

# **Understanding Canadian Bicameralism: Past, Present and Future**

**Presented at the 2018 Annual Conference of the Canadian Political Science  
Association**

**Gary William O'Brien, Ph.D.**

**June, 2018**

**Not be cited until a final version is uploaded**

Studies of the Senate of Canada's institutional design as well as the proposals for its reform have often focused on the method of selection, distribution of seats and powers.<sup>1</sup> Another methodology is the use of classification models of bicameral second chambers which also explore power and representation dimensions but in a broader constitutional and political context. Although such models have been employed to study Canada's upper house in a comparative way,<sup>2</sup> they have not been used extensively to understand the origins of the Senate's underlying structure or to analyze reform proposals for their impact on its present multi-purposed roles.

This paper proposes to give a brief description of the models which characterize pre- and post-Confederation second chambers. Given that many of the legal and procedural provisions concerning Canada's current upper house can be traced back to the *Constitutional Act, 1791* and the *Act of Union, 1840*, it will place Canadian bicameralism within its historical context. The Senate's "architecture", "essential characteristics" and "fundamental nature", terms used in the 1980 and 2014 Supreme Court opinions but with no link to pre-Confederation antecedents, cannot be understood without references to Canadian parliamentary history. Finally, it will provide some observations on the nature of Canadian bicameralism and will conceptualize various reform proposals in terms of classification models. While it may be true that origins and historical roots do not necessarily determine function within a modern political system,<sup>3</sup> the chances of successful reform may prove more difficult if the ideas for change diverge significantly from Canada's bicameral development. As the Wakeham Royal Commission stated in its report on reforming the House of Lords: "...(T)he

---

<sup>1</sup> See for example Jack Stilborn, "Forty Years of Not Reforming the Senate" in Serge Joyal (ed.), *Protecting Canadian Democracy: The Senate You Never Knew* (Montreal and Kingston: Canadian Centre for Management Development, McGill-Queens University Press, 2003), 31-66; and Bruce Hicks, "Placing Future Senate Reform in Context", *Constitutional Forum*, Vol 24, no. 2, 2015.

<sup>2</sup> See Arend Lijphart, "Bicameralism: Canadian Senate Reform in Comparative Perspective" in Herman Bakvis and William M. Chandler (eds.), *Federalism and the Role of the State* (Toronto: University of Toronto Press, 1987), 101-112.

<sup>3</sup> Robert A. Mackay, *The Unreformed Senate of Canada* (rev.ed.) (Toronto: McClelland and Stewart, 1963), 11.

more successful second chambers are those which best fit with the history, traditions and political culture of the country concerned..."<sup>4</sup>

### **The Models of Canadian Bicameralism**

In their theoretical analysis of bicameral institutions, Tsebelis and Money describe two categories: (i) an efficiency dimension which deals with, among other factors, the quality of legislation and (ii) a power dimension such as legal veto power, and conventions or rules of the constitution, not enforced by the courts. Patterson and Mughan note that "a powerful justification for a two-house parliament lies in demands for representation", a third dimension.<sup>5</sup> A fourth dimension would include the constitutional principles upon which the model was based. Four bicameral typologies characterized pre-Confederation Canada.

#### **(a) The Mixed Government Model**

Janet Aizenstat has called the Westminster liberal democratic model of mixed government "with bicameralism at its heart, the world's greatest political invention."<sup>6</sup> In its original form it was based on the premise that the major interests of society must take part jointly in government "so preventing any one interest from being able to impose its will upon the others."<sup>7</sup> It appeared as a class-based government with three distinct branches - king, lords and commons – balancing each other to ensure that one was not the master of any other. The power to make legislation was dispersed and outcomes were the result of compromise. Such a system permitted important protections – from parliamentary extremism, for class privilege and for minority rights. Throughout

---

<sup>4</sup> Royal Commission on the Reform of the House of Lords, *A House for the Future* (London: The Stationery Office, 2000), 11.

<sup>5</sup> See George Tsebelis and Jeannette Money, *Bicameralism* (Cambridge: Cambridge University Press, 1997), 35-42; and Samuel C. Patterson and Anthony Mughan, *Senates: Bicameralism in the Contemporary World* (Columbus: Ohio State University Press, 1999), 10.

<sup>6</sup> Special Senate Committee on Senate Reform, Issue no. 1, 65. See also Janet Aizenstat, *The Canadian Founding: John Locke and Parliament* (Montreal and Kingston: McGill-Queen's University Press, 2007).

<sup>7</sup> M.J.C. Vile, *Constitutionalism and the Separation of Powers* (Indianapolis: Liberty Fund, second edition, 1998), chapter 2.

the eighteenth century, the House of Lords remained a co-equal part of parliament in the passage of legislation and functioned as a major court exercising appellate jurisdiction.<sup>8</sup>

Of almost equal importance was its efficiency dimension which was demonstrated in its redundant legislative procedures.<sup>9</sup> Bills were to be considered and re-considered before passage in order to ensure they were the most intelligent decisions that could be made by a body of legislators.

### **(b) The Complementary Model of Bicameralism**

This model retains the system of a popularly elected lower house and a non-elected upper chamber but with a reformulated constitutional principle. With the recognition of the convention of responsible government, parliamentary bicameralism is to be based on the premise that the lower house is the pre-eminent political forum.<sup>10</sup> The legislative work of the second house is no longer to conflict with that of the first but act in harmony as its useful partner. With a diminished power dimension, the upper house focuses on influence either by sober second thought, detailed examination of legislation or giving minorities a stronger parliamentary voice than they normally would have in the lower house.

The complementary model removes the old tensions of the mixed government model and relegates the upper house to “efficient, apolitical functions.”<sup>11</sup> It cannot prevent parliamentary despotism or protect against popular demagoguery and runs the risk of being abolished if it falls out of favour with elected officials. It is through the lens of a complementary chamber that the contemporary House of Lords is viewed today. Philip Norton writes: “The House of Lords conceives its role

---

<sup>8</sup> See Philip Norton, *Reform of the House of Lords* (Manchester: Manchester University Press, 2017), chapter 2.

<sup>9</sup> Writing in 1908, Joseph Redlich saw that the genius of Westminster’s bicameralism was not its checks and balances but rather its legislative practices. See *The Procedure of the House of Commons* (New York: AMS edition, 1969, Volume 1), 4.

<sup>10</sup> See David E. Smith, *The Canadian Senate in Bicameral Perspective* (Toronto: University of Toronto Press, 2003), 33.

<sup>11</sup> Tsebelis and Money, *op.cit.*, 34.

as not to conflict with but rather to complement the work of the House of Commons.”<sup>12</sup>

### **(c) The Popular Sovereignty Model**

Under this model there is greater representation of social classes and economic interests as the members of the upper house are chosen through popular election. As opposed to independence, accountability and effective representation are its primary characteristics. Charles James Fox proposed an elected Legislative Council for Upper and Lower Canada during the debate on the *Constitutional Act, 1791* making the idea as much English as American.<sup>13</sup> Fox’s vision of an elected second chamber within parliament was embraced by many Radicals who followed him, particularly John Arthur Roebuck who put forward his ideas of government in the 1835 *Pamphlets for the People*. Like Jeremy Bentham, Roebuck did not feel a second chamber was really needed. But, he admitted, supposing he was in error “the most efficient Second Chamber would be an elective one, completely responsible to the People.”<sup>14</sup>

The principal objection to the popular sovereignty model is that it may challenge the “harmony” of parliamentary machinery which the complementary model promises. Because the second house will have greater popular legitimacy and mandate, gridlock may threaten the work of parliament. Composition and powers interrelate and therefore new conventions will have to be worked out if government is to remain efficient. It has been proposed as a modification to the mixed government model, as well as to the complementary model but with the proviso that the legislative power of the second chamber be restricted to a suspensive veto.

### **(d) The Territorial Model of Bicameralism**

---

<sup>12</sup> Norton, op.cit.

<sup>13</sup> See Parliamentary History, *Debates on the Second Quebec Government Bill*, April 8, 1791. Fox told the House of Commons: “The Legislative Councils ought to be totally free, and repeatedly chosen, in a manner as much independent of the governor as the nature of a colony would admit.”

<sup>14</sup> J.A. Roebuck (ed.), *Pamphlets for the People*, Vol. 1, (London: Charles Ely, 1835). See “The Evils of the House of Lords”, 5.

In this typology the upper house's territorial distribution of seats helps constrain a central government's powers by safeguarding sectional interests in the enactment of legislation. The model promises more legitimacy for upper houses as one of its purposes is now representation of people and territory.<sup>15</sup> In federal systems, the model promises more stability for bicameralism as territorial consent would be required for constitutional change.

Territorial bicameralism emerged most vividly from the 1787 Philadelphia Constitutional Convention where delegates agreed on a strong bicameral legislative system with the lower house reflecting popular democracy and the upper chamber the territorial dimension with each state having the same number of seats. An upper house based on regional representation irrespective of population is a common feature of federal and some unitary systems.<sup>16</sup>

### **Canadian Bicameralism in its Historical Context**

(i) A colonial model of mixed government was introduced to Nova Scotia in 1758 through prerogative instruments<sup>17</sup> and to Upper and Lower Canada by the passage of the *Constitutional Act, 1791*. With respect to its legal powers, the model fell far short from that found at Westminster as the local legislatures were constitutionally prevented from providing an effective legislative check on the executive. The Lieutenant Governor could on his own withhold royal assent from any bill or reserve it for the colonial office's review. Even after royal assent was signified, London could disallow a bill within two years.<sup>18</sup> However, the refusal of

---

<sup>15</sup> See Tsebelis and Money, *op.cit.*, 32-33.

<sup>16</sup> See Meg Russell, "The Territorial Role of Second Chambers", *The Journal of Legislative Studies*, Volume 7, 2001, Issue 1.

<sup>17</sup> See J. Murray Beck, *The Government of Nova Scotia* (Toronto: University of Toronto Press, 1957), chapter 1.

<sup>18</sup> The *Act of Union, 1840* and the *Constitution Act, 1867* carried the same language on the reservation of bills. MacGregor Dawson notes that it was only by 1914 that Canadian autonomy for its internal affairs became a reality. See R. MacGregor Dawson, *The Government of Canada* (Toronto: University of Toronto Press, 1970, fifth edition), 44.

granting supply could be, and was in Lower Canada, a potent administrative power of the legislature in the pre-Rebellion period.<sup>19</sup>

Regarding its composition, the objective of the 1791 act was to make the Canadian upper houses “aristocratic” and equal to the “democratic” lower ones. While seats in the upper house could be held for life, at the discretion of the king, hereditary titles could be bestowed which would enable a son to inherit his father’s writ of summons. The Prime Minister William Pitt the Younger told the Commons: “An aristocratical principle being one part of our mixed government, he thought it proper that there should be such a council in Canada as was provided by the bill and which might answer to that part of the British constitution which composed the other house of parliament.”<sup>20</sup>

There were warnings that exporting an aristocratic model to Canada would prove difficult. Nova Scotia’s upper house had never been popular. J. Murray Beck writes that Nova Scotians “had received a miniature House of Lords for which they expressed no enthusiasm. The Colonial Secretary who conferred it likewise doubted its utility, while the Council of Twelve (the predecessor of the Legislative Council) contended that a British-type of second chamber could not be constructed in a colony...(T)he Legislative Council started with no one prepared to own it....”<sup>21</sup>

The Colonial Office had been told by Sir Guy Carleton in 1790 that a hereditary, class-based Legislative Council in the Canadas was not going to work. He wrote that “the fluctuating state of Prosperity would expose all hereditary honours to fall into disregard.” Believing that a form of the mixed government model could still be reproduced on a non-aristocratic basis, Carleton’s advice was to establish a Council with nominated members only and “to appoint the number during life, good behaviour and residence in the provinces.”<sup>22</sup> Unfortunately, Carleton failed

---

<sup>19</sup> See Gerald M. Craig (ed.), *Lord Durham’s Report* (Toronto: McClelland and Stewart, Carleton Library, 1963), 20-77.

<sup>20</sup> Parliamentary History, op.cit., April 8, 1791.

<sup>21</sup> Beck, op.cit., chapter VII.

<sup>22</sup> W.P.M. Kennedy (ed.), *Statutes, Treatises and Documents of the Canadian Constitution, 1713-1929* (Toronto: Oxford University Press, 1930, second edition), Dorchester to Grenville, February 8, 1790.

to emphasize that councillors needed to have and exhibit some degree of independence. The historical consensus is that upper houses failed in the old colonial system, among other reasons,<sup>23</sup> because they were too close to the Crown.<sup>24</sup>

In both the Canadas, Legislative Councillors holding writs of summons saw themselves as representing the imperial connection. They viewed the lower house not so much as representing the popular will with all its dangers but when under the control of les Patriotes or the reformers representing non-British republican influences. Being independent could mean jeopardizing British rule. With the outbreak of rebellions in 1837-38, it was clear that the colonial mixed government model had contributed to instability and needed to be reformed.

(ii) As dissatisfaction with the mixed government model grew, reform opinion particularly in Upper Canada shifted from giving the Council greater independence to establishing a new constitutional model whereby a ministry to remain in power only needed the confidence of the elected assembly. In accordance with this new convention, the upper house would become non-threatening. Its composition would be determined by the political leaders controlling a majority in the Assembly and its role would be confined to refining lower house legislation. While its legal powers would remain, the conventions of parliament would be altered.

---

<sup>23</sup> The appointment system was also criticized. In the 1834 Ninety-Two Resolutions, the Lower Canadian Assembly condemned it as “the most serious defect of the *Constitutional Act*...the most powerful and most frequent cause of abuses of power.” Lord Durham felt the Councils had no resemblance to the Lords “except that of being a non-elective check on the elective branch of the legislature.” See Craig, *op.cit.*, 169. Notwithstanding that the Chief Justice of the province was often appointed Speaker, the Central Canadian Councils had no judicial role.

<sup>24</sup> In Nova Scotia members of the Legislative Council “consisting principally of His Majesty’s Officers” were felt to be “always disposed to second the views of the Governor.” Beck, *op.cit.*, Chapter 3. The report of the *Select Committee of the British House of Commons on the Civil Government of Canada* concluded “that a more independent character should be given to (the Legislative Councils)...” (House of Commons, 1828).



The one who best articulated the theory of the complementary model was Robert Baldwin whose ideas came from his father, William Warren Baldwin.<sup>25</sup> In an 1836 letter to the Colonial Secretary Lord Glenelg, Robert Baldwin proclaimed that responsible government was already an integral part of the British constitution and that he simply wanted it transplanted. His desire was that political machinery in government “work harmoniously within itself, without collision between any of its great wheels.” The Executive Council would rely on the confidence of “the most powerful Party in Parliament.”

Believing that “the institutions of every Colony ought as nearly as possible to correspond with those of the Mother Country,” Baldwin opposed abolishing the Council and felt it still had an important role to play. He told Glenelg “it may in addition be urged that a second chamber of some kind has, at least in modern constitutional legislation, been deemed essential to good Government.”<sup>26</sup>

Lord Durham who had been sent to review the unrest in the Canadas concluded that a new bicameral arrangement was called for. He admitted that attempts to replicate the House of Lords in Canada were a failure. As he said: “The constitution of the House of Lords is consonant with the frame of English society; and as the creation of a precisely similar body in such a state of society as that of these Colonies is impossible....”<sup>27</sup> While endorsing the implementation of responsible government, he also recommended the Council’s constitution be revised to allow it to act “as a useful check on the popular branch of the legislature.” Durham feared that if responsible government was adopted, the reformers were determined to ensure that the nominated upper house would become subordinate to the lower one. The reformers, he wrote, “rightly judged that, if the higher offices and the Executive Council were always held by those who could commend a majority in the Assembly, the constitution of the Legislative Council was a matter of very little moment, inasmuch as the advisers

---

<sup>25</sup> See J.M.S. Careless (ed.), *The Pre-Confederation Premiers, Ontario Government Leaders, 1841-1867* (Toronto: University of Toronto Press, 1980), 91, and Robert L. Fraser, “William Warren Baldwin” in *Dictionary of Canadian Biography*, Volume VII (1836-50).

<sup>26</sup> H.D. Forbes (ed.), *Canadian Political Thought* (Oxford University Press, 1985), 26-33.

<sup>27</sup> Craig, *op.cit.*, 81, 169-70.

of the Governor could always take care that its composition should be modified so as to suit their own purposes.”<sup>28</sup>

Despite Durham’s recommendation, the *Act of Union* retained the basic design of the old councils including the provision of unlimited numbers. When responsible government was finally accepted by the colonial office, swamping became an integral constitutional power. It was used by Lafontaine-Baldwin to secure the passage of their legislative programme, including the controversial Rebellion Losses Bill for Lower Canada. While the number of councillors appointed between 1842 and 1847 averaged just over three a year, at times with both conservatives and reformers being represented, between 1848 and 1849, 12 additional councillors were appointed, all supporting the government.<sup>29</sup>

The new constitutional arrangements did not sit well with certain members of the Council. On April 12, 1849 a motion was moved that the present constitution of the Council was “defective” and: “That from the number of Members of this House, not being limited, and from the power of appointment of Members being vested virtually in the Members of the Executive Council, most of them leaders of the majority in the Legislative Assembly, who have lately used such power to the extent of acquiring the power of this House – there is no longer in this House the check upon undue or oppressive legislation, which there ought to be for the public liberty and welfare.”<sup>30</sup>

In the aftermath of the Montreal riots and the burning of the parliament buildings, the Legislative Council lost much of its credibility.<sup>31</sup> Once again, calls were made for a new bicameral arrangement.

(iii) When Baldwin went to London to press the Colonial Office on the need for responsible government, he met with Roebuck who advised him that “making the

---

<sup>28</sup> Ibid., 81.

<sup>29</sup> See Sir E.P. Taché’s review of Council appointments between 1841 and 1849, *Parliamentary Debates on the subject of the Confederation of the British North American Provinces* (Quebec: Hunter Rose, 1865), 238-239.

<sup>30</sup> *Journals of the Legislative Council, Province of Canada*, April 12, 1848, 167. The motion was negated.

<sup>31</sup> See Mackay, op.cit., 29.

Legislative Council elective ought to be the great object of Canadian Politicians.” Not surprisingly, Baldwin rejected that advice on the grounds that “making the Legislative Council elective might convert that body into an additional engine of hostility against the executive Government...”<sup>32</sup> Throughout his political career, Baldwin stubbornly opposed having the Council elected. As George Brown would later state during the *Confederation Debates*: “So long as Mr. Robert Baldwin remained in public life, the thing (electing the upper house) could not be done; but when he left the deed was consummated.”<sup>33</sup>

There was outrage in some quarters over how Council had been treated. At the 1849 convention of the British American League, according to the report of the debates, a Mr. Dixon “contented that there had never been a greater specimen of pure democracy manifested in this country by the packing of the Legislative Council. (Loud cheers.) The Legislative Council is made subservient to the party in power; it was a farce to call that the British Constitution, that equally and well balanced constitution, upon which we have so justly prided ourselves.”<sup>34</sup>

Public opinion seemed in favour of restoring the Council’s role of acting independently while updating the mixed government model’s premises. In 1853 the Reform Hincks-Morin government asked the British parliament to amend the *Act of Union* to make the Council elected. The British government preferred instead that the province revise the constitutional framework itself and passed an enabling act. In 1854 the Conservative MacNab-Drummond administration introduced legislation to popularly elect the Council. The minister introducing the bill, Joseph Cauchon, stated that the change involved “a radical alteration in the system of government. The necessity of this measure was fully proved by the expression of public opinion. He had himself been opposed to the principle of election as applied to the Legislative Council. But the unmistakable expression of

---

<sup>32</sup> Forbes, op.cit., 26-33.

<sup>33</sup> *Parliamentary Debates*, op.cit., 92.

<sup>34</sup> *Minutes of the Proceedings of the Second Convention of the Delegates of the British American League* (Toronto: Patriot Office, 1849, Forgotten Books), xxxi.

public opinion, the almost unanimous assent of the people of the country, had convinced him that change was absolutely necessary.”<sup>35</sup>

The act amending the constitution of the Legislative Council was given royal assent on June 24, 1856. No provision was made for dissolution if there was a deadlock between the two houses. Councillors would serve eight-year terms. Ultimately, once the appointed members who had been ‘grandfathered’ vacated their seats, there would be 48 members elected from single member constituencies, 24 from Canada West (Upper Canada) and 24 from Canada East (Lower Canada). One fourth would retire every two years. For the first time, a real property qualification of 2,000 pounds was added.<sup>36</sup>

Many of those supporting an elective Council, including Cauchon, Francis Hincks and John Rolph, saw its role as being reactive and limited to checking the assembly against “hasty” legislation. This was also the view of the Governor General at the time, Edmund Head. In a lengthy dispatch to the Colonial Secretary, Head stated he agreed with the basic purpose of bicameralism which was “to secure full and fair discussion for every legislative measure and to argue against haste....” He believed however that an appointed chamber would not achieve this objective. It was better for legislative debate to be “conducted by men who feel they have in their hands the power of rejection, when they disapprove, and who are conscious of holding a position in the Community, such as will bear them out in temporary opposition at least to the apparent wishes of the people themselves. On any other terms, it is little better than the consideration of a measure by a debating Society or Club....” He wanted the upper house to have the ability to stand up to the Legislative Assembly in times of great political passion and mean it.<sup>37</sup>

George Brown feared that an elective chamber would never limit itself to delaying or revising legislation. As opposed to a “Court of Review”, Brown felt it

---

<sup>35</sup> *Assembly Debates*, March 27, 1855, 2469.

<sup>36</sup> See Province of Canada, Second Session, Fifth Parliament, c. 140, s. 4.

<sup>37</sup> See *Journals of the Legislative Council*, 1857, 45-54.

would become “an active political engine.”<sup>38</sup> Although the popular sovereignty model was in place only a few years making it difficult to draw firm conclusions, there is some evidence that with no provisions for defining the norms of parliamentary governance Brown was right. In 1858, shortly after the Brown/Dorion ministry was sworn in, the Council approved a motion of non-confidence in the new administration.<sup>39</sup> On the other hand, there was no increase in the number of bills sent down from the Council for concurrence by the Assembly in the post-1857 period nor were more joint conferences held to work out compromises. Its over-reaching role of being a revising chamber continued.<sup>40</sup>

(iv) The new elective model included a provision that the Council would be based on territorial equality, making it unusual in that there would be a regional equality of seats in both the upper and lower houses. It is doubtful if there would have been any agreement for an elected upper house if it had not included this wider demand. The new arrangement anticipated the formula for seat distribution and role for the Senate after Confederation. Without displacing the convention of responsible government which held that primary political power remained centred in cabinet, the province’s territorial model became another legislative shield for regional protection. The agreement also foreshadowed that any substantial upper house reform must be a matter of compromise between the regional partners.

The popular sovereignty-territorial model was short-lived. Commenting on the 1864 Quebec City Conference discussions on creating a new federation of British North American colonies, New Brunswick Lieutenant Governor A.H. Gordon wrote: “...with hardly an exception the elective principle as applied to the Legislative Council was decidedly condemned.”<sup>41</sup> During the *Confederation*

---

<sup>38</sup> See Jeffery L. McNairn, *The Capacity to Judge: Public Opinion and Deliberative Democracy in Upper Canada, 1791-1854* (Toronto: University of Toronto Press, 2000), chapter 7.

<sup>39</sup> *Ibid.*, 1858, 428.

<sup>40</sup> Prince Edward Island also experimented with an elected upper house from 1862 to 1893. See D.C. Harvey, “The Passing of the Second Chamber in Prince Edward Island,” *Canadian Historical Association Annual Report* (1922), 22-31.

<sup>41</sup> See G.P. Browne, *Documents on the Confederation of British North America* (Carleton Library Series, Toronto: McClelland and Stewart, 1969), 45.

*Debates*, George Brown, a follower of Robert Baldwin to the end, vented his opposition to an elected upper house: “I voted, almost alone, against the change when the Council was made elective but I have lived to see a vast majority of those who did the deed wish it has not been done....”<sup>42</sup>

Not all concurred with this view. Most of the elected Legislative Councillors argued against returning to a nominated second chamber. They felt it was a breach of trust which took power out of the hands of the people. One elected Councillor (Mr. Christie) felt election “has worked well so far. All the fears which were entertained in reference to it have been groundless, and I believe it would continue to work well.”<sup>43</sup> Another elected member (Mr. Letellier de St. Juste) said that nomination would be “a backwards step” and the Council would no longer be “a counterpose between the Executive and the Lower House.”<sup>44</sup> With the coming of Confederation the popular sovereignty model for the national parliament was abandoned after a brief nine-year experience. The territorial model continued, although considerably altered.

### **The Senate of Canada – a hybrid model**

All previous typologies of Canadian bicameralism had collapsed. The colonial mixed government model whose primary role was to show allegiance to the imperial government ended in the aftermath of the rebellions of 1837-38. The Baldwin inspired complementary model which had rendered the upper house subservient to the lower one became unpopular. It was replaced by an elected chamber with territorial equality. But this model too fell out of favour and was subsumed in a compromised federal agreement. A pan-Canadian typology emerged which, according to the Supreme Court, has remained basically unchanged since 1867.<sup>45</sup> A hybrid constitutional and political model with three competing principles – territorial, mixed government and complementary – took

---

<sup>42</sup> *Parliamentary Debates*, op.cit., 89-90. During the debate on the 1855 bill Brown declared he wanted “no new checks on the force of public opinion.” *Assembly Debates*, March 27, 1855, 2470.

<sup>43</sup> *Ibid.*, 220.

<sup>44</sup> *Ibid.*, 186.

<sup>45</sup> *Reference re: Senate Reform 2014 SCC 32 (2014)*, 1 SCR 704 (*Senate Reference*) at 20.

its place without precise definition as to model boundaries and no specification as to which was primary.

The delegates attending the 1864 Quebec City conference focused first not on how senators were to be selected nor their powers but with the chamber's territorial makeup and function.<sup>46</sup> After a number of days of negotiation, agreement was reached on the equality of seats for each region. The adoption of a territorial component was a defining departure from the House of Lords. Although Sir John A. Macdonald felt the Fathers wanted "... in the words of Governor Simcoe... to make ours "an image and transcript of the British Constitution,"<sup>47</sup> there was no going back to 1791.

The ratifying debates in the colonial legislatures reinforced the idea that the Senate was to represent territorial regions within the national political system. Macdonald stated: "To the Upper House is to be confined the protection of sectional interests, therefore, is it that the three great divisions are equally represented for the purpose of defending such interests against the combinations of majorities in the Assembly."<sup>48</sup> Taché believed that each region was given equal members "so as to secure to each province its rights, its privileges, and its liberties."<sup>49</sup> Section 22 of the *Constitution Act, 1867* embodies the principle that members belonging to the Senate are representatives of provinces. Section 23 specifies that senators are to be resident in the province for which they are appointed.

Despite F.A. Kunz's claim that the Senate's federal function "has proved to be one of the most enduring myths of political demagoguery in Canadian history,"<sup>50</sup> it is a historical fact that Quebec and Maritime delegates accepted Confederation

---

<sup>46</sup> See Christopher Moore, *Three Weeks in Quebec City: The Meeting That Made Canada* (Toronto: Allen Lane, 2015), 89.

<sup>47</sup> Joseph Pope, *Confederation: Being a Series of Hitherto Unpublished Documents Bearing on the British North American Act* (Toronto: Carswell Co. Law Publishers, 1895), 160.

<sup>48</sup> Quoted in Mackay, *op.cit.*, 59.

<sup>49</sup> *Parliamentary Debates*, *op.cit.*, 234.

<sup>50</sup> F.A. Kunz, *The Modern Senate of Canada* (Toronto: University of Toronto Press, 1965), 319.

because of the promise of equal regional representation and their successors have adamantly opposed unilateral federal action to alter the model. In its recent policy statement on Quebec-Canada relations, the Quebec government wrote: “In exchange for representation based on population in the House of Commons, Québec and the Maritime provinces obtained equal representation of the regions in the Senate. This guaranteed them substantial representation within federal institutions and ensured that the Senate served as a counterweight to the Lower House.”<sup>51</sup>

Provincial governments have jealously guarded their interests in the Senate’s architecture, particularly its power and representative dimensions. John Turner writes that during the Dominion-Provincial Conference in January 1950 the provinces vigorously objected that they should have been consulted before the passage of *B.N. A. Act (No. 2) 1949*, giving parliament the exclusive right to amend the constitution in relation to the Senate, “and this representation was made so forcibly that Prime Minister St. Laurent gave definite undertakings that the application of the (act) would be held in abeyance pending the production by the provinces of a better method of amending the constitution.”<sup>52</sup>

Whether legal fiction or not, contemporary constitutional opinion emphasizes the territorial function of the Senate. In the 1980 *Upper House Reference*, the Supreme Court stated “a primary purpose of the creation of the Senate...was....to afford protection to the various sectional interests in Canada in relation to the enactment of federal legislation.” This view was repeated by the Court in 2014.<sup>53</sup>

As for the second component of the hybrid model, there was a consensus that the old model of mixed government be retained and made more secure. Despite

---

<sup>51</sup> *Quebecers, Our Way of Being Canadian: Policy on Quebec Affirmation and Canadian Relations* (Quebec: Secretariat aux affaires intergouvernementales canadiennes, June 2017), 119.

<sup>52</sup> John N. Turner, “The Senate of Canada: Political Conundrum”, in *Canadian Issues: Essays in Honour of Henry F. Angus*, edited by Robert M. Clark (Vancouver: University of British Columbia Press, 1961), 57-80.

<sup>53</sup> *Reference re: Authority of the Parliament of Canada in relation to the Upper House (Senate Reference 1980)* 1 SCR 54 at 67; *Reference re: Senate Reform 2014 SCC 32 (2014)*, at 15.



the acceptance of the responsible government convention, the co-equal legislative power arrangement first enacted in 1791 was repeated. Sensitive to the 1840s-50s public backlash in Central Canada to Lafontaine-Baldwin's attempt to change the "balanced constitution", there was an agreement to put an end to swamping. Macdonald's resolution "that the members of the Legislative Council shall be appointed by the crown under the great seal of the General Government and shall hold office during life", was adopted, despite the opposition of several P.E.I. delegates who preferred election. The Confederation Resolutions were looked upon as a "treaty" between the Canadas and the Maritime provinces<sup>54</sup> and the mixed government model was embedded into a statute of the Imperial parliament.

A majority of the delegates participating in the 1866 London Conference resisted imperial attempts to make the modernization of Canadian bicameralism easier by providing a deadlock-breaking mechanism. The delegates understood that altering the provisions of the Quebec resolutions which had purposely omitted any safety-valve "was touching the very life of the whole scheme. If we err, the whole scheme will come down some time." (Mr. McCully) Mr. Archibald argued: "The upper house may disagree with the House of Commons. Its value will be that of occasional obstruction." Mr. Langevin agreed: "If you give power to swamp the Legislative Council, then you destroy its utility."<sup>55</sup>

Lord Carnarvon, then Secretary of State for the Colonies, eventually succeeded in pressuring the Fathers to accept a fairly weak swamping mechanism in the form of section 26. However, as Carnarvon told the House of Commons: "I am free to confess that I could have wished that the margin had been broader."<sup>56</sup> The failure to enact a more Carnarvon-inspired safety-valve impeded future attempts to modernize and democratize Canada's second chamber.

Yet the Fathers, as fitting the *realpolitik* leaders they were, were not going to let the old mixed government model stand completely in the way of political power. The third model of Canadian bicameralism – the complementary one –

---

<sup>54</sup> Sir E.P. Taché, *Parliamentary Debates*, op.cit., 240.

<sup>55</sup> Browne, op.cit., 212.

<sup>56</sup> See Mollie Dunsmuir, "The Senate: Appointments under Section 26 of the *Constitution Act, 1867*", Library of Parliament, 1990.

also had to be crafted back into the Senate's architecture. Although Macdonald stated that "(The Upper House) would be of no value whatever were it a mere chamber for registering the decrees of the Lower House. It must be an independent House, having a free action of its own...", he also added "but it will never set itself in opposition against the deliberate and understood wishes of the people".<sup>57</sup>

Not all accepted Macdonald's (and Brown's) seemingly innocent characterization that the Senate was going to act "independently". One Member of the Legislative Council (Mr. Sanborn) admitted "you will have at (the Senate's) very first meeting a 'party character'".<sup>58</sup> Subsequent political leaders understood the significance of the constitution's preamble, that there is fundamental separation of powers in which, in the words of Justice Ian Binnie, "each of the branches of the State is vouchsafed a measure of autonomy from the others".<sup>59</sup> Since the colonial model of mixed government was never abolished,<sup>60</sup> the Senate always posed a threat to those holding office. The thinking behind what became the Salisbury Convention that the Lords will never block legislation outlined in government election commitments has never been formally accepted in Canada. Wilfred Laurier stated in 1908: "If there was a deadlock between the House of Commons and the Senate, nothing sort of revolution could solve the difficulty...no constitutional remedy within our grasp could bring the Senate to a different view."<sup>61</sup>

Prevented constitutionally from swamping, all prime ministers except the current one have turned to partisan stacking instead, completely at odds with Premier Taché's commitment that the first round of upper house appointments would be bound by Resolution 14 "so that all political parties may, as nearly as

---

<sup>57</sup> Ibid.

<sup>58</sup> *Parliamentary Debates*, op.cit., 225.

<sup>59</sup> Quoted in Evan Fox-Decent, "Parliamentary Privilege, Rule of Law and the Charter After the Vaid Case", *Canadian Parliamentary Review*, Autumn, 2007, 28.

<sup>60</sup> Ajzenstat writes: "...the bones of the eighteenth century Constitution can still be seen in the Canadian political system." *The Canadian Founding*, op.cit., 123.

<sup>60</sup> Browne, op.cit., 212.

<sup>61</sup> House of Commons *Debates*, 1908, 1571-2. Quoted in Turner.

possible, be fairly represented.”<sup>62</sup> Gary Levy observed: “The fear of defeat or obstruction has been the main reason successive governments have worried about the partisan composition of the Upper House and preferred to fill it with persons who could be counted upon to support it.”<sup>63</sup>

Notwithstanding the co-equality of power enshrined in section 91, several key political leaders believed that the mixed government model would be of little consequence within the new federal arrangement. The real protection of regions would be in the Commons and Cabinet. Narcisse Belleau stated: “The safety of Lower Canada depends...on the responsibility of the members of the Executive to the House of Commons” while George-Etienne Cartier added: “When the leader for Lower Canada shall have sixty-five members belonging to his section to support him...will he not be able to upset the Government if his colleagues interfere with his recommendations to office? This is our security.”<sup>64</sup>

As Canada’s modern governmental and administrative processes grew, the importance of the Senate’s complementary role was more and more recognized. In 1965 Kunz wrote: “...(W)ith the advance of the idea of government by experts, and in the same proportion as the House of Commons became less and less a “checking” and “choosing” body and more and more a debating and educating body, there appeared added reasons for maintaining, within the framework of Parliament, an assembly capable of devoting attention to the less exciting, yet no means negligible aspects of legislation that was dealt with mainly from a political and controversial angle in another place.”<sup>65</sup>

In the 2014 Senate reference, the Supreme Court referred to the Senate as being a “complementary legislative body of sober second thought.”<sup>66</sup> The announcement in 2015 that the Trudeau Government would end the partisan nature of the Senate and create a merit-based process to advise the Prime Minister on Senate appointments revealed the government’s desire that the Senate should act as a complementary chamber. Stéphane Dion applauded the

---

<sup>62</sup> *Parliamentary Debates*, op.cit., 238-239.

<sup>63</sup> Gary Levy, Brief to Special Senate Committee on Modernisation, March 1, 2017.

<sup>64</sup> Mackay, op.cit., 43-44.

<sup>65</sup> Kunz, op.cit., 5.

<sup>66</sup> *Reference re: Senate Reform 2014 SCC 32 (2014)*, at 54.

actions of Mr. Trudeau in wanting to appoint senators “of exceptional competence... and full understanding of the role of a chamber of sober second thought: proposing improvement to legislation without disputing or usurping the legitimate lead role of the elected House of Commons in a democracy.”<sup>67</sup>

### **Conclusion: The Nature of Canadian Bicameralism**

Canadian bicameralism has always differed from that of Britain. The Senate and the models upon which it is based were largely designed from the dynamics of pre-Confederation society and parliamentary history, not from the House of Lords. Likewise, the Canadian House of Commons has a different constitutional basis from its British counterpart in that it cannot legally demand the same treatment of legislation from the Senate as the U.K House can from the Lords.

If we were to identify its “Fathers” three individuals come to mind. The first would be Sir Guy Carleton who in 1790 warned the Colonial Office to abandon its plan of appointing hereditary members because of “the fluctuating state of Prosperity” within Central Canada and instead appoint “the numbers during life, good behaviour and residence in the provinces”- advice seemingly ignored during the recent Senate expenses scandal. Carleton’s views led to the Canadian mixed government model of a centrally nominated upper house.

The second would be William Warren Baldwin who by 1828 came to the conclusion that under responsible government the mixed model should be abandoned in favour of a complementary one. He with his son Robert was an important influence on Durham who understood that without protections, under this new bicameral arrangement “the constitution of the Legislative Council was a matter of very little moment....”

The third Father would be Joseph Cauchon who sponsored the 1856 act to change the Council’s design. When he said that the bill involved “a radical alteration in the system of government,” he was referring not only to the popular election of Councillors but to the fact that members of the second chamber would

---

<sup>67</sup> Stéphane Dion, “Justin Trudeau did more to reform the Senate than Steven Harper has in a Decade”, *Policy Options*, Sept 21, 2015. See also V. Peter Harder, *Complementarity: The Constitutional Role of the Senate of Canada*, Senate of Canada, April 12, 2018.

henceforth represent territory based on regional equality. The territorial component of Canadian bicameralism has lasted from 1856 to the present time. However, Cauchon's view of regional protection was based on election. Abandoning the elective principle in favor of centrally-nominated process politically weakened the model and rendered the Senate's role as a defender of regions imprecise.

Mackay began his 1926 *The Unreformed Senate of Canada* with the words "The Problem".<sup>68</sup> Clearly, many features of Canadian upper chambers going back Nova Scotia's 1758 Legislative Council have been problematic, but not all. While the "power" and "representation" dimensions of Canadian bicameralism have been often criticized, the "efficiency" function has not. The work of Canadian upper houses has generally been seen as beneficial to the scrutiny of legislation, no matter what the model. Since their members have followed Westminster parliamentary procedure which is based on redundancy, this was not unexpected. Lord Durham who was so critical of Lower Canada's Legislative Council admitted "many of the Bills which it is most severely blamed for rejecting, were Bills which it could not have passed without dereliction of its duty to the constitution...."<sup>69</sup> Even George Brown admitted that "men of the highest character and ambition have been brought into the Council by the elective system."<sup>70</sup> Senators have been given special praise for their legislative contribution despite the partisan nature of their house, for example by Eugene Forsey.<sup>71</sup> The 1991 Beaudoin-Dobbie Committee applauded the Senate's investigative work and proposed its continuation in a reformed institution.<sup>72</sup>

Another feature of Canadian bicameralism is that political leaders have often tried to alter the bicameral arrangement without formal amendment, going through the backdoor to ensure that forms "not endanger the political

---

<sup>68</sup> Mackay, op.cit, 9: "The role of the Senate has been a recurring political problem almost since Confederation."

<sup>69</sup> Craig, *Lord Durham's Report*, 59.

<sup>70</sup> See *Parliamentary Debates*, op.cit., 89-90.

<sup>71</sup> See Eugene Forsey, *How Canadians Govern Themselves* (Ottawa: Government of Canada, 1980, first edition).

<sup>72</sup> *Report of the Special Joint Committee on a Renewed Canada* (Ottawa: House of Commons, 1991), 43.

structure.”<sup>73</sup> Colonial governors used the appointment system not to build an aristocratic or independent second chamber but to ensure that the councillors were committed to supporting the imperial connection. Senate appointments were often used not to enhance its federative nature but to stack it with partisan members. Prime Minister Harper attempted to implement the elective principle through a consultative election process while still adhering to the procedure described in section 20 for summoning senators. The current Prime Minister’s policy of reforming the appointments process to create a “non-partisan,” complementary upper chamber which subordinates its mixed-government and territorial principles may be coming close to altering the fundamental nature of the Senate. The Province of Quebec registered its opposition to this attempt to unilaterally change the constitutional role but “to no avail.”<sup>74</sup>

The most important factor in preventing the Senate’s abolition has been its federal territorial component. Provincial second chambers, even those with fixed numbers but which had no constitutional protection from entities outside their province’s legal system, were all done away with once political leaders had grown tired of them or found them too costly. Manitoba (1876), New Brunswick (1892), Nova Scotia (1928), and Quebec (1968) are examples.<sup>75</sup>

The “Problem” that Mackay identified in 1926 relates to resolving the conflicting interaction among the models embedded in the Senate’s architecture and the need to bring these models more in tune with modern Canada. In order to improve the Senate’s effectiveness, reform proposals have aimed at modernizing different aspects of its multi-purpose function. For example, the Pepin-Robarts 1979 Task Force on Canadian Unity advocated changes to the territorial model, recommending a Bundesrat-style upper chamber composed of appointees of the provincial government. The 1985 unsuccessful attempt by the Mulroney government to have a constitutional amendment agreed to allowing a

---

<sup>73</sup> Mackay, *op.cit.*, 43.

<sup>74</sup> See *Quebecers, Our Way of Being Canadian*, *op.cit.* 120.

<sup>75</sup> G. William Kitchin, “The Abolition of Upper Chambers”, in Donald Cameron Rowat (ed.), *Provincial Government and Politics: Comparative Essays* (Ottawa: Carleton University, 1973), 61-8.

money bill to be proclaimed if the Senate had not passed it within thirty days was focused on reinforcing its complementary role.

Some proposals were broader with the goal of improving more than one part of the Senate's hybrid model. The Trudeau government's 1978-79 Bill C-60 recommended strengthening the complementary model with a suspensive veto of 120 days for ordinary legislation while at the same time proposing changes to the territorial model by having half the senators chosen by provincial assemblies and half chosen by parliament and renaming the Senate "The House of the Federation."

Other studies proposed returning to the historical fourth model of Canadian bicameralism - the popular sovereignty model – with varied objectives. For example, both the 1984 Molgat-Cosgrove Joint Committee and the 1985 Macdonald Commission recommended that senators be elected in order to improve their role as regional representatives. Such proposals also advocated suspensive vetoes thereby strengthening the complementary role. The 1985 Alberta Select Committee also proposed election but with the goal of reinforcing the mixed government model. While recommending a 180-day suspensive veto over constitutional amendments and a ninety-day suspensive veto over money or taxation bills, it proposed the Senate have the power to veto any bill except a supply bill and the power to ratify non-military treaties.<sup>76</sup>

It may be that at the end of the day, Canadians will decide to abandon the problematic components of the Senate's design and make it a single-purpose chamber, namely a complementary one which could ultimately lead to its abolition, or abolish it immediately. However, if the observation of the Wakeham Commission holds any validity, that "the more successful second chambers are those which best fit with the history, traditions and political culture of the country concerned", then reform proposals should follow the pre-Confederation examples and be submitted for discussion with regional partners even if other matters are raised. Hopefully such talks will not take place during periods of federal-provincial crisis but one of relative normalcy and not be subject to self-imposed deadlines. The proposals, particularly those developed by provincial governments after public consultation, should be systematic and examine how the present models of

---

<sup>76</sup> See Stilborn, *op.cit.*, for a summary of reform proposals.

the Senate's hybrid structure can be modernized, why did previous recommendations for reform come up short, and what impact will such changes have on other government institutions. Not surprisingly, any finalized re-designed second chamber will be the outcome of negotiation and compromise, which has characterized so much of Canadian politics.

In the 1992 Charlottetown Accord, which was defeated by a ten-point margin in a national referendum, the first ministers agreed on keeping all three models but with changes, while adding another. They strengthened the territorial component by recommending that seats be distributed on the basis of provincial equality. The mixed government model, although weakened, would remain in that the Senate would henceforth be influential over some types of legislation particularly bills affecting the French language or culture and tax policy changes related to natural resources. As well, it would be given new powers to ratify key appointments made by the federal government. The complementary model would be better defined as revenue and expenditure bills would be subject to a 30-day suspensive veto. If a bill was defeated or amended by the Senate within this period, it could be repassed by a majority in the House of Commons. The first ministers also revitalized the fourth model of the Canadian bicameral family by proposing that senators be elected either directly by the people or by the provincial legislatures.

In the spirit of Wakeham, the approach and kind of compromises while not the specifics agreed to at Charlottetown may hold out the promise that substantial Senate reform can still be achieved.