The Founders' Senate

Article · December 2019

CITATIONS
0

READS
12

1 author:

J.W.J. Bowden
Carleton University
27 PUBLICATIONS **24** CITATIONS

SEE PROFILE

The Founders' Senate — and Ours

Canada's Upper House was (and is) supposed to be partisan

— *writes* James W. J. Bowden

Few political debates in Canada have enjoyed the longevity of that over reforming the Senate. The controversy over the Senate's purpose and whether Senators should be appointed by the Crown or elected by the people stretches back to even before Confederation itself, to at least the 1850s if not the 1840s. Debates over the utility of bicameralism and the Senate's abolition date back to the beginning of the 20th century. This debate has persisted for over one hundred fifty years now because the *status quo* since Confederation has prevailed through a combination of inertia, bad timing, and lack of political will.

These cacophonous and quixotic campaigns for Senate Reform — as if in a predictable cycle — attain their most strident and loudest crescendos when the Conservatives return to power after years, or decades, in opposition and must confront a massive Liberal majority and the prospect of legislative obstruction in the august Red Chamber. As such, peaks in the Senate Reform Cycle occurred in 1911-1913 in the early years of Robert Borden's government after Laurier dominated Canadian politics for the previous 15 years, in the late 1980s and early 1990s when Brian Mulroney faced the results of 22 years of Liberal rule punctuated only by nine months of ineffectual stupidity by Joe Clark in 1979-1980, and, most recently, in the mid-2000s when Stephen Harper faced insurmountable odds after 13 years of Liberal governments.

The Senate Expenses Scandal of 2013 brought the clamour for reforming or abolishing the Senate to a fever pitch, resulting in the Supreme Court's *Senate Reference* in 2014, which effectively destroyed any lingering constitutional hope of Senate Reform. The political aftermath of these events has strained the Senate over the last six years. In July 2013, Prime Minister Harper decided to shuffle all Senators out of Cabinet[1] — a decision which put Harper in the dubious company of the mercurial John Diefenbaker, who went without a Senator-Minister from 1958 to 1962, and the similarly inauspicious short tenure of Arthur Meighen in 1926.[2] This deliberate policy broke with precedent going back to the 1840s. And Justin Trudeau followed suit with some reforms even before he became Prime Minister in 2015. In January 2014, Trudeau unilaterally expelled all Liberal Senators from the Liberal parliamentary party and caucus without warning, thus further marginalising the Senate.[3] And in 2015, as Prime Minister, Trudeau set up the Independent Advisory Board for Senate Appointments and pledged to appoint only "Independent" Senators, who now sit in their own Independent Senators Group (ISG) instead of as Liberals or Conservatives. Andrew Scheer, shortly after winning the leadership of the Conservative Party, caused controversy in 2017 when he pledged to restore the old precedents and appoint partisan Senators, and again during the election of 2019 when he reiterated that pledge.[4] Scheer seems to believe the traditional method of Senate appointments is a satisfactory way to constitute an upper house.

History and precedent are firmly on Scheer's side: the Senate of the Dominion of Canada and its direct predecessor, the Legisla-

tive Council of the Province of Canada, always operated as partisan chambers. The Senate of Canada should remain partisan; however, Prime Ministers should, from time to time, nominate Senators to the Opposition benches order to maintain balance and hew to the original compromise upon Confederation.

From Legislative Council to Senate

On 1 July 1867, the parliament buildings, Legislative Assembly, and Legislative Council of the Province of Canada became the parliament buildings, House of Commons, and Senate of the Dominion of Canada. Alpheus Todd himself, who had served as the last Parliamentary Librarian of the Province of Canada, became the first Parliamentary Librarian of the Dominion of Canada. Ottawa, the last capital city of the Province of Canada, became the capital of the Dominion of Canada. But converting the elected Legislative Council of the Province of Canada into an appointed Senate of the Dominion of Canada resulted from extensive debate at the Quebec Conference of 1864 and in the provincial legislatures thereafter, and achieving this design required specific statutory provisions and executive instruments to promulgate them into force. Ultimately, these took the form of sections 25 and 127 of the *British North America Act, 1867* and statutory instruments flowing from them.

At the Quebec Conference, the framers gave much consideration to how the first group of Senators should be appointed once they rejected the Province of Canada's novel experiment in electing Legislative Councillors, which began in 1855. Instead, the Great Coalition of Sir John A. Macdonald, George-Etienne Cartier, and George Brown had agreed that the 24 Legislative Councillors from Canada West and 24 Legislative Councillors from Canada East — most of whom were elected — should simply continue as Senators for Ontario and Quebec, respectively, in order to prevent their tenuous coalition government formed for the express purpose of bringing about federal union of British North America from collapsing into bitter partisan acrimony.[5] Brown saw this compromise of simply continuing the Province of Canada's contingent in its Legislative Council as Ontario's and Quebec's representation in the federal upper house as a neutral position that kept the Great Coalition intact:

> We [in the Province of Canada] could not leave to the Executive the choice of Legislative Councillors. A conflict might have arisen in the Cabinet before the choice was made, and a party administration might have been formed.

These standings, with 24 Legislative Councillors and thus 24 Senators each for Ontario and Quebec, formed the basis of the "regions" within the Senate and determined that New Brunswick and Nova Scotia would receive 12 Senators each upon Confederation and, further, that they would each have to give up two in order to make room for Prince Edward Island within the Maritime Region. Incidentally, Brown and Macdonald openly disagreed at the Quebec Conference whether the Province of Canada's method should apply to the other provinces; Brown favoured pluralism and contended, "each province should be allowed to take its own mode of selection," while Macdonald, in a harbinger of his centralising tendencies, insisted on uniformity: "We should not have a different system in the different provinces. It is of great importance that all should follow the same mode."[6]

Charles Tupper of Nova Scotia believed that the new federal upper chamber should ensure some balance between parties: "I agree with Mr. Brown that the Legislative Council should be chosen from all parties."[7] His fellow Nova Scotian Jonathan McCully Scotia agreed, saying: "Due regard should be had to the claims of the Opposition so that political parties may be equally represented in the Legislative Council."[8] McCully then tabled the motion that became, with some grammatical modification, resolution 14 of the Quebec Conference:

> That the first Legislative Council in the Federal Legislature shall be appointed by the Crown at the recommendation of the Federal Executive Government upon the nomination of the respec-

> tive Local Governments, and that in such nomination due regard be had to the claims of the members of the Legislative Council of the Opposition in each Province, so as that all political parties be as nearly as possible fairly represented.[9]

Tupper would go on to steal the credit from his colleague and claim the idea of appointing existing provincial Legislative Councillors as the first group of Senators in his autobiography:

> On my motion it was agreed that the first federal senate should be composed of the members of existing legislative councils of all the provinces, the various governments to select them in equal numbers from both parties as far as practicable.[10]

The Senate of the Dominion and its direct predecessor, the Legislative Council of the Province of Canada, always operated as partisan chambers.

Leonard Tilley of New Brunswick, who later joined Macdonald's cabinet after Confederation, concurred with McCully's motion: "I think that this is an additional guarantee to the minority that party shall be represented. Anything to the contrary would be a direct breach of the will of the Conference."[11] Continuing this line of questioning, William McDougall of Ontario asked, "Is it the meaning of the resolution that the Federal Government can displace any member of the Legislative Council appointed in breach of agreement?" Macdonald replied, "It is the understanding that the Federal Government shall be a Court of Equity to see that the understanding of fairness as to party is carried out."[12] Macdonald also pledged: "The Federal Government will be bound to see that the parties are appointed under this understanding before their appointments are ratified."

Resolution 14 of the *Quebec Resolutions* now preserves the essence of McCully's motion and the principle that the first group of Senators of the Dominion of Canada should maintain partisan balance — precisely because partisanship was integral:

> 14. The first selection of the Members of the Legislative Council shall be made, except as regards Prince Edward Island, from the Legislative Councils of the various Provinces, so far as a sufficient number be found qualified and willing to serve; such Members shall be appointed by the Crown at the recommendation of the General Executive Government, upon the nomination of the respective Local Governments, and in such nomination due regard shall be had to the claims of the Members of the Legislative Council of the Opposition in each Province, so that all political parties may as nearly as possible be fairly represented.[13]

At this stage, the British North American Framers referred to the upper chamber of what would become the Parliament of the Dominion of Canada as the "Legislative Council" instead of as the Senate. This resolution from the Quebec Conference morphed into Resolution 15 from the London Conference:

> 15. The members of the Legislative Council for the Confederation shall in the first instance be appointed upon the nomination of the Executive Governments of Canada, Nova Scotia and New Brunswick, respectively, and the number allotted to each Province shall be nominated from the Legislative Councils of the different Provinces, due regard being had to the fair representation of both political parties; but in case any member of the Local Council, so nominated, shall decline to accept it, it should be competent for the Executive Government in any Province to nominate in his place a person who is not a member of the Local Council.[14]

This, in turn, became sections 25 and 127 of the *British North America Act, 1867*. Section 25 authorised the Queen to appoint the first group of Senators by proclamation upon also promulgating the *British North America Act* itself and Confederation into force, and

section 127 contained the policy: the Legislative Councillors of Canada West and Canada East would become the Senators for Ontario and Quebec, and a select number of provincial Legislative Councillors of New Brunswick and Nova Scotia would be nominated by the governments of New Brunswick and Nova Scotia as their provinces' first Senators. (Nova Scotia's Legislative Council at the time consisted of 21 members, only 12 of whom became Senators for Nova Scotia).[15]

Section 127 of the *British North America Act* contained the general framework that the Legislative Council of the Province of Canada would become Senate of Canada (and thus that the Legislative Councillors themselves would become Senators), and that the Legislative Councillors of Nova Scotia and New Brunswick would have the option either of transferring to the Senate of Canada and representing their provinces in Ottawa, or, alternatively, remaining in their home provinces' Legislative Councils:

> 127. If any Person being at the passing of this Act a Member of the Legislative Council of Canada, Nova Scotia, or New Brunswick, to whom a Place in the Senate is offered, does not within Thirty Days thereafter, by Writing under his Hand addressed to the Governor General of the Province of Canada or to the Lieutenant Governor of Nova Scotia or New Brunswick (as the Case may be), accept the same, he shall be deemed to have declined the same; and any Person who, being at the passing of this Act a Member of the Legislative Council of Nova Scotia or New Brunswick, accepts a Place in the Senate shall thereby vacate his Seat in such Legislative Council.[16]

Furthermore, section 25 of the *British North America Act* then gave Queen Victoria the authority to promulgate the royal proclamation to appoint this first group of Senators. Like a honeybee's sting, sections 25 and 127 could only be used once; their built-in obsolescence made them easy targets for the British *Statute Law Revision Act,* which repealed them in 1893 along with various other spent provisions of the *British North America Act*.[17]

> 25. Such persons shall be first summoned to the Senate as the Queen by Warrant under Her Majesty's Royal Sign Manual thinks fit to approve, and their Names shall be inserted in the Queen's Proclamation of Union.[18]

The Legislative Council of the Province of Canada became the Senate of the Dominion of Canada; the 24 Legislative Councillors for Canada West became the first 24 Senators for Ontario, and the 24 Legislative Councillors for Canada East became the first 24 Senators for Quebec. Ironically, many of them had first been *elected* as Legislative Councillors, since the Legislative Council of the Province of Canada had been transitioning from an appointed to an elected chamber between 1856 and 1866.[19] Almost all of the Legislative Councillors from the Province of Canada and several Legislative Councillors from New Brunswick and Nova Scotia were appointed en masse, by Royal Proclamation, as the first Senators representing Ontario, Quebec, New Brunswick, and Nova Scotia in the 1st Parliament. Only William Todd of New Brunswick and Edward Chandler of Nova Scotia declined the appointment to the Senate of Canada, under the terms of section 127.[20]

Queen Victoria issued the proclamation appointing the first group of Senators pursuant to section 25 "by and with the advice of our Privy Council," and they took their seats on 23 October 1867.[21] In practice, such wording signified that the British Cabinet advised her to issue the proclamation (even if they did so after consulting the Premiers in British North America), given that the cabinets of the self-governing Crown colonies had not yet gained the authority to advise the Sovereign directly. However, the *Canada Gazette* contains a copy of the Imperial proclamation; it also includes a separate concurring Canadian proclamation, which reproduced Queen Victoria's proclamation for Canada, and was issued by the Governor General, Lord Monck, "with the advice of the Queen's Privy Council for Canada" (i.e., the Cabinet) and counter-signed by the Prime Minister, Sir John A. Macdonald.[22] This procedure also upheld the legitimacy and neutrality of the appointments by putting them above any colonial partisanship.

Of Quebec's first 24 Senators, 16 were

Conservatives or Liberal-Conservatives, and 8 were Liberals; Ontario sent 14 Conservatives or Liberal-Conservatives and 10 Liberals to the Senate. These reflected the will of the electorates of Canada East and Canada West. In addition, the first twelve Senators for New Brunswick maintained partisan balance between six Liberals and six Conservatives; of the first twelve Senators for Nova Scotia, however, eight were Conservatives and four were Liberals.[23] As the minutes of the Quebec Conference, the *Quebec Resolutions,* and the *London Resolutions* demonstrate, the framers took the partisanship of their provincial Legislative Councils and the Senate of Canada for granted; indeed, they considered partisanship integral to the functioning of upper chambers — *that* was never up for debate at all. They all accepted the principle and merely haggled over the most efficient means of securing the partisan character of the Senate of Canada from the moment that it first met.

Furthermore, the proceedings of the Quebec Conference in particular clearly show that the Fathers of Confederation regarded both the elective Legislative Council of the Province of Canada and the appointive Legislative Councils of New Brunswick and Nova Scotia as inherently partisan chambers. In other words, the Legislative Council of the Province of Canada did not become partisan simply because of the experiment in electing Legislative Councillors between 1855 and 1866; partisanship, as part of the character of the place, precedes the method of selection and served the purpose of providing accountability and structure to the proceedings of required of any self-respecting upper chamber. A house of review must consider government business originating from the elected legislative assembly, and governments must ensure that their proposed legislation makes its way through the legislative council, irrespective of the method of selection of its members. They must therefore be capable of understanding and acting on the partisan motivations behind a given bill.

The First Change in Government

The Framers discussed the composition of the Senate at the Quebec Conference in 1864 and raised some concerns against both swamping the upper house and avoiding partisan deadlock between the two houses. Brown recognised that Cartier and virtually all other MPs from Canada East treated fixed representation of regions in the Senate as a necessary condition for federal union. Brown said in the Confederation Debates in February 1865: "if the number of legislative councillors was made capable of increase, you would thereby swamp the whole protection they [Lower Canadians] had from the upper chamber."[24] The Framers thus rejected the traditional British model that the Sovereign could appoint additional Peers by prerogative authority (usually in order to break a legislative deadlock) in a practice known as "swamping." All federations must maintain, at minimum, a partially codified constitution setting out a division of powers between two orders of government and reject such ambiguities as permitting the appointment of an unlimited number of parliamentarians *ad hoc*. The Framers thus agreed at the Quebec Conference that Senate should therefore consist of an equal and fixed number of Senators in each of the three regions: 24 for Ontario, 24 for Quebec, and 24 for the Maritimes (which originally gave 12 each to New Brunswick and Nova Scotia but later reduced them to 10 and assigned four to Prince Edward Island). That solved the federal question but did not address the possibility of deadlock between the two houses of parliament.

The British North American delegates at the London Conference in 1866 devised a solution which both conformed to the federal principle and equality of representation and fixed membership in the Senate by region and provided for a limited "elasticity" for increasing the number of Senators under limited circumstances.[25] Sections 26 and 27 of the *British North America Act, 1867* locked in this compromise between the federal and the practical, and the routine and the ordinary: an equal number of additional Senators can be appointed from each region, but, extraordinarily, by the Queen along a chain of con-

stitutional advice starting with the Canadian Prime Minister, going through the Governor General of Canada, and then the Colonial Secretary. These layers of advice thus put the extraordinary procedure under section 26 above Canadian politics alone and offered some assurance of neutrality, rather like section 25 and the appointment of the first group of Senators upon Confederation. Section 27 then stipulated that the Senate would have reduce to its normal size before the Prime Minister could advise the Governor General to appoint any more Senators under the normal procedure.

> 26. Addition of senators in certain cases
> If at any time on the Recommendation of the Governor General the Queen thinks fit to direct that Three or Six Members be added to the Senate, the Governor General may by Summons to Three or Six qualified Persons (as the Case may be), representing equally the Three Divisions of Canada, add to the Senate accordingly.
>
> 27. Reduction of Senate to normal number
> In case of such Addition being at any Time made, the Governor General shall not summon any Person to the Senate, except on a further like Direction by the Queen on the like Recommendation, until each of the Three Divisions of Canada is represented by Twenty-four Senators and no more.

The Dominion saw its first change of government from one party to another in November 1873, when Sir John A. Macdonald resigned in disgrace over the Pacific Scandal and Governor General Lord Dufferin appointed the Leader of the Opposition and Liberal Party, Alexander Mackenzie, in his place. Canada's rigid party discipline had not yet taken hold in the early 1870s, and both men had difficulty commanding a majority in the 2nd Parliament. Mackenzie advised Dufferin to prorogue the session immediately (necessary because MPs appointed to cabinet had to resign and run in ministerial by-elections) and to call an early election in January 1874. This delivered Mackenzie's Liberals a clear majority of 131 out of 206. But this majority in the House of Commons did not solve Mackenzie's problem in the Senate; out of 77 seats, the Liberals only held 22, plus two "National Liberals" opposite 55 Conservatives and Liberal-Conservatives.[26]

Mackenzie therefore wanted to invoke section 26 to appoint six additional senators. On 22 December 1873, he drew up an Order-in-Council for Governor General Lord Dufferin's approval as well as an accompanying memorandum outlining the rationale for his request. Mackenzie deemed appointing six extra Senators as "in the public interest." Dufferin, blessed with keen political instincts himself, immediately approved the Canadian Order-in-Council on 23 December 1873 but did not pass it on to his superior in London, Colonial Secretary Lord Kimberley, until 26 January 1874, four days after the election that gave the Liberals a clear majority in the Commons.[27] Mackenzie described section 26 as "giving some elasticity to the system" in contrast to the "rigidity consequent of having a fixed number of appointed senators holding their seats for life."[28]

He stressed from the outset that the Senate of Canada operates as a partisan chamber:

> The Senate must necessarily be composed of gentlemen holding the political views of one or the other of the two great parties into which political society is divided. The political complexion of this body cannot therefore be regarded with indifference by any Government, as a large and hostile majority in the Senate may affect the Government very seriously, acting in conjunction with a powerful minority in the Commons.[29]

Mackenzie then cited Resolution 14 of the *Quebec Resolutions* and argued that Confederation would never have happened in the previous decade without agreement on partisan balance in the first group of Senators:

> When the terms of Union were under discussion in the old Provincial Parliaments, the Legislative Councils of the then separate Provinces were nearly equally divided between the two parties. An agreement was then entered into by the leaders of the respective parties that the members of the Senate should be nominated

> by them in equal numbers, that is that each party should nominate one half. This was not, for obvious reasons, provided for in the Act, but nevertheless it might be said to be 'so nominated in the bond,' as the 14th Resolution of the Quebec Conference states that 'due regard shall be had to the claims [...] of the Opposition in each Province go that all political parties may as nearly as possible be fairly represented.' Without such a stipulation, the negotiations could not have been carried on with success.[30]

Moreover, Mackenzie noted that since 1867, Prince Edward Island and British Columbia had joined Confederation and that the Parliament of Canada had created Manitoba from Rupert's Land and the North-Western Territory, which expanded the ranks of the Senate by nine members. Macdonald had made 31 appointments to the Senate, 29 Conservative supporters and two only two Liberal supporters. But Macdonald only extended the Confederation Compromise of ensuring a partisan balance of the first group of Senators to Prince Edward Island, which sent two Senators of each party to Ottawa. Consequently, as Mackenzie lamented, "the Opposition to the present Administration control the Senate by a very large majority."[31]

Mackenzie defended the principle underpinning the Confederation Compromise, arguing that "the fair equilibrium which should exist has been seriously disrupted," though he also acknowledged that a "fair equilibrium" did not mean that the two parties must maintain an equal number of Senators. He conceded that this "would be scarcely possible" for practical purposes. Mackenzie concluded that the Senate, which "exists [as] the result of a system of compromise," should remain an independent legislative body and not "too much the creation of the Administration of the day" but should instead include some "able advocates of the Government measures" tabled before it. Mackenzie advised Dufferin in the Order-in-Council to appoint six additional Senators and believed that "a sufficiently clear case has been established to justify the application of the counterpoise provided by the Constitution."[32] The Colonial Secretary, Lord Kimberley, disagreed.

In his correspondence with Dufferin, Kimberley explained that he had decided not to recommend the additional appointments to Queen Victoria on the grounds that section 26 should only "provide a means of bringing the Senate into accord with the House of Commons in the event of a collision of opinion between the two Houses."[33] In contrast, Mackenzie wanted to invoke section 26 pre-emptively simply because the Liberals lacked a majority in the Senate, not because the Conservative majority in the Senate had blocked any specific legislation.[34] In fact, by definition, the Conservatives could not have obstructed or frustrated the Mackenzie government's legislative program in the Senate in January 1874 because Mackenzie had secured an immediate prorogation of the 2nd Parliament in November 1873 and an early election in January 1874; the 3rd Parliament did not first meet until 26 March 1874.[35]

Even upon the dissolution of the 3rd Parliament in 1878, Mackenzie had only managed to increase the Liberal grouping in the Senate from 24 to 29 of 77. It seems in retrospect that the Section 26 Procedure would have made little difference, since Mackenzie had wanted in 1874 to increase the Liberal representation from 24 to 28.

Mulroney Succeeds

In the late 1980s, Prime Minister Brian Mulroney faced an intransigent Senate determined to block government bills which clearly constituted matters of confidence: the Free Trade Bill in 1988 and the money bill implementing the Goods and Services Tax in 1990. In the first case, the Liberals held 59 seats versus 36 for the Progressive Conservatives; the Leader of the Opposition in the Senate, the adept and wily Allan MacEachen, therefore presided over a larger grouping than did the Leader of the Government in the Senate.[36] In 1988, the Liberal majority deployed a suspensive veto in the four-year-old parliament, declaring that it would delay passage of any Free Trade Bill until after a general election. In 1990, MacEachen sought to turn the Senate into a *de facto* confidence chamber; 52 Liberal Senators blocked the Mulroney government's money bill to create a consumption tax in a two-year-old parliament. Prime Minister Mulroney responded in kind to this unprecedented obstruction with an extraordinary counter-measure: section 26.

Originally, "The Queen" in section 26 referred to the one and indivisible Imperial Crown, where the Sovereign would act for Canada but on the advice of British ministers. The Sovereign therefore appointed the Governor General of Canada on the advice of British Ministers, and the Governor General then reported directly to the Colonial Secretary and represented the Imperial Crown. But in light of the constitutional evolution of the Dominion and Canada and the multiplication of the Imperial Crown into a personal union of separate Crowns for each self-governing Realm, "Queen" in the *Constitution Act, 1867* now refers to the Queen of Canada who acts upon the advice of Canadian ministers. Section 26 therefore survived Canada's evolution from self-governing Crown colony to independent and sovereign state under its own separate Crown because it says "Queen" and not "Her Majesty in Council," like the provisions for Imperial reservation and disallowance of Canadian statutes. Henry Davis predicted in the *Manual of Official Procedure of the Government of Canada* in 1968 what the Mulroney government did in 1990: "Today the United Kingdom Government would not become involved. A recommendation from the Governor General would be put before the Queen who would be bound to accede to it."[37] The *British North America Act, 1915* established the four Western Provinces as the fourth senatorial region and also amended section 26 to allow for the appointment of 4 or 8 additional senators — one or two for each of the four regions.

The Mulroney government invoked section 26 in September 1990 through a comedically complicated chain of executive instruments made necessary by the layering of advice contained in section 26.[38]

26 September 1990: the Mulroney government presented an Order-in-Council 1990-2061 for the Governor General's signature. This advised His Excellency to "recommend to Her Majesty the Queen that Letters Patent, to which Her Majesty may be graciously pleased to affix Her signature thereto, do issue under the Great Seal of Canada directing, pursuant to section 26 of the Constitution Act, 1867, that eight Members be added to the Senate in order that the Governor General may by Summons to eight qualified persons, representing equally the Four Divisions of Canada, add to the Senate accordingly."

27 September 1990: The Queen of Canada issued Letters Patent under the Great Seal of Canada stating: "We, on the recommendation of Our Governor General, do by these Presents direct, pursuant to section 26 of the Constitution Act. 1867, that eight Members be added to the Senate of Canada."

27 September 1990: Prime Minister Mulroney issued instrument of advice 1990-13 to Governor General Ray Hnatyshyn that he summon eight additional Senators, "representing equally the Four Divisions of Canada, to the Senate": Dr Wilbert Joseph Keon, Mr. Michael Arthur Meighen, Mr. Norman Grimard, Mrs. Therese Lavoie-Roux, Mr. James W. Ross, Mr. John Michael Forrestall, Mrs. Janis Johnson, Mr. Eric Arthur Bresnton.[39]

For what it's worth post-*Statute of Westminster*, Prime Minister Mulroney's invocation of section 26 certainly did meet Lord Kimberley's test because the Liberal major-

ity continued to block several confidence measures. The appointment of 8 additional Senators thus finally tilted the balance in the Mulroney government's favour, increasing the size of the Senate from 104 to 112 and giving the Conservatives a plurality of 54 opposite 52 Liberals.[40] The Senate then passed the money bill and saved Canada from undergoing an embarrassing constitutional crisis.

A Partisan Chamber

History recognises the Senate and the Legislative Council from whence it came as partisan legislative bodies. The layout of the Senate builds in two sides, government to the Speaker's right and opposition to the Speaker's left — demonstrating architecturally and conceptually that it functions as a partisan chamber. It does not sit configured a Continental European horseshoe. Statute law and parliamentary law also acknowledge the Senate as a partisan legislative body. Section 62 of the *Parliament of Canada Act* also recognises the jobs of "Leader of the Government in the Senate" and "Leader of the Opposition in the Senate," as well as those of "Deputy Leader of the Government in the Senate" and "Deputy Leader of the Opposition in the Senate," as worthy of receiving "additional annual allowances." Even the most recent edition of the *Rules of the Senate* (the upper chamber's equivalent to the *Standing Orders* of the Other Place) from December 2015 — likewise replete with references to the "Leader of the Government in the Senate" and the "Leader of the Opposition in the Senate" — also implicitly treat the Senate as a partisan legislative body. Indeed Rule 4-8(1) exposes how the last two Prime Ministers of Canada have made the Senate *less* accountable, not more:

> 4-8. (1) During Question Period, a Senator may, without notice, ask a question of
>
> (a) the Leader of the Government, on a matter relating to public affairs;
>
> (b) a Senator who is a minister, on a matter relating to that Senator's ministerial responsibility;

Successive Prime Ministers have largely failed the Senate in maintaining a partisan balance.

In light of the Harper government's refusal to keep the Leader of the Government in the Senate in cabinet after 2013 and the Trudeau government's refusal even to concede the existence of that role, preferring instead "Government Representative in the Senate," Rule 4-8(1)(b) has gone dormant and Rule 4-8(1)(a) has become an absurdity.

The Legislative Council of the Province of Canada and the Senate of Canada to which it gave rise remained partisan chambers and counted a cabinet minister or two amongst their ranks in all but five years between 1856 and 2013. The Senate should remain partisan, and Cabinets should include at least one Senator-Minister again, a Government Leader in the Senate who can properly and accountably shepherd government bills through the upper chamber. However, Prime Ministers should also take care to maintain some semblance of partisan balance between Liberals and Conservatives so that the Senate maintains both its partisanship and its credibility as a house of review that will scrutinise, improve, and delay — but not obstruct — key government legislation. The Senate made that mistake by blocking the Mulroney government's free trade bill in 1988 and by blocking a money bill in 1990 that established the Goods and Services Tax, which, in turn, prompted Mulroney to invoke Section 26 of the *Constitution Act, 1867* successfully for the first time since Confederation, in order to "stack" the senate with eight additional appointees.

A future Prime Minister could even retain Justin Trudeau's Independent Advisory Board for Senate Appointments provided that he used the body to sift through qualified partisans who will sit honestly as partisans, either in government or in opposition, on either side of the Speaker. This body could vet "fit and qualified persons" so that the Prime Minister always has a short list of potential appointees for each province and territory on

hand. This process would have avoided the problem that Harper faced during the intersession in December 2008 when he nominated 18 appointees in haste and in panic, as a desperate contingency in case that the House of Commons still supported the Liberal-New Democratic coalition in January 2009 and ousted him from office.[41] Three of those Senators — Pamela Wallin, Patrick Brazeau, and Mike Duffy — later precipitated and came to represent the Senate Expenses Scandal.

While the Senate maintained its partisanship from 1867 to 2015, successive Prime Ministers — who control nominations to this appointive chamber — have largely failed the Senate in maintaining a partisan *balance*. Alexander Mackenzie pointed this out as early as 1873 and argued that his predecessor, Sir John A. Macdonald, had broken the Confederation Bargain in principle after only six years, when he advised that the Queen appoint additional Senators under section 26; while Governor General Lord Dufferin approved, the Colonial Secretary, Lord Kimberley, rejected the request.[42] Partisan balance also matters and would preserve the Senate's credibility as a house of review. Some of our newer sister Commonwealth Realms in the Caribbean have constitutionally entrenched a partisan balance within their Senates. For instance, section 30 of the Constitution of the Federation of Saint Kitts and Nevis (promulgated in 1983) says, "Of the Senators (a) one-third of their number [...] shall be appointed by the Governor-General, acting in accordance with the advice of the Leader of the Opposition; and (b) the others shall be appointed by the Governor-General, acting in accordance with the advice of the Prime Minister." Section 31 further allows the Governor-General to dismiss Senators on the advice of either the Prime Minister of Leader of the Opposition. The Constitution of Antigua and Barbuda, from 1981, contains similar provisions: of 14 Senators, the Governor-General appoints ten on the advice of the Prime Minister and 4 on the advice of the Leader of the Opposition. The Constitutions of Barbados and Grenada follow that pattern but also carve out a third category of Senators appointed on the personal initiative of the Governor-General without outside advice at all!

In the absence of any equivalent provisions within the Constitution of Canada, individual Prime Ministers should strive to be a "Court of Equity," as Macdonald vowed, in order to maintain some partisan balance and ensure that the Senators supporting their governments never occupy more than, say, 60% of the seats. Prime Ministers would also do well to name any former premier, or former provincial cabinet minister, willing represent their provinces in the Senate; they would bring both legislative and executive experience as well as a practical understanding of politics and a valuable provincial perspective to the federal parliament. Pierre Trudeau magnanimously nominated former Social Credit Premier of Alberta and ideological rival, Ernest Manning, to the Senate in 1970, as well as former Progressive Conservative Premier of Manitoba, Dufferin Roblin, in 1978. Sadly, no Prime Minister has appointed opposition Senators since Paul Martin.

The Senate can, like the House of Lords, include non-affiliated cross-benchers. But in order to function as intended by the Framers of the BNA Act, it must consist mainly of partisans in government and opposition.

Notes

1. Steven Chase and Gloria Galloway, "Readying a Shuffle, Harper Severs Senate's Connection to Cabinet," *Globe and Mail*, 4 July 2013.
2. Privy Council Office, "Thirteenth Ministry" and "Eighteenth Ministry" in *Guide to Canadian Ministries Since Confederation*, 9 January 2018.
3. *National Post*, "Justin Trudeau Kicks All 32 Liberal Senators Out of Caucus in Bid for Reform," 29 January 2014.
4. Peter Zimonjic and Rosemary Barton, "Andrew Scheer Says He Will Not Appoint Independent Senators If Elected Prime Minister," *CBC News*, 28 June 2017; Joan Bryden, "Scheer Stands By Vow to Return to Partisan Senate, Make Patronage Appointments," *The Canadian Press*, 29 September 2019.
5. Joseph Pope, editor, *Confederation: A Series of Hitherto Unpublished Documents Bearing on the British North American Act* (Toronto: The

Carswell, 1895), 64.

6. G.P. Browne, editor, *Documents on the Confederation of British North America* (Montreal-Kingston: McGill-Queen's University Press, 2009), 104-105.
7. Browne 2009, 102.
8. Ibid., 103.
9. Ibid., 104-105.
10. Sir Charles Tupper, *Reflections on 60 Years* (Toronto: Cassell and Company, Limited, 1914), 41.
11. Browne 2009, 103.
12. Ibid., 105-106.
13. Maurice Ollivier, editor, "*Quebec Resolutions*," Part I in *British North America Acts and Selected Statutes,* 39-49 (Ottawa: Queen's Printer, 1962), 41.
14. Idem, "*London Resolutions*," Part I in *British North America Acts and Selected Statutes,* 50-60. (Ottawa: Queen's Printer, 1962), 51.
15. Charles Paul Hoffman, *The Abolition of the Legislative Council of Nova Scotia, 1925-1928*, Master of Laws Thesis, McGill University, 7 December 2011, 43.
16. *British North America Act, 1867* (UK) 30 Victoria, c. 3, s. 127.
17. Canada, Department of Justice, "Schedule to the *Constitution Act, 1982*: A Modernization of the Constitution" in *A Consolidation of the Constitution Acts, 1867 to 1982* (Ottawa: Her Majesty the Queen in Right of Canada, 1 January 2001), 8.
18. *British North America Act, 1867* (UK) 30 Victoria, c. 3, s. 25.
19. 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 (University of Toronto Press, 2003): 3; Wikipedia, "Legislative Council of the Province of Canada," 28 November 2016; Canada, Senate of Canada, "A Legislative and Historical Overview of the Senate of Canada," May 200; Statute 19-20 Victoria, chapter 140: An Act to Change the Composition of the Legislative Council by Rendering the Same Elective, 1856. The Governor General had even reserved the bill so that London could give it Royal Assent.
20. Canada. Parliament of Canada, Parl Info: "Senators, 1st Parliament," 6 January 2017.
21. *Ibid.*
22. *Canada Gazette*, 1, no. 1 (Ottawa: The Queen's Printer, 1 July 1867), 1; *Canada Gazette*, 1, no. 1 (Ottawa: The Queen's Printer, 1 July 1867), 2.
23. Parliament of Canada, Parl Info: "People: Parliamentarians, 1st Parliament," accessed 24 September 2018.
24. Janet Ajzenstat *et al.,* eds., *Canada's Founding Debates* (University of Toronto Press, 1999), 87.
25. Browne 2009, 211.
26. Parliament of Canada, Parl Info: 3rd Parliament: "Party Standings in the House of Commons" and "Party Standings in the Senate," accessed 31 October 2019.
27. Eugene Forsey, "Alexander Mackenzie's Memoranda on the Appointment of Extra Senators, 1873-4," *The Canadian Historical Review* 27, no. 2 (June 1946): 189-190.
28. Forsey 1946, 190.
29. Ibid., 191.
30. Ibid.
31. Ibid., 192.
32. Ibid., 194.
33. Mollie Dunsmuir, "The Senate: Appointments Under Section 26 of the *Constitution Act, 1867*," Library of Parliament Briefing BP-244E (August 1990)
34. Privy Council Office, PC 1873-1711, "Appointment of Six Additional Senators Under Section 26 of the *British North America Act, 1867*," 22 December 1873.
35. Parl Info, "Third Parliament: Sessions," accessed 31 October 2019.
36. Parl Info, "Thirty-Third Parliament: Party Standings in the Senate, 26 September 1988," accessed 31 October 2019.
37. Privy Council Office, *Manual of Official Procedure of the Government of Canada,* Henry F. Davis and André Millar. (Ottawa: Government of Canada, 1968): 552.
38. *Constitution Act (Re) (B.C.C.A.),* [1991] B.C.J. No. 244 pages 5-6.
39. Prime Minister's Office, Instrument of Advice 1990-13, 27 September 1990. Obtained from ATIP 2015-00304.
40. Parl Info, "Thirty-Fourth Parliament: Party Standings in the Senate, 26 September 1990 and 27 September 1990," accessed 31 October 2019.
41. CBC News, "Wallin, Duffy Among 18 Named to Fill Senate Seats," 22 December 2008.
42. Privy Council Office, PC 1873-1711, "Appointment of Six Additional Senators Under Section 26 of the *British North America Act, 1867*," 22 December 1873.