Canada's Promise

Concerned Canadians have sought Senate reform almost since Canada became a nation because they know, instinctively maybe, that the proper representation of our provincial interests in the Senate would provide a check to the irresponsible exercise of power by our federal government.

The following will show that we do not need to reform the Constitution Act to ensure the provinces are fairly represented in the Senate. We need only apply, with integrity, British constitutional principles to the letter of the law. To implement, in practice, the rule of law established by our constitution, it requires only an understanding of the British constitution adopted and adapted for the government of Canada, the political will to restore the accountability of our federal executive to the people through parliament and the administration of justice.

The right to a constitutional government belongs to the people according to British doctrine because Man is recognised to be perfectly free to order his actions and dispose of his person and possessions without asking leave, or depending on the will of any other person [1]. To ensure respect for this most fundamental principle of justice, constitutional principles were developed and applied in the operation of the British Monarchy to guarantee that the exercise of power by the executive branch of government is authorised by the people.

Because Canada is a federation of provinces, the people's political will regarding how they wish to govern themselves is divided. In general, according to sections 91 and 92 of our constitution, if this political will concerns purely local issues, the provinces are vested with the exclusive jurisdiction to govern the matter; otherwise the matter falls under federal jurisdiction.

The Supreme Court of Canada explains, in the Reference concerning the secession of Quebec, that its role is not to delimit the jurisdictions of the federal and provincial governments. Rather, it is to ensure the integrity of the constitutional framework within which our democratically elected leaders can lawfully conciliate the unity and the diversity of Canada[2].

Section 22 of our constitution establishes the number of senators who shall represent each province in the Parliament of Canada. This section provides for the participation of the provinces in the legislative process of our federal government so that they may lawfully represent and protect their local and regional interests within the Canadian federation [3].

Because senators represent the provinces in this legislative process, it follows that when the senators approve a law, in theory and legally, they approve it on behalf of the provinces. Thus, the provinces approve that our federal government has the jurisdiction to regulate every matter touched by the law, as well as approving the manner, the extent of this regulation and the taxation required to enforce its observance throughout Canada with no further regard for their own purely local interests.

Section 32 requires that the Governor General of Canada fill the vacancies that occur in the Senate by persons who are "fit" [to represent the provinces - according to sec. 22]. Section 12 explains that the "Powers, Authorities, and Functions" of the Governor General are vested in and exercisable by him/her with the advice and/or consent [4] of those persons "as the case requires". I submit this means that the Governor General must exercise the powers, authorities and functions of office as required by the full and honest application of British constitutional principles to the case.

But the practice whereby section 32 is applied is clearly unconstitutional and contrary to the common-law rules according to which the constitution of Canada must be interpreted. To whom does it belong to appoint and mandate a provincial representative with a power of attorney? This right obviously belongs to the province whose rights are being discussed and determined by the act of her representative. Under common law rules, it certainly does not belong to the Prime Minister of the government of Canada to select who shall represent the provinces in the Senate.

Under the British constitutional model of government, the question is formulated rather as follows: Who is authorised to advise the Governor General of the wishes and interests of the provinces regarding the appointment of their constitutional representatives to the Senate?

The Supreme Court's reference decision establishes the foundation for an appeal to the courts to demand that the intent of Confederation be respected in the implementation of the Constitution Act.[5] As regards the representative character of the Senate, this intent is expressed in the 14th of the Resolutions of Quebec (1864). It states that the senators shall be appointed “so that all [provincial] political parties may as nearly as possible be fairly represented”.[6]

True to the constitutional principle of our government, this would enable the provincial parties to select and confide the authority vested in them by provincial election to delegates in the Senate, so they may represent the local policy their constituents support, as well as, protect their freedom (i.e. their exclusive jurisdiction) to implement those policies in their provincial government. Nothing prevents the parties from demanding that their choice of representative sign an undated resignation to guarantee he or she honours this confidence, and thus, the authority to act on their behalf and on behalf of their constituents.

Implementing the scheme of Confederation would constitute a Parliament wherein the political will of Canadians would be fully represented. Regarding Canada's general government, their federal political parties would represent their political will in the House of Commons. Regarding their local government, their political will would be represented in the Senate by the proportional representation of their provincial political parties.

Section 18 of the Constitution Act states that the powers and privileges of both the Senate and the House of Commons stem from the House of Commons of Great Britain. Section 4 of the Parliament of Canada Act confirms that both the Senate and the House of Commons possess the same powers and privileges as those of the British House of Commons in 1867.

Both Houses would therefore be equally entitled to delegate a Leader with the authority and the responsibility to advise the Governor-in-council of the wishes and interests of their constituents.

The Constitution Act was thus designed to enable the authority to rise from the people to the Governor General, so she may uphold the legitimate exercise of power by the State. In the appointment of Senators, for example, the Governor-in-Council would turn to the Leader of the Senate duly authorised to advise him or her of the wishes of the Provinces. So too, it would enable the Governor General to facilitate the conciliation of the unity and the diversity of Canada to ensure that federal law is constructed with regard for those purely local matters that Canadians want governed diversely by the provinces [6].

This constitutional framework is explicitly confirmed to ensure the legitimacy of the rule of law by section 91, which states:

> "It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and the House of Commons, to make laws for the peace order and good government of Canada..."

Our constitution thus calls for a Cabinet led by two first ministers, each possessed of the equal authority to advise the Governor General of the wishes and interests of the people. This should come as no surprise as the Constitution Act meant to perfect and extend the federal system of Responsible Government existing in the Province of Canada at the time of Confederation which was characterised by this double leadership[7].

To bring you an understanding of the political process, which necessarily and naturally arises from this constitutional framework such that you will cherish and act to uphold it, knowledge of the constitutional evolution of the province of Canada is required.

Vincent Pouliot, President
Institute of Responsible Government

Notes:

1 John Locke, Essay concerning the True Original, Extent and End of Civil Government, par. 4

2 Reference concerning the secession of Quebec, [1998] 2 SCR par. 101

3 Reference concerning the Upper House (1980) 1 S.C.R. 54 p 68

4 Though sec. 12 states that the Governor General may act alone, the outcome of the constitutional crisis created by New Brunswick's Common School's Act was, in the words of Alpheus Todd, that:

> In all acts of government, the ministers of the Crown are required to assume, on behalf of and with the consent of the sovereign, the burden of personal power, and thereby relieve the Crown of all personal responsibility. Even in his choice of a first minister… that choice is practically influenced by the necessity for its being confirmed by the approbation of Parliament: so that, in a constitutional point of view, so universal is this principle that "there is not a moment in the king's life, from his accession to his demise, during which there is not some one responsible to Parliament for his public conduct (...) (Alpheus Todd, Parliamentary government in the Colonies, pp. 16-17)

5 Reference concerning the secession of Quebec, [1998] 2 SCR par. 38-41

6 The Senate would be "a means of protecting sectional and provincial interests"[1] "against the combination of majorities in the House of Commons" [2] "to establish a central government in which these Provinces should be represented, entrusted with exclusive authority only in affairs in which they had a common interest."[3]

> [1] Re: Authority of the Parliament in relation to the Upper House (1980) 1 S.C.R. 54 p 68
> [2] Ibid. p. 66 quoting John A. Macdonald, Debates on Confederation, 1865 p.38
> [3] Reference re: Secession of Quebec (1998) 2 SCR p.217, par. 58 quoting Re the Initiative and Referendum Act, [1919] A.C. 935 (P.C.), at p. 942

7 During the Debates on the Confederation of the Provinces of British North America, John A. Macdonald states:

"In the constitution it is proposed to continue the system of Responsible Government, which has existed in the province since 1841...", p. 33

"Nominally there was a legislative union in Canada, yet as a matter of fact, since the union of 1841 it was a federal union: in matters affecting Upper Canada solely, members from that section exercised the right to exclusive legislation, while the members from Lower Canada legislated in matters affecting their own section" p. 30