Institute of Responsible Government

The Role of the Senate in the Scheme of Confederation

Montesquieu wrote: "Political liberty is to be found … only when there is not abuse of power. But constant experience shows us that every man invested with power is apt to abuse it and to carry his authority as far as it will go…. To prevent this abuse, it is necessary from the very nature of things that power should be a check to power."

That is what the Senate was meant to be: a power that acts as a check to power. Specifically, it was to permit the provinces to hold those wielding federal powers accountable and to prevent their abuse of it.

The constitutional framework constraining the exercise of power

Under the British constitution, it belongs to the people to govern themselves as they wish. It is their prerogative. But, to ensure a civil and secure society, the people must forego the use of force to fulfill their needs and to do justice for themselves.

In Canada, the Governor General, is the custodian of the people's power. The Governor General is legally vested with the powers of the State but he does not possess the authority to exercise them. This authority belongs to the people. By election, they vest the authority in their representatives to represent and protect their prerogative in the exercise of the powers of the State.

The role of the Governor General is to sanction the exercise of the powers of the State in accordance with the well-understood wishes and interests of the people. He knows these wishes and interests through the counsel of his chief advisers, possessed of the authority, by parliament, to speak and act on its behalf.

Today, only the House of Commons is represented in the Governor's Council. Thus, the Governor General must sanction the exercise of all the discretionary powers of the State as it pleases the PMO with no oversight, unlimited by anyone, regardless of constitutional principles or the provisions of the Constitution Act.

The powers that the Governor General must exercise on the sole advice of the prime minister include:

- the initiation, conception and extent of powers granted by all bills submitted to Parliament and their detailed regulation;

- the appointment of Senators, members of the Governor's council, judges, ambassadors and the highest political officers of the state;
- the summons, prorogation and dissolution of Parliament;
- the deployment of our military forces, our international treaties and the policies underlying our international relations.

However, section 18 of our Constitution, as confirmed by section 4 of the *Parliament of Canada Act*, confers on both the Senate and the House of Commons the same powers and privileges as those belonging to the British House of Commons in 1867.

The most important privilege of the House of Commons, forming the very basis of the British constitutional model of government, is to advise the Governor General of the wishes and interests of the people in the exercise of the powers of the State.

If the provinces were properly represented in the Senate, and if the Senate were represented on the Governor's council, they could object if the Prime Minister tried to advise the Governor General on the appointment of senators because the provinces do not confer on the Prime Minister the authority to choose their representatives. The provinces could uphold their exclusive constitutional jurisdiction. They could approve and oversee federal spending. They could even assert the right they have under Common Law to participate in the selection of the Governor General of Canada.

Why were both Houses of the Canadian Parliament attributed the same powers and privileges as the British House of Commons? It is because both were meant to be equally representative of the wishes and interests of the people.

The representative nature of the Senate

It is wrong to think that the Fathers of Confederation wanted a weak and illegitimate Senate.

The 14th resolution of the Quebec Conference (1864), which laid the foundations of Canada's Constitution Act (1867), stipulates "The first [senators] 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 Opposition in each Province, so that all political parties may as nearly as possible be fairly represented."

This resolution thus provides for the proportional representation of all provincial political parties in the Senate! This representative character permits the Senate to conciliate the people's local interests in the government of Canada in harmony with those represented and protected in their

provincial legislatures. By this, the local political capacity of the people to govern themselves as they wish is fully and truly represented in the Senate.

It provided only for the appointment of the first senators because the Fathers of Confederation could not agree on more. Some of them argued that each province should be free to choose how it should be represented at the outset. They all agreed, however, that the union of the provinces could not proceed unless this matter was settled. The delegates therefore agreed to this compromise.

They naturally assumed that the representative principle underlying the first selection of senators would continue to apply until their province decided otherwise. They certainly did not foresee that the federal government would be structured to prevent the provinces from advising the Governor General of their choice of representative.

The exclusion of the provinces from the government of their own federation

How the provinces were excluded from power is worthy of a political novel.

The government of the federation was meant to be an adaptation of the model of Responsible Government that succeeded in conciliating the interests of Upper and Lower Canada in the government of the Province of Canada from 1848 until the time of Confederation.

This model was characterized by a coalition government formed and led by two prime ministers, who were the political leaders of Upper and Lower Canada sitting in the Governor's council.

This dual political structure was the result of the full and honest application of the principles of responsible government[1] to the constitutional balance between Upper and Lower Canada as established by the Act of Union (1840).

There were two prime ministers because the House of Assembly had resolved on September 3, 1841, that, to guarantee the rule of government in accordance with the well-understood wishes and interests of the people, "the chief advisors of the [Governor General], constituting the administration under him, must be possessed of the confidence of the representatives of the people".

Since section 12 of the Union Act (1840) provided both Upper and Lower Canada with the same number of representatives in the House of Assembly, they each argued that they had the same right to the guarantee of Responsible Government. They argued that they were each entitled to a chief adviser possessed of the confidence of their section of the Assembly.

The application of these same principles to the constitutional balance established between the Senate and the House of Commons by section 18 of the Constitution Act would create the same

dual political structure that would permit both Houses to delegate a chief adviser to the Governor-in-council possessed of the authority to represent and protect the wishes and interests of the people in the exercise of the powers of the State.

But in London in May 1867, before the first Parliament of Canada was convened, the first Governor General Lord Monck, chose John A. Macdonald to form the government on condition that he accept to be the sole prime minister. He wrote:

> "In authorising you to undertake this duty of forming an administration for the Dominion of Canada, I desire to express my strong opinion that in future it shall be distinctly understood that the position of First Minister shall be held by one person who shall be responsible to the Gov. Gen for the appointment of the other Ministers, and that the system of dual First Ministers which has hitherto prevailed shall be put an end to."
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> Public Archives of Canada, Macdonald Papers, M.G. 26-A, vol. 51, p 2047-9, spool c-1505, MIKAN# 528612

It is not hard to image the arrangement that would subjugate Macdonald: The Governor-in-Council would sanction all the power the PM sought in Canada's domestic matters if he upheld Her Majesty's interests in Canada's international affairs.

To consolidate his power following the first federal election, the Prime Minister of Canada simulated the continuation of the model of Responsible Government by forming a coalition government – not with the Senate but with the leader of the opposition in the House of Commons. Contrary to section 18, he applied the rules of the House of Lords to the Senate by insisting that its role was to apply a sober second thought to federal legislation. When he began appointing the provinces' representatives in the Senate, he thwarted the first attempt to reform the Senate by moving it for discussion in a parliamentary commission that he controlled until the dissolution of Parliament. When New Brunswick challenged the legitimacy of his disallowance of provincial laws, he succeeded in silencing the controversy without anyone addressing how it is that the Prime Minister of Canada exercises the people's prerogative as he pleases.

Conclusion

The Prime Ministers Office has always feared the kind of control that an effective and representative Senate could exercise. To maintain power, they conveyed misconceptions and confounded values that have given rise to the corruption we are experiencing today.

The people's disapproval of the Senate provides an opportunity to review its intended role through the full and honest application of constitutional principles to the letter of the Canada's Constitution Act. The result would be the political structure intended to enable citizens to exercise their rightful influence in the government of Canada.