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## Constitutional Law -- Federal Power to Amend the Constitution of Canada -- Reform of the Senate

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## COMMENTS COMMENTAIRES

CONSTITUTIONAL LAW—FEDERAL POWER TO AMEND THE CONSTITUTION OF CANADA—REFORM OF THE SENATE.—Does the federal Parliament have the power to abolish the Senate? The Supreme Court of Canada in the *Upper House Reference* (1979)<sup>1</sup> has just said no. I think the answer should have been yes. This comment will attempt to explain the decision and to criticize it.

The Constitutional Amendment Bill, 1978, Bill C-60, which was introduced into the House of Commons of the Parliament of Canada by Prime Minister Trudeau on June 20th, 1978, was an elaborate document which proposed the codification of some parts of Canada's constitutional law and changes in other parts of the law. The bill lapsed when the Parliament was dissolved before the election of May 1979 at which the Trudeau government was defeated. Now that the Trudeau government has been re-elected (February 1980) it is possible that a new Bill, along similar lines, will be re-introduced.

Among many other matters, Bill C-60 proposed to abolish the Senate and replace it with a new federal Upper House called the House of the Federation.<sup>2</sup> Like the present Senate, the new Upper House would be an appointed not an elected body, and, again like the present Senate, appointments would be made on a regional basis. However, unlike the present Senate, whose members are appointed by the federal government<sup>3</sup> and hold office until age seventy-five,<sup>4</sup> the members of the new Upper House would be appointed half by the provinces and half by the federal government. Each appointing government would be obliged to make its quota of appointments anew after each election, and to draw its appointees from the various

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<sup>1</sup> Decision of the Supreme Court of Canada, December 21st, 1979, as yet unreported. References to passages in the opinion of the court will be identified by the page number in the typed reasons for judgment issued by the court.

<sup>2</sup> Bill C-60, ss 62-70.

<sup>3</sup> British North America Act, 1867, 30 & 31 Vic., c. 3 (U.K.), s. 24, hereinafter cited as B.N.A. Act.

<sup>4</sup> *Ibid.*, s. 29.

political parties on the basis of proportional representation based on the voting in the election. Thus, after a federal election the federal government would make a new set of appointments of half the Upper House in accordance with the results of the election, and after a provincial election the government of that province would make a new set of appointments from that province in accordance with the results of the provincial election.

As well as these changes in the appointment and tenure of members of the Upper House, the powers of the Upper House were to be reduced. Whereas the present Senate has virtually the same powers over legislation as the House of Commons,<sup>5</sup> the new Upper House would have only temporary delaying power and could be by-passed by the House of Commons after two months. In this respect, Bill C-60 was following the lead taken by the United Kingdom, which by the Parliament Acts of 1911 and 1949 reduced the power of the House of Lords to a suspensory veto.<sup>6</sup>

These proposals for a new Upper House stirred considerable controversy. One of the points of controversy was whether the federal Parliament had the power to enact the proposals. After testimony had been given before a special joint committee of the Senate and the House of Commons by Professor W.R. Lederman denying that the federal Parliament had the requisite legislative power,<sup>7</sup> the federal government directed a reference to the Supreme Court of Canada. The reference did not in terms ask the court to determine the constitutionality of the proposals of Bill C-60. It posed a series of questions which were designed not only to determine the constitutionality of the proposals in the Bill, but also to test the constitutionality of various other possible measures of Upper House reform. The questions referred to the court were as follows:

1. Is it within the legislative authority of the Parliament of Canada to repeal sections 21 to 36 of the British North America Act, 1867, as amended, and

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<sup>5</sup> The only exception is s. 53 of the B.N.A. Act, requiring that money bills must originate in the House of Commons.

<sup>6</sup> The general effect of the Parliament Acts of 1911, 1 & 2 Geo. 5, c. 13, and 1949, 12, 13 & 14 Geo. 6, c. 103, is to confine the House of Lords to a suspensory veto of only one month for money bills and thirteen months for other bills. At the end of the stipulated period of delay a bill can be enacted into law without the assent of the House of Lords. See S.A. de Smith, *Constitutional and Administrative Law* (3rd ed., 1977), pp. 294-298.

<sup>7</sup> Evidence of W.R. Lederman, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, 3rd session of the 30th Parliament, 1977-78, August 23rd, 1978*. Professor Lederman's views correctly anticipated the decision of the Supreme Court of Canada, in striking contrast to the testimony of a later witness who argued confidently that the federal Parliament did have the requisite power: Evidence of P.W. Hogg, *ibid.*, September 19th, 1978.

to amend other sections thereof so as to delete any reference to an Upper House or the Senate? If not, in what particular or particulars and to what extent?

2. Is it within the legislative authority of the Parliament of Canada to enact legislation altering, or providing a replacement for, the Upper House of Parliament, so as to effect any or all of the following:
  - (a) to change the name of the Upper House;
  - (b) to change the numbers and proportions of members by whom provinces and territories are represented in that House;
  - (c) to change the qualifications of members of that House;
  - (d) to change the tenure of members of that House;
  - (e) to change the method by which members of that House are chosen by
    - (i) conferring authority on provincial legislative assemblies to select, on the nomination of the respective Lieutenant Governors in Council, some members of the Upper House, and, if a legislative assembly had not selected such members within the time permitted, authority on the House of Commons to select those members on the nomination of the Governor General in Council, and
    - (ii) conferring authority on the House of Commons to select, on the nomination of the Governor General in Council, some members of the Upper House from each province, and, if the House of Commons has not selected such members from a province within the time permitted, authority on the legislative assembly of the province to select those members on the nomination of the Lieutenant Governor in Council,
    - (iii) conferring authority on the Lieutenant Governors in Council of the provinces or on some other body or bodies to select some or all of the members of the Upper House, or
    - (iv) providing for the direct election of all or some of the members of the Upper House by the public; or
  - (f) to provide that Bills approved by the House of Commons could be given assent and the force of law after the passage of a certain period of time notwithstanding that the Upper House has not approved them?

If not, in what particular or particulars and to what extent?

The Supreme Court of Canada, in a unanimous opinion of "the court",<sup>8</sup> interpreted the first question as asking whether the federal Parliament had the legislative authority to abolish the Senate, and it answered the question no. The court considered that some parts of the second question could not be answered "in the absence of a factual context or actual draft legislation",<sup>9</sup> but the court held that the federal Parliament could not alter the powers of the Senate so as to "seriously impair the position of the Senate in the legislative process".<sup>10</sup> This meant that the federal Parliament could not follow

<sup>8</sup> No individual judge is identified as the author of the opinion. The Bench consisted of eight judges, Beetz J. not participating.

<sup>9</sup> *Supra*, footnote 1, at p. 21.

<sup>10</sup> *Ibid.*, at p. 20.

the United Kingdom precedent<sup>11</sup> and enact a provision that, after a period of delay, a bill could become law without the assent of the Upper House. The court also held that changes in the "fundamental features, or essential characteristics"<sup>12</sup> of the Senate were incompetent to the federal Parliament. These essential characteristics were not clearly identified, but they seem to consist of (a) regional representation, which would preclude an upper house composed on some basis other than region, and (b) appointment by the federal government, which would preclude the direct election of members or even a provincial role in appointments.

### *History of section 91(1)*

The case turned on the extent of the federal Parliament's power under section 91(1) of the British North America Act. Section 91(1) gives to the federal Parliament the power to make laws in relation to:

The amendment from time to time of the Constitution of Canada, except as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces, or as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a province, or to any class of persons with respect to schools or as regards the use of the English or the French language or as regards the requirements that there shall be a session of the Parliament of Canada at least once each year, and that no House of Commons shall continue for more than five years from the day of the return of the Writs for choosing the House: Provided, however, that a House of Commons may in time of real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such continuation is not opposed by the votes of more than one-third of the members of such House.

This head of power was not in the B.N.A. Act as originally enacted. It was added in 1949 by an amendment which was enacted by the United Kingdom (or imperial) Parliament as the British North America (No. 2) Act, 1949.<sup>13</sup> This amendment was enacted at the request of the Canadian government, of course, but it created some controversy in Canada because the joint address of the Senate and Commons which made the request had not been preceded by the agreement of the provinces. Several provincial premiers were opposed to the amendment on the ground that the whole question of amending the constitution should be left until agreement with the provinces had been achieved. Prime Minister St. Laurent responded by saying that the amendment would give to the federal Parliament no more than the provinces had always enjoyed under section 92(1) of the B.N.A. Act (which empowers each provincial Legislature to amend "the constitution of the province"),<sup>14</sup> and that provincial

<sup>11</sup> *Supra*, footnote 6.

<sup>12</sup> *Supra*, footnote 1, at p. 23.

<sup>13</sup> 13 Geo. VI, c. 81 (U.K.); R.S.C. 1970, Appendix II, No. 31.

<sup>14</sup> S. 92(1) is set out in full and discussed later in this Comment.

concerns were unjustified because of the extensive exceptions expressly written into the new head of power.<sup>15</sup>

### *Use of section 91(1)*

There is no doubt that section 91(1) authorizes the federal Parliament to amend the B.N.A. Act.<sup>16</sup> In fact, since the acquisition of the new power in 1949, the federal Parliament has used section 91(1) to amend the B.N.A. Act five times: (1) In 1952 the federal Parliament amended section 51 of the B.N.A. Act, which provides a formula for the regular readjustment of representation in the House of Commons.<sup>17</sup> (2) In 1965 the federal Parliament amended section 29 of the B.N.A. Act, which gave senators tenure for life, and imposed compulsory retirement at age seventy-five.<sup>18</sup> (3) In 1974 the federal Parliament again amended section 51 of the B.N.A. Act (item (1) above), substituting a new formula for the regular readjustment of representation in the House of Commons.<sup>19</sup> (4) In 1975 the federal Parliament again amended section 51 of the B.N.A. Act, this time to increase the representation of the Northwest Territories in the House of Commons from one member to two.<sup>20</sup> (5) In 1975 the federal Parliament amended sections 21 and 22 of the B.N.A. Act by increasing the number of senators from 102 to 104 and giving to each of the Yukon Territory and the Northwest Territories one member of the Senate.<sup>21</sup>

Before 1949 at least three of these five amendments would have had to have been enacted by the United Kingdom Parliament.<sup>22</sup> Each was uncontroversial. The Supreme Court of Canada in the *Upper House Reference* described them as federal "housekeeping" matters.<sup>23</sup> The court did not doubt that each was valid: each was within the meaning of "the constitution of Canada", and each was outside the five exceptions written into section 91(1).

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<sup>15</sup> The legislative history of s. 92(1) is related in Paul Gérin-Lajoie, *Constitutional Amendment in Canada* (1950), pp. xiv-xxxv.

<sup>16</sup> Curiously, s. 91(1) does not include the phrase "notwithstanding anything in this Act" which is found in s. 92(1).

<sup>17</sup> *British North America Act, 1952, S.C., 1952, c. 15.*

<sup>18</sup> *British North America Act, 1965, S.C., 1965, c. 4.*

<sup>19</sup> *British North America Act (No. 2), 1974, S.C., 1974-75-76, c. 13.*

<sup>20</sup> *British North America Act, 1975, S.C., 1974-75-76, c. 28.*

<sup>21</sup> *British North America Act (No. 2), 1975, S.C., 1974-75-76, c. 53.*

<sup>22</sup> The fourth and fifth could probably have been enacted by the federal Parliament by virtue of the *British North America Act, 1886, 49-50 Vic., c. 35 (U.K.)*, s. 1, which permits the Parliament to provide for representation of federal territories.

<sup>23</sup> *Supra*, footnote 1, at p. 9.

*Meaning of "the constitution of Canada"*

The restrained use of section 91(1) since its adoption in 1949 never provided an occasion for a judicial interpretation of the phrase "the constitution of Canada". In this phrase, as in other constitutional contexts,<sup>24</sup> the word "Canada" is ambiguous. It could mean the country as a whole ("Canada as a geographical unit")<sup>25</sup> or it could mean the central government ("the juristic federal unit")<sup>26</sup> as opposed to the provincial governments.

Professor F.R. Scott argued for the former view—the wide view. He argued that "there is no separate 'federal' constitution; the constitution is a single body of law setting up and apportioning authority to different organs of the state, some federal and some provincial".<sup>27</sup> On this view, the phrase "the constitution of Canada" included all constitutional rules, including even the constitutions of the various provinces. Its scope was limited only by the terms of the five exceptions in section 91(1). On this view, the phrase would obviously include the Senate and the only question would be whether the abolition or alteration of the Senate was precluded by one of the exceptions in section 91(1). (None of the exceptions are in fact applicable.)<sup>28</sup>

In *Jones v. Attorney General of New Brunswick* (1974)<sup>29</sup> the Supreme Court of Canada accepted Scott's wide view of "the constitution of Canada". In that case it was argued that the federal Official Languages Act was unconstitutional on the basis of the fourth exception to section 91(1). The fourth exception to section 91(1) precludes the amendment of the constitution of Canada "as regards the use of the English or the French language". Laskin C.J., writing for a unanimous nine-judge court, held that this exception, while it precluded the taking away of the language rights guaranteed by section 133 of the B.N.A. Act, did not preclude the

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<sup>24</sup> For discussion of the semantic problem, see P.W. Hogg, *Constitutional Law of Canada* (1977), p. 34.

<sup>25</sup> *Supra*, footnote 1, at p. 14.

<sup>26</sup> *Ibid.*

<sup>27</sup> F.R. Scott, *The British North America Act (No. 2)*, 1949 (1949), 8 U. T. L.J. 201, at p. 203; *Essays on the Constitution* (1977), p. 204. *Accord*, Stephen A. Scott, *Bill C-60: Or, How Not to Draft a Constitution* (1979), 57 Can. Bar Rev. 587, at pp. 593-596.

<sup>28</sup> Only the second exception to s. 91(1) is conceivably applicable. The second exception protects "rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or Government of a province", but it is hard to see how the abolition of the Senate affects a right or privilege granted or secured to "the Legislature or Government of a province": see Stephen A. Scott, *op. cit.*, *ibid.*, at p. 596. In the *Upper House Reference* the Supreme Court of Canada never suggested that any of the exceptions would cover this case.

<sup>29</sup> [1975] 2 S.C.R. 182.

grant of new language rights. Since the Official Languages Act only granted new language rights it was not affected by the exception. In reaching this result, Laskin C.J. had this to say:<sup>30</sup>

I am not called upon here to state exhaustively what is comprehended within the phrase in s.91(1) "the constitution of Canada". It certainly includes the British North America Act, 1867 and its amendments, and hence includes s.133. What is excepted from Parliament's amending power under s.91(1) includes an exception as regards the use of the English or French language. Parliament is forbidden to amend the Constitution of Canada as regards the use of either of the languages, and s.91(1) therefore points to the provisions of the constitution dealing therewith, and thus to s.133. See Scott, "The British North America (No. 2) Act, 1949" (1950), 8 Univ. of Tor. L.J. 201, at p. 205.

In this passage, I believe that his lordship is saying that the whole of the British North America Act is part of the constitution of Canada. He is certainly saying that section 133 is part of the constitution of Canada despite the fact that section 133 guarantees the use of the two languages in the Legislature and courts of Quebec as well as in the federal Parliament and federal courts. Add to this the citation of Professor Scott's article, and it is rather clear that Professor Scott's thesis has been accepted.

The narrow reading of the phrase "the constitution of Canada" assumes that the various constitutional rules can be divided into a "federal" constitution and ten "provincial" constitutions, and that the phrase "the constitution of Canada" encompasses only the former class of rules. In the *Upper House Reference* the Supreme Court of Canada accepted this narrow reading. The court said that the phrase "the constitution of Canada" "does not mean the whole of the British North America Act, but means the constitution of the federal government, as distinct from the provincial governments".<sup>31</sup> This dictum appears to be flatly inconsistent with the previously-quoted dictum in the *Jones* case<sup>32</sup> which had been agreed to only five years earlier by a unanimous court which included five of the same judges as decided the *Upper House Reference*. Yet, astonishingly, the dictum in the *Upper House Reference* is not accompanied by any acknowledgement, let alone explanation, of the earlier *Jones* dictum.

Not only did the Supreme Court of Canada adopt inconsistent positions on the meaning of "the constitution of Canada" in the *Jones* case and *Upper House Reference*, in neither case did the court offer any reasons for the position taken. A commentator is therefore unusually free to express his own opinion on the preferable position. In support of the wide interpretation, one could invoke the width of

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<sup>30</sup> *Ibid.*, at pp. 196-197.

<sup>31</sup> *Supra*, footnote 1, at p. 14.

<sup>32</sup> *Supra*.



the five exceptions which are carved out of the legislative power conferred by section 91(1). These exceptions include "matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces", and "rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a Province".<sup>33</sup> Professor Stephen A. Scott, taking the same wide view as Professor F.R. Scott, has argued that the phrase "the constitution of Canada" must be "of the widest possible ambit", because the phrase must "define a category wide enough to allow the (large and important) enumerated exceptions to be drawn or deducted from it".<sup>34</sup> This argument for the wide interpretation of section 91(1) is forceful, but not conclusive. The exceptions to section 91(1) could have been included out of an abundance of caution to assure the provincial critics of the 1949 amendment which added section 91(1) that no diminution of provincial powers, rights or privileges was intended.

In my opinion, the preferable interpretation of "the constitution of Canada" is the narrow one—the one espoused in the *Upper House Reference*. The reason for my opinion is the existence of the provincial power of amendment in section 92(1) of the B.N.A. Act. Section 92(1) (which, unlike section 91(1), has been in the B.N.A. Act from the beginning) gives to each provincial Legislature the power to make laws in relation to:

The amendment from time to time, notwithstanding anything in this Act, of the constitution of the province, except as regards the office of Lieutenant Governor.

The existence of provincial power to amend "the constitution of the province" suggests that the phrase "the constitution of Canada" was intended to identify a "federal" constitution which would exclude the constitutions of the provinces. It will be recalled that Prime Minister St. Laurent, in defending the adoption of section 91(1) without prior provincial consent, emphasized the parallel between the existing section 92(1) and the new section 91(1).<sup>35</sup> Commentators other than Professors F.R. Scott and Stephen A. Scott have tended to emphasize the same parallel.<sup>36</sup>

Assuming that the narrow meaning of "the constitution of Canada" is correct, does the phrase include the Senate of Canada? In my opinion, the answer must be yes. It has never been doubted that a

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<sup>33</sup> The full text of s. 91(1) is set out *supra*.

<sup>34</sup> Stephen A. Scott, *op. cit.*, footnote 27, at p. 593.

<sup>35</sup> *Supra*.

<sup>36</sup> Gérin-Lajoie, *op. cit.*, footnote 15, pp. xxxi-xxxii; Favreau, *The Amendment of the Constitution of Canada* (1965), p. 9; Laskin, *Canadian Constitutional Law* (3rd ed. rev., 1969), p. 36; Hogg, *op. cit.*, footnote 24, at p. 22.

province can abolish its upper house as an amendment to the constitution of the province, and in fact Manitoba, New Brunswick, Prince Edward Island, Nova Scotia and Quebec have done so.<sup>37</sup> In the case of Quebec the upper house (the Legislative Council) was established by the B.N.A. Act, sections 71-79; but its abolition in 1968 was accomplished by ordinary provincial statute enacted under section 92(1).<sup>38</sup> Surely, it is equally clear that the federal Upper House is part of the constitution of Canada. Thus, Dr. Paul Gérin-Lajoie, not a commentator who is likely to exaggerate the extent of federal power, says of section 91(1):<sup>39</sup>

It may be more accurately described as a power mainly to alter the structure of the central government machinery and the rules governing its functioning. For instance, the Senate could be remodelled or abolished; . . .

And Senator Eugene Forsey, not a commentator who is likely to exaggerate the vulnerability of Senate or monarchy, says that under section 91(1) the federal Parliament:<sup>40</sup>

. . . could abolish the Senate, or the monarchy, by ordinary Act; . . .

#### *Matters "of interest" to the Federal Government*

Yet in the *Upper House Reference* the Supreme Court of Canada held that section 91(1) did not authorize the abolition or substantial alteration of the Senate. How was the court able to reach that result? The passage in which the court defined "the constitution of Canada" reads as follows:<sup>41</sup>

In our opinion, the word "Canada" as used in s.91(1) does not refer to Canada as a geographical unit but refers to the juristic federal unit. "Constitution of Canada" does not mean the whole of the British North America Act, but means the constitution of the federal government, as distinct from the provincial governments. The power of amendment conferred by s.91(1) is limited to matters of interest only to the federal government.

It will be observed that there is a slide in the reasoning in this passage. The last sentence does not follow from the first two. It does not follow from the fact that the constitution of Canada means the constitution of the federal government that the power of amendment conferred by section 91(1) is limited "to matters of interest only to the federal government". Yet this limitation is repeated even more explicitly one page later:<sup>42</sup>

<sup>37</sup> Forsey, *Freedom and Order* (1974), p. 227.

<sup>38</sup> Act respecting the Legislative Council of Quebec, S.Q., 1968, c. 9.

<sup>39</sup> Gérin-Lajoie, *op. cit.*, footnote 15, p. xxxi.

<sup>40</sup> Forsey, *op. cit.*, footnote 37, p. 232.

<sup>41</sup> *Supra*, footnote 1, at p. 14.

<sup>42</sup> *Ibid.*, at p. 15.

In our opinion, the power of amendment given by s.91(1) relates to the constitution of the federal government in matters of interest only to that government.

What the court is saying is that, while the phrase “the constitution of Canada” means the constitution of the federal government, the power to amend the constitution of Canada authorizes amendments to the constitution of the federal government only if the amendments are of interest only to that government. Nowhere does the court justify this additional limitation on federal power under section 91(1). There is nothing in the language of section 91(1) to justify such an interpolation. Section 91(1) simply refers to “the constitution of Canada”. None of the five exceptions to federal power speak in express terms or by implication about matters of interest only to the federal government. Indeed, the court assumed, correctly in my view, that none of the exceptions were relevant in this case.<sup>43</sup>

That little interpolation by the court seems to me to be the key to the result. The court never expressly denied that the Senate is part of the constitution of Canada. It is hard to see how that could be denied. Although the opinion is not quite clear on the point, what it seems to be denying is that the Senate is of interest only to the federal government. Historically, of course, the Senate was an important part of the confederation arrangements since it was designed to offset representation by population in the House of Commons by according equal representation in the Senate to each of the three (later four) regions of Canada. In the *Upper House Reference* the court alluded several times to the role of the Senate as a protector of the more lightly populated regions of the country.<sup>44</sup> The conclusion of this line of reasoning is that the Senate is a body which is not merely “of interest only to the federal government”. Therefore, once the interpolation has been parachuted into section 91(1), section 91(1) does not authorize the abolition or fundamental alteration of the Senate.

The main difficulty with this line of reasoning is, as argued above, that there is no legal basis for the interpolation of the requirement that an amendment be “of interest only to the federal government”. However, even if the court is granted its interpolation, the reasoning is seriously deficient. If it is relevant to look at the *intended* function of the Senate as a protector of the more lightly populated regions of the country, is it not even more to the point to notice that the Senate has never actually performed this function? The Senate’s failure to serve as an effective protector of regional or

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<sup>43</sup> *Supra*, footnote 28.

<sup>44</sup> *Supra*, footnote 1, at pp. 10, 11, 12, 21, 23.

provincial interests is agreed to by all scholars,<sup>45</sup> and indeed is obvious to all readers of newspapers. Therefore, even the complete abolition of the federal Upper House would have no significant impact on regional or provincial interests.

The fact is however that most current proposals for Senate reform, including the proposals in Bill C-60, do not contemplate the complete abolition of a federal Upper House. What they contemplate is its reform into, or replacement by, an Upper House which will be an effective protector of regional or provincial interests. Yet, the court's decision in the *Upper House Reference* denies the possibility of even this kind of reform. The court insisted that the appointment of members of the Upper House by the federal government was an essential characteristic of the Upper House which could not be altered under section 91(1).<sup>46</sup> This is ironic, because the federal appointment of members is the feature which above all else has prevented the Senate from being an effective defender of regional or provincial interests.<sup>47</sup> A move to a provincially-appointed Upper House, whatever the other disadvantages of such a body, would obviously make the Upper House a more effective defender of provincial interests. And direct election, if one may judge from the position in Australia,<sup>48</sup> would make the Upper House a more assertive body. Yet, according to the Supreme Court of Canada, neither of these changes can be accomplished under section 91(1).

It really is a puzzle to me that the court should have fastened upon the Senate's appointed feature as one of those essentials which cannot be amended under section 91(1). Why, for example, is a change to direct election held to be outside the range of section 91(1) amendments? Only a full quotation will do justice to the court's opinion on this point:<sup>49</sup>

Sub-question (e)(iv) deals with the possible selection of all or some members of the Senate by direct election by the public. The substitution of a system of

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<sup>45</sup> Dawson, *The Government of Canada* (5th ed., 1970), ch. 15; Mallory, *The Structure of Canadian Government* (1971), ch. 6; McConnell, *Commentary on the British North America Act (1977)*, p. 66. The Senate has, of course, performed the function of reviewing legislation—but not for the purpose of protecting the smaller provinces.

<sup>46</sup> *Supra*, footnote 1, at pp. 22-23.

<sup>47</sup> This is abundantly demonstrated by Dawson and Mallory, *op. cit.*, footnote 45.

<sup>48</sup> The Australian Senate, an elected body, denied supply to the government of Prime Minister Whitlam in 1974 and 1975; the latter event led to the dismissal of the Prime Minister. Such bursts of independence are unknown in Canada because the Senate is appointed. The American Senate, another elected body, is even more independent, but it is not analogous because of the differences between the presidential and parliamentary systems of government.

<sup>49</sup> *Supra*, footnote 1, at pp. 22-23.

election for a system of appointment would involve a radical change in the nature of one of the component parts of Parliament. As already noted, the preamble to the Act referred to "a constitution similar in principle to that of the United Kingdom", where the Upper House is not elected. In creating the Senate in the manner provided in the Act, it is clear that the intention was to make the Senate a thoroughly independent body which could canvass dispassionately the measures of the House of Commons. This was accomplished by providing for the appointment of members of the Senate with tenure for life. To make the Senate a wholly or partially elected body would affect a fundamental feature of that body. We would answer this sub-question in the negative.

What an extraordinary melange of law and political science is embodied in this passage! The idea that the Senate would somehow become a less "thoroughly independent" body if election were substituted for appointment will amaze political scientists. And the idea that a "constitution similar in principle to that of the United Kingdom" requires an appointed upper house ignores the hereditary and aristocratic character of much of the House of Lords. What is also ignored is the fact that the constitution of the United Kingdom permitted the powers of the House of Lords to be reduced to a suspensory veto by the Parliament Acts of 1911 and 1949,<sup>50</sup> and would permit the House of Lords to be converted to an elected body if that became the policy of the United Kingdom government. The court focuses reverently on the archaic forms of the United Kingdom constitution and forgets its dynamic (and more fundamental) capacity for change.

My opinion in summary, therefore, is that: (1) The court was wrong to interpolate the requirement that an amendment under section 91(1) must be "of interest only to the federal government"; (2) even if the requirement is interpolated, the abolition or alteration of the Senate as presently constituted satisfies the requirement because the Senate does not function as a protector of regional or provincial interests; and (3) the court's decision actually precludes reforms which would convert the Senate into an Upper House which would be an effective protector of regional or provincial interests.

#### *Textual References to the Senate*

As well as the argument that Upper House reform is not of interest only to the federal government, the court relied on the explicit reference to the Senate in the opening words of section 91. Section 91 confers federal legislative power on "the Queen, by and with the advice and consent of the Senate and the House of Commons". The court held that this phraseology implied that the nature and function of the Senate could not be essentially changed

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<sup>50</sup> *Supra*, footnote 6.

under section 91(1).<sup>51</sup> The court made a similar inference from a reference to "the Parliament of Canada" in one of the exceptions to section 91(1) itself. Since "the Parliament of Canada" was defined in section 17 of the B.N.A. Act as including the Senate, it followed that section 91(1) did not contemplate changes in the Senate.<sup>52</sup>

These arguments, based as they are on textual analysis of the B.N.A. Act, seem to me to be more persuasive than the argument based on the court's own self-created (and misapplied) requirement that a law under section 91(1) must be "of interest only" to the federal government. But the textual arguments seem to me to be quite inconclusive. Is it not equally plausible to argue that the references in the B.N.A. Act to the Senate and the Parliament are references to bodies which are vulnerable to change under the power to amend "the constitution of Canada"? There is authority for the proposition that such change could not go so far as to eliminate representative democratic institutions,<sup>53</sup> but the amendment or even abolition of the Upper House is hardly a threat to representative democracy.

In any event, why are these arguments by inference not applicable to the provinces? It will be recalled that five provinces have abolished their upper houses as amendments to "the constitution of the province."<sup>54</sup> The court did not cast doubt on the validity of those abolitions. It said that provincial power was more extensive than federal power because section 92 does not "particularize the participants in the law making process".<sup>55</sup> Whereas section 91 refers to "the Queen with the advice and consent of the Senate and House of Commons", section 92 simply refers to "the Legislature". In addition, the court said, section 92(1) does not itself contain any references which could be interpreted as contemplating the continued existence of the provincial upper houses.<sup>56</sup> With respect, these distinctions are not satisfactory. The court failed to notice that the Legislature of Quebec is defined in section 71 of the B.N.A. Act in terms very similar to the definition of the Parliament of Canada in section 17 of the B.N.A. Act. Compare the two sections:

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<sup>51</sup> *Supra*, footnote 1, at p. 12.

<sup>52</sup> *Ibid.*, at p. 18.

<sup>53</sup> *Initiative and Referendum Reference*, [1919] A.C. 935, at p. 945. In the *Upper House Reference*, *supra*, footnote 1, at pp. 17-19, the court gave a much broader reading to the dictum in the *Initiative and Referendum Reference* than I think the language in context will bear. For my interpretation, see Hogg, *op. cit.*, footnote 24, pp. 220-223.

<sup>54</sup> *Supra*.

<sup>55</sup> *Supra*, footnote 1, at p. 19.

<sup>56</sup> *Ibid.*

17. There shall be one Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons.
71. There shall be a Legislature for Quebec consisting of the Lieutenant Governor and of two houses, styled the Legislative Council of Quebec and the Legislative Assembly of Quebec.

Surely the reference to "the Legislature" in section 92, in its application to Quebec, incorporates the definition in section 71 no less than a reference to the Parliament of Canada incorporates the definition in section 17. On this basis, section 92 is not very different from section 91. The line of reasoning favoured by the Supreme Court of Canada, if applied to Quebec, would suggest that Quebec's abolition of its upper house in 1968 was unconstitutional; if so, then all Quebec laws enacted since 1968—all of which lack the assent of the Legislative Council—are invalid.

The better view of the law, in my opinion, is that the references in the B.N.A. Act to the Senate, the Parliament and the Legislatures are not intended to immunize those institutions from change. The powers to amend the constitution of Canada and the constitution of the province should be given a fair reading as including the organs of legislative power. Nor, in my view, is there any textual justification for the court's limitation of section 91(1) to "matters of interest only to the federal government". I therefore conclude that the *Upper House Reference* was wrongly decided. In my opinion, section 91(1) should have been interpreted as authorizing the federal Parliament to abolish or alter the Senate.

As a matter of policy, the decision also seems unfortunate. It means that substantial reform of the Senate cannot be accomplished by federal legislation. While the Trudeau government's specific proposals for the House of the Federation in Bill C-60 did not attract much support, the government was not wedded to the specifics and was embarked on a process of legislative hearings and broad provincial and private consultation which would eventually have yielded different proposals. For those who believe in Upper House reform here was a realistic opportunity of achieving it. This decision of the Supreme Court of Canada means that Upper House reform can only be accomplished by an amendment to the B.N.A. Act enacted by the United Kingdom (imperial) Parliament. If, as many will claim, a Canadian request for a United Kingdom amendment must be preceded not merely by consultation but by the unanimous consent of all provincial governments, then the experience of the last ten years suggests that nothing will happen. It is a very significant fact that British Columbia, the only province which has seriously espoused the cause of Upper House reform,<sup>57</sup> was not one of the seven

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<sup>57</sup> British Columbia's Constitutional Proposals (Province of B.C., September 1978), Paper No. 3, Reform of the Canadian Senate.

provinces which intervened in the litigation to oppose federal power.<sup>58</sup> The decision is a victory for those who wish the Senate to remain exactly the way it is now.

Beyond the question of Upper House reform, it is unfortunate in my view that the federal power to make changes in the institutions of the central government is hedged about with the vague yet sweeping limitations which proved fatal in this case. Very few changes in the institutions of the central government could be confidently described as being of interest only to the federal government. Consider, for example, the proposal advanced by the Task Force on Canadian Unity to elect a part of the House of Commons on the basis of proportional representation; the idea is to make the House of Commons more reflective of the true distribution of party allegiance by region.<sup>59</sup> Could this be accomplished by the federal Parliament as an amendment to the constitution of Canada? Before the present decision one could have confidently answered yes. But no confident answer can be given now. Is this of interest only to the federal government? Is the simple-majority single-member-constituency electoral system, which has been in place since confederation,<sup>60</sup> an "essential characteristic" of the House of Commons which (according to this decision) cannot be altered? No one knows the answer to these questions.<sup>61</sup> From now on the federal government is going to have to ask the court for permission before enacting any significant measure under section 91(1), and the court is often going to say no. In this country one has to be strong to believe in constitutional reform.<sup>62</sup>

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<sup>58</sup> Manitoba and Quebec were the other provinces which remained aloof from the litigation.

<sup>59</sup> The Task Force on Canadian Unity, *A Future Together* (Minister of Supply and Services Canada, 1979), pp. 105-106.

<sup>60</sup> The Canadian House of Commons has for most of its life had several two-member constituencies, although there has been none since 1966: Qualter, *The Election Process in Canada* (1970), p. 118. But a system of proportional representation based on districts as large as a province would be a radical departure from tradition. See generally Irvine, *Does Canada Need a New Electoral System?* (1979).

<sup>61</sup> It is ominous to note that in the *Upper House Reference* the court denied federal power to provide for the direct election of all or some of the members of the Upper House, even though direct election would not diminish regional representation: *supra*.

<sup>62</sup> I acknowledge the help of my colleagues, Professors James C. MacPherson and Donald V. Smiley, who read an earlier draft of this Comment and made useful suggestions for its improvement.

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