁷ Senate of Canada: Proposed Broadcast/Multi-Media Policy, CueTwo Communications, Dunvegan, Ontario, November 8, 2002.

likely to go on for some years, but I believe the time will come when cameras are finally allowed into the Chamber on a permanent basis, and not only when the Senate resolves into Committee of the Whole.²⁸

Another significant milestone in the Senate of Canada's recent evolution is the reform of our royal assent procedure, which occurred in 2002 after years of study and debate.

Traditionally, royal assent has been the formal process through which a bill passed by the legislature becomes law in countries that use the Westminster model of parliamentary government. In most Commonwealth countries, Royal Assent is given by governors general or their deputies, and the process originally required that they attend a formal ceremony in the Upper House where MPs were summoned to witness the event. Although the British government continued to advise governors general on the exercise of this power until the late 1920s, that responsibility now rests with each country's government. Moreover, most countries have moved away from this formal ceremony, "in part because MPs complained that it disrupted their deliberations too much."²⁹ In fact, the ceremony has largely been replaced with a written declaration, as in the United Kingdom, which passed legislation reforming royal assent in 1967.

Until recently, however, Canada remained the exception, being the only Commonwealth country still using the traditional ceremony exclusively. The question of modernizing royal assent had been debated by senators and members of Parliament for many years. Indeed, there was a general dissatisfaction with the process, and attendance at the ceremony was poor, since the timing was often inconvenient for parliamentarians, governors general and their deputies (justices of the Supreme Court). Though several motions, reports and bills had proposed changes over the years, all of them had died on the Order Paper.

In October 2001, however, the government introduced Bill S-34, which in essence mirrored Bill S-26, a measure that had been introduced by Senate Opposition Leader John Lynch-Staunton in 1999. After going through the various stages of the parliamentary process, the bill received royal assent on June 4, 2002, and written declaration was used for the first time on February 13, 2003. The new procedure stipulates that royal assent will take place in two different manners, one under section 2(a) of the bill, in Parliament assembled – as had traditionally been the case – and the other according to section 2 (b), by written declaration. As the Chairman of the Standing Committee on Rules, Procedures and the Rights of Parliament, Senator Jack Austin, said:

“The bill provides that there will be at least two royal assent ceremonies in Parliament assembled: one when the first bill of the session appropriating sums for the Public Service of Canada based on Main or Supplementary Estimates is presented, and then on one other occasion during the calendar year, such occasion to be chosen by the government. It has been indicated to us [...] that the government would seek to choose an important piece of legislation and use royal

²⁸ A motion by Senator Jean-Robert Gauthier advocating the telecast of Chamber proceedings is the latest example of discussion on this issue. The motion was debated in the Senate on May 6, 2003.

²⁹ See article on Royal Assent: <http://www.nationmaster.com/encyclopedia/Royal-Assent>

assent in Parliament assembled to highlight its importance and significance to the Canadian people.”³⁰

Of special significance in the debate on Bill S-34, was the Report of the Standing Committee on Rules, Procedures and the Rights of Parliament. Indeed, the report urged the government to take steps to highlight the public visibility, as well as the constitutional and symbolic significance of royal assent, to help Canadians better understand how their laws are made.

This paper has attempted to demonstrate that the Senate of Canada, besides playing an important role in the legislative process, has evolved over time by implementing various internal reforms that have helped it streamline its operations to better serve and represent the interests of Canadians. Though the examples chosen are by no means exhaustive, I certainly hope they have helped you see the Senate of Canada as a modern, effective and responsive institution.

³⁰ Senate Debates, March 6, 2002, p. 2329.