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Chair

The Honourable Albina Guarnieri

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● (1535)

[*English*]

The Chair (Hon. Albina Guarnieri (Mississauga East—Cooksville, Lib.)): I'd like to call the meeting to order.

[*Translation*]

Pursuant to the order of reference of Wednesday, February 13, 2008, the committee resumes its study of Bill C-20.

[*English*]

We're fortunate to be able to consult with two able scholars and residents here today in committee.

We are joined by Monsieur Fabien Gélinas, associate professor, Faculty of Law, McGill University; and Mr. Peter W. Hogg, scholar in residence, Blake, Cassels and Graydon.

Thank you and welcome.

Mr. Gélinas, we'll begin with you. You each have 10 minutes, and we'll be generous with allotting you enough time to make your comments. Thank you.

[*Translation*]

Mr. Fabien Gélinas (Associate Professor, Faculty of Law, McGill University, As an Individual): Thank you, Madam Chair.

Good afternoon, everyone.

I would first like to thank the committee for inviting me to participate in your work in this way. It is an honour and a pleasure. Well, maybe we will see about the pleasure later.

I was not able to prepare a written report, for which I apologize, but I did bring some notes that I gave to the clerk to facilitate the work of the interpreters and, as a result, the work of committee members.

We are here to shed light on Bill C-20, An Act to provide for consultations with electors on their preferences for appointments to the Senate.

In order to prepare a sufficiently big picture for the committee, I followed the evolution of Bill S-4, which is now Bill C-19, dealing with the length of senators' terms. In so doing, I was also able to read the comments of Professor Hogg who is here with us and to whom I extend greetings.

The two bills on Senate reform remind me, in a number of respects, of the two best-known lovers in western theatre, Romeo and Juliet. We may ask ourselves whether they are really meant for each other. Are they ever going to end up together anywhere but in the great beyond? Another question comes to mind. Will the death of one, real or feigned, cause the death of the other? Questions like that arise. And everything is still possible at this stage.

So I propose to focus my introductory remarks on Bill C-20 considered separately and apart from the other bill, and to broaden my comments during the discussion if the members of the committee consider that useful.

As a constitutional lawyer, I naturally asked myself if the bill is valid constitutionally. In legal terms, the answer seems quite simple. The bill does not seem to change any provision of the Constitution within the meaning of section 52 of the Constitution Act of 1982. The constitutional amending procedure in section 38 of the act and those following does not come into play. It simply does not apply.

Nevertheless, in our political system, everyone can appreciate the limits of the legal provisions that are enshrined. It is clear that passing the bill may well have a major impact on the functioning and the balance of our political institutions. The impact will be felt by the normative, or conventional, effect of the Constitution, the conventions of the Constitution that are unwritten, and not in the law, but that nevertheless are binding.

Since we are talking about choosing senators, the problem here, in summary, comes from section 24 of the Constitution Act of 1867, which gives the Governor General the exclusive legal power to appoint senators. Section 24 makes no mention of the Prime Minister, however often it is informally said that senators are appointed by the Prime Minister.

We know that the conventions of responsible government establish that Governors General exercise most of their powers only with the advice of their ministers. The conventions stipulate that the special power described in section 24, the power to appoint senators, is exercised with the advice of the prime minister. This is one of the so-called special prerogatives.

The legal power enshrined in the Constitution belongs to the Governor General, therefore. Because of a constitutional convention, he or she exercises that power only in accordance with the advice of the prime minister. The convention exists because of the principle of responsible government, which, in the British parliamentary system, is a means of ensuring the operation of democratic principles.

The Bill under study organizes the mechanisms of an optional consultation process that might well look like an election for senators. These provisions in no way require the Governor General to appoint the senators receiving most popular support at the end of the consultations. They do not even require the Prime Minister to accept the result of the consultation when formulating his advice to the Governor General. In fact, no requirement is placed on the Governor General or even on the Prime Minister. There is therefore no impact on section 24 of the Constitution Act of 1867.

As I have already mentioned, the bill may well have a significant impact on the conventions of the Constitution. The current Prime Minister is almost obliged, politically, to be bound by the results of the consultation. If he so declares himself, either before or after the legislation is passed, and if he then moves to make appointments as a result, he is demonstrably laying the foundation for a constitutional convention. This would be confirmed, in my view, only if his successor saw fit to be bound by the same rules.

The requirements for a convention to be established are generally considered to be precedents, a feeling of obligation on the part of the political actor involved, and a reason for the rule. What I would like to highlight here is this reason for the constitutional norm that is the subject of our attention.

There is a reason for the conventional rule that transfers the Governor General's power in section 24 of the Constitution Act of 1867 to the Prime Minister, and the reason is the democratic principle. The conventional rule apparently sought here, to transfer the power of elected people—the power accorded to the Prime Minister acting with the confidence of the House of Commons—to voters, that is, the people who would be consulted, is the democratic principle too. The concept of democracy is also described in the first paragraph of the preamble to the bill. These are two different concepts—that is what I want to underline here—or at least two very different ways to put the democratic principle into operation. The first takes the familiar and well-paved road of responsible government in the House of Commons. The other cuts a largely uncharted path through our political system.

The Supreme Court has already had the opportunity to study the protection provided by constitutional law to the rules of responsible government. The principle of responsible government is definitely, but somewhat uncertainly, enshrined in the Constitution and protected from unilateral change by Parliament, or by a provincial legislature in the case of an amendment to a provincial constitution. This protection is guaranteed, both federally and provincially, by section 41 of the Constitution Act of 1982 that, as you know, requires unanimous consent to amend the offices of Governor General and Lieutenant Governors. This is a way to protect the principle of responsible government under the Constitution. In the case of the Senate, this protection is guaranteed in section 42 of the procedure for amending the constitution, which protects section 24 of the Constitution Act of 1867 from unilateral amendment.

This leads me to suggest that, if the bill went any further in limiting the Governor General's decision-making under section 24, it would move into an area of constitutional uncertainty.

But, in my view, this is not the case here. If we consider the bill in isolation and in its current form, I believe that no fault can be found with its constitutional validity.

● (1540)

Politically, however, I would say to sum up that the idea that lies beneath the intended reform deserves serious attention. Although it claims to uphold the democratic principle, it introduces a foreign element into our system whose consequences do not seem, to me at least, to be sufficiently clear.

Thank you.

The Chair: Thank you, Mr. Gélinas.

Mr. Hogg, you have the floor.

[*English*]

Professor Peter Hogg (Scholar in Residence, Blake, Cassels and Graydon LLP, As an Individual): Thank you very much, Madam Chair, and thank you, Professor Gélinas.

My view is not very different from that of Professor Gélinas, and I will attempt to speak to the particular point that he made before I finish, but let me set out my argument, which is pretty straightforward.

I say that Bill C-20 would be a valid act of Parliament, and it escapes the strictures of paragraph 42(1)(b), the fact that it requires an amendment to change the method of selecting senators. It avoids that because it does not literally amend section 24 of the Constitution Act, 1867.

It could be argued—and Professor Gélinas did not argue this—that Bill C-20 is, in pith and substance, really an amendment to the method of selecting senators and is therefore unconstitutional under paragraph 42(1)(b). My view is that the Supreme Court of Canada would not accept that argument, and I say that because the appointing power of section 24, which only speaks to the Governor General, does not now impose any restrictions on the consultations or considerations that the Prime Minister might take into account before recommending an appointment to the Governor General.

For example, right now the Prime Minister could, if he wished, commission an informal poll as to the wishes of the electorate with respect to an appointment from a particular province. The Prime Minister could right now, and in fact has done, respect the choice of the electorate expressed in a provincial election, as we know has been done in respect of appointments from Alberta, where those elections have been held.

So all Bill C-20 does is make a formal consultation process available to the Prime Minister, should he choose to take advantage of it. As you will know, the Prime Minister does not need to take advantage of the consultation process if he doesn't want to; the bill leaves that as a matter of discretion in the Governor in Council. If the Prime Minister does order the formal consultation process to take place, he does not have to respect the results in making recommendations for appointments.

I fully recognize—and this starts to get me into the area where Professor Gélinas is—and obviously a court would recognize that after Parliament has established the complicated process proposed by Bill C-20, no Prime Minister is likely to continue to make appointments in the old way. But I say that is a truth of politics, not a truth of law. It might be different if Bill C-20 compelled the Prime Minister to follow the statutory consultation process and then compelled him to make appointment recommendations in accordance with the outcome of the process, but as we know, Bill C-20 doesn't do either of those things. Bill C-20 simply gives the Prime Minister a vehicle for consulting the electorate, but does not require him to use it and does not require him to respect the outcome if he does use it.

● (1545)

Getting to the corner of Professor Gélinas' point, section 24 has never attempted to control the decision-making process that precedes the decision of the Governor General to make Senate appointments. So if it did turn out that prime ministers now automatically use the process, and if it came to be accepted, as Professor Gélinas suggests might be a possibility, that this was really a convention, that this ripened into a new convention that appointments would always be made by using this admittedly optional process, section 24 would not speak to that. Section 24 says nothing about the conventions that precede an appointment, and conventions can change in various ways over the years. If this ended up causing a change in the convention, section 24 would simply operate in the way it has always done. That is to say, whoever by convention is supposed to make the recommendations of the Governor General, the Governor General would then go ahead and make the appointment.

Let me raise one other point that I know has been at least mentioned in the proceedings before the committee. The point is this. In the upper house reference, the decision of the Supreme Court of Canada in 1980, the Supreme Court said that the fundamental features or essential characteristics of the Senate were outside the unilateral power of Parliament.

I know it has been suggested, and now is still the case, that any bill—this was suggested, for example, with respect to the term limit bill—that arguably altered the fundamental features or essential characteristics of the Senate would be outside Parliament's power. I just want to briefly answer that point, because I'm sure it will be part of your deliberations.

That upper house re-decision was a decision in 1980, before the Constitution Act 1982. It was the answer to a series of questions that were put to the Supreme Court of Canada by the government of the day about the extent of Parliament's power to change the Senate, including to make provision for elections to the Senate. The court gave very general answers to those questions—it wasn't asked anything very specific, and it didn't have a bill placed before it. The court's answers were particularly concerned with the protection of the provisions respecting regional and provincial representation in the Senate. Of course, Bill C-20 doesn't touch those.

The important point is that that case is no longer relevant. When it was decided in 1980, the Constitution Act 1867, which was the only authority then for making changes to the Senate, said nothing about Parliament's power to enact changes to the Senate. So the court was constructing some general rules in the face of a Constitution that said nothing. Of course, that has now been overtaken by the Constitution Act 1982, which now specifies expressly what has been withdrawn from the unilateral power of Parliament. One of those matters, of course, as we have seen, is “the method of selecting senators”. Another is “the powers of the Senate”. Another is “the number of members by which a province is entitled to be represented in the Senate”. Another is the “residence qualifications of senators”. They're all set out in section 42, the 7/50 provision in the amending powers.

● (1550)

Those explicit provisions are now the governing constitutional law with respect to changes to the Senate. I say the only one that is potentially relevant is the method of selecting senators, and I've explained my view that that provision does not cover Bill C-20.

My conclusion is that the Parliament of Canada does have the power to enact Bill C-20, and if it were enacted, it would be a valid act of Parliament.

Thank you, Madam Chair.

● (1555)

The Chair: Thank you, Mr. Hogg.

I can see that the comments by both our scholars are provoking many questions. My colleagues are eager to pose questions.

We'll begin with our first round of questioning for seven minutes.

Mr. Murphy, you're first.

Mr. Brian Murphy (Moncton—Riverview—Dieppe, Lib.): Thank you, Madam Chair.

Thank you, witnesses, for attending.

I want to get into some broad-ranging questions about two competing elected houses and the international experience, in a few seconds. But I want to give

[*Translation*]

the opportunity for Professor Gélinas to respond to Professor Hogg's contention that, if a constitutional convention became established after two or three prime ministers had chosen to endorse the choice of the electors, section 24 of the act would not be affected at all.

[*English*]

To be clearer in English, for me, Professor Hogg has suggested—and I don't think you quite got there in your submission—that if, after time, having put the voters to their choice and having put Elections Canada and taxpayers to the expense of a selection process, a Prime Minister elected to choose the candidates who were chosen, and if after a number of terms, let's say, or one term, that became a convention, Professor Hogg, I think, was saying that this would have no effect on who ultimately selects senators and therefore would, in itself, be fine.

Do you agree with that?

Prof. Fabien Gélinas: I would agree. The submission I made is to the effect that section 24 is not touched at all by the bill we're looking at, that the bill doesn't have any impact on section 24. And my answer would be the same whether or not a constitutional convention evolved after a number of years or after a number of prime ministers, to the effect that the Prime Minister has to follow the results of the consultations.

Mr. Brian Murphy: That's very clear. Thank you for that.

Now, on the broader question, it seems that on the black letter aspect of this legislation there's nothing that you feel impugns the Constitution. That's fine. But the political effect of it is that the selection process will be followed, in all likelihood, by prime ministers, and therefore it changes directly the method by which senators are elected or selected.

Therefore we can envision in a very short time two democratically elected houses. I tread very carefully in talking about Australasia and New Zealand and Australia. But in New Zealand, I believe, that never came to pass, because they rejected the elected aspect. In Australia there are specific powers between the two houses, as there are in the United States under the presidential aspect of veto.

There is a very short time, but how do you envisage this working in our current environment with, effectively, an elected Senate and an elected House of Commons with respect to gridlock and stalemate? I'll give you each an occasion to answer that, if we have time.

The Chair: Mr. Hogg.

Prof. Peter Hogg: Mr. Murphy, I think it would be highly desirable, if the Senate is going to become in effect an elected body, to have provisions to change the representation of provinces into some form of equal representation, as was proposed in Charlottetown, and also to have a provision for dealing with gridlock between the two houses, something like a joint vote or something of that sort.

The government's problem is that it can only do limited things without a constitutional amendment. The Charlottetown accord was a very complex and very clever system for getting to a triple-E Senate, but of course it envisaged a constitutional amendment. Without a constitutional amendment, it's difficult to put these other things into place.

You can get along without formal provisions for conflict between the two houses. In the end, if one house says no and the other says yes, the bill fails, and that solves the problem. In a system of responsible government, if it's the Senate saying no and the House of Commons saying yes, that's not something we're used to, but I think we'll have to get used to more of that kind of thing if we ultimately evolve an elected Senate.

● (1600)

[*Translation*]

The Chair: Mr. Gélinas, do you have anything to add?

Mr. Fabien Gélinas: I would just emphasize that the creation of a constitutional convention is not easy to predict. Just passing legislation does not mean that a constitutional convention will result. If a new prime minister were elected, that new prime minister would have the option to decide not to hold elections and consultations, to state and repeat that he was going to use his discretion independently of any consultations. So it is entirely uncertain at this stage whether a constitutional convention will be created. I think it is quite important for that to be said.

In practical terms, the creation of a long-term constitutional convention, of course, would cause a deep change in our system that would raise questions that we cannot answer today. This is exactly consistent with my preliminary remarks.

[*English*]

The Chair: Mr. Murphy, you have about 20 seconds left.

Mr. Brian Murphy: Why did people reject the proposal to elect a Senate in New Zealand?

Prof. Peter Hogg: New Zealand is a small country. It's not a federal country. It had an upper house and it abolished it. Australia is geographically a much larger and more diverse country, and of course it has an upper house, but it has mechanisms for dealing with conflict. It's a triple-E Senate in Australia, and it has provisions of a kind that you are indicating, Mr. Murphy, for resolving conflict. I think at a certain point they have a joint sitting of the two houses, and because the House of Commons is more numerous, it usually means that the House of Commons can prevail.

The Chair: Thank you.

Monsieur Paquette.

[*Translation*]

Mr. Pierre Paquette (Joliette, BQ): Thank you both for your presentations. I confess that I am no great expert on constitutional law. So I feel that you are going to shed a lot of light on this for us.

When the government House leader spoke to the committee to introduce Bill C-20, he said, on page 3 of his speech:

> The bill is carefully drafted to ensure that the Senate will remain a chamber of independent sober second thought and that its essential positive characteristics are maintained.
>
> This legislative proposal is drafted so as not to make any changes that would require a formal constitutional amendment.
>
> This flexibility is important. It will help to ensure that nominees are available to fill seats as they become vacant.
>
> For the first time ever, Canadians across Canada will have a direct say in who should represent them in the Senate.

The Chair: Excuse me, I think we are having problems with the interpretation. Can you slow down a little? Thank you.

Mr. Pierre Paquette: Yes.

We really get the impression that, faced with repeated failures to reform the Senate, the Conservative government, who have made this their kind of trademark, has come up with a bill that addresses the main pitfall, the constitutional amendment process that Senate reform would normally entail. So, the bill has been written so that the sections that you mentioned, section 24, for example, are not affected, though the political intention is still to have an elected Senate. That has come up on several occasions.

For example, to hold public consultations under Bill C-20, it would cost $150 million, according to the Chief Electoral Officer, or about half the cost of a general election. I cannot see how the Prime Minister, who proposed this reform, would not take the results of the public consultation into account. They are doing indirectly what they cannot do directly. That is, getting themselves a list of candidates who have been indirectly elected. If you combine Bill C-19, which limits terms to eight years, and Bill C-20, which establishes public consultations, you have Senate reform, that is for sure.

In my opinion, what we are looking at is a complete reform of the nature of the Senate as conceived by the founders of Canada.

Let me ask you for your opinion. Is it not your impression that Bills C-19 and C-20 are going to let the government and Parliament, if they are passed, do indirectly what the Constitution prevents them from doing directly?

● (1605)

Mr. Fabien Gélinas: Of course, when we talk about doing indirectly something that we have no right to do directly, that is even more reason for it not to be allowed and to know why it is not allowed. I feel that the bill is put forward in the spirit of not changing the essential characteristics of the Senate.

Mr. Pierre Paquette: They are trying to use it as a back door to put in place the reforms that they cannot put in place by amending section 24.

Prof. Fabien Gélinas: It could be said that it is the prerogative of the government to try to establish constitutional practices or customs. The next government also has the prerogative to not follow the same rules. With decisions of successive governments, the existence of constitutional conventions may be eventually established, but before that, there is no change. So a number of things have to happen for a convention to come about.

I agree with you when you say that Bill C-20 is more suspect when it is considered together with Bill C-19. It becomes more suspect because we start to see an attempt at reform that looks a little more significant. It is one thing to elect a person who is going to stay in place until the age of 75, but it is clearly another thing to elect someone who is going to stay one year, five years, eight years, twelve years. That is not the same thing. Each scenario must be looked at very closely to see if we are crossing the line of what the Constitution allows Parliament to do unilaterally.

On Bill C-19, I do not share the view of my colleague Peter Hogg on the relevance or otherwise of the Senate Reference. I think that the Senate Reference is still relevant in interpreting the scope of section 44 of the Constitution Act of 1982, that is, in interpreting the scope of the federal power to unilaterally amend the Constitution of Canada. Even so, that does not mean that Bill C-19 goes too far. I can expand on that if you are interested.

Mr. Pierre Paquette: Mr. Hogg, would you like to react to that at all? After all, on page 1 of your presentation, you say: “Obviously, the bill assumes that the Prime Minister would be under a political imperative to respect the outcome of the consultation he has ordered...”

The bill provides a flexible way to get around constitutional rules. But you agree with me that, politically, they are in fact moving towards Senate reform.

So are they not doing indirectly what they cannot do directly?

[*English*]

Prof. Peter Hogg: Monsieur Paquette, it does skate very close to that doctrine.

There are two things I think one can say to help allay that concern. To pick up on Mr. Murphy's point, this bill is to the disadvantage of the Prime Minister. It is to the disadvantage of the Prime Minister because it will diminish his powers over time.

The fact that it is a purely optional thing means it can't be taken for granted that it will become a convention that lasts forever. So I think it's perfectly legitimate for Parliament today to treat it as an optional mechanism, knowing it is likely that it will then become generally used.

The second thing I think one can say is that Parliament does have power to make changes to the Senate, and over time we would expect institutions to change. So what is happening here is that we are moving in a more democratic direction than we have done before, but I think still falling short of violating section 24 of the Constitution.

● (1610)

The Chair: Thank you, Mr. Hogg.

[*Translation*]

I am sorry, but your time is up.

[*English*]

Mr. Angus, you're next on the list.

Mr. Charlie Angus (Timmins—James Bay, NDP): Thank you.

I think all of us are finding this discussion today very interesting.

I'd like to ask Professor Gélinas, if Bill C-20 stated that the consultation process *will* be the manner in which senators are chosen, would that put us across the line?

Prof. Fabien Gélinas: When you say the consultation process *will* become the manner in which senators are appointed, there are two possible meanings. One meaning is that you go to the power of the Governor General, which is mentioned in section 24, in which case it's clearly over the line. The other interpretation is to say that you're trying to bind the Prime Minister to giving the advice that flows from the consultation process, and that, I would say, is a grey area.

On the one hand, you could argue that the powers of the Governor General are not touched, that section 24 only concerns the powers of the Governor General and that they don't include anything that happens before the legal decisions that the Governor General will make.

On the other hand, you could argue that the power of the Governor General under section 24 includes the right to be advised by the Prime Minister and the right to be given advice that's free.

Mr. Charlie Angus: To be very clear here, right now it is the option of the Prime Minister to choose the consultation process or not choose it in any particular case. If the bill said that as of this date this process will be the process that the Prime Minister must accept, that will lead to the appointment of a senator, Professor Hogg, does that go over the line?

Prof. Peter Hogg: Like my colleague, I find that a difficult question. But I think if the Prime Minister were required by statute to invoke the process and were then required to respect the outcome of the process—that's your question really—then it's true that section 24 is still not literally amended. But then it seems to me that Mr. Paquette's point becomes very difficult to answer, because then there does seem to be a mandatory move to an elected Senate, albeit behind the back of section 24.

So I think there would at least be a risk of unconstitutionality if the bill had those two elements to it, on Mr. Paquette"s reasoning.

Mr. Charlie Angus: It's very clear to the people of Canada what's being attempted here. This is an attempt to move toward an elected Senate without tripping up the giant elephant that sits in the middle of any room when we discuss the Senate.

The bigger question here is the legitimacy of the process. If you're going to tell the people of Canada there will be a consultation process but the Prime Minister is not bound to accept that choice, the fundamental legitimacy of this process is put into question. In any fundamental democratic principle, the acceptance of candidates who are chosen in a vote is not voluntary, it's mandatory. This is the democratic will of the Canadian people.

So what is the greater risk here? Is it to have a voluntary process that does not need to be respected, or to say to the Canadian people, “If this process is in place, your choice will be accepted”?

● (1615)

The Chair: Mr. Hogg, would you like to handle that one?

Prof. Peter Hogg: I think what the government is trying to do in the bill, Mr. Angus, is give the expectation that we will move toward an elected Senate, but leave the obligation for that step as a purely political one, and in that way avoid the danger of a finding of constitutionality.

[*Translation*]

The Chair: Do you have anything to add, Mr. Gélinas?

[*English*]

Prof. Fabien Gélinas: There is a fairly good chance that even if the Prime Minister were bound to hold consultations and follow the result, that would be found perfectly appropriate by the Supreme Court under section 44. There is that possibility, but it would be in an area much less certain.

Mr. Charlie Angus: Going back to the legitimacy of the process we're being asked to bring to the people of Canada, certainly questions have been raised about the exorbitant price of setting up a process that may or may not be implemented. But I'm not really aware of other democratic systems that work on the principle of “shall”, “might”, and “could”. “Will” is a fundamental word that we use. The government “will” do this if this is law.

We are always being asked to accept the principle that the Prime Minister would likely be bound, but he's not necessarily bound. Do we have any other examples of electing democratic institutions in the world where it's at the whim of a Prime Minister to accept the candidates or not?

Prof. Peter Hogg: I can't think of any examples of that. Our Senate is a bit unusual in that it's a relic of a time when democratic values weren't as strongly held as they are now. And of course the House of Lords is still an appointed body.

Prof. Fabien Gélinas: I would add that the appropriate comparison might not be the House of Commons but the bench, where there is a consultation process and the Prime Minister keeps a discretion to the end. This is an example that might be as appropriate to the Senate as the example of members of Parliament.

The Chair: Mr. Angus, we have time for one quick question.

Mr. Charlie Angus: I'm just wondering, in dealing with this issue once and for all, whether it would be better to put to the Canadian people the question of where they stand on the Senate so we can actually have real reform. Do you think that's a possible mechanism?

Prof. Fabien Gélinas: By means of...?

Mr. Charlie Angus: We could have either a non-binding referendum, or a bill that would be challenged so the Supreme Court would come down and say, “Yes, it is within the power of the Prime Minister and Parliament to mandate an election process with mandated results”. Then we could bring this relic into the 21st century, as opposed to what we're doing now, which is a hodgepodge.

Prof. Fabien Gélinas: That's obviously a 100% political question, and I have nothing particular to say about it.

● (1620)

The Chair: Our next questioner is Mr. Reid.

Mr. Scott Reid (Lanark—Frontenac—Lennox and Addington, CPC): Thank you, Madam Chair, and thank you to both of our witnesses for being here.

We are starting to receive some written submissions from different groups, and I've been reading them. One of them raises a concern that I think is incorrect. I'm going to ask our witnesses, and I'm very hopeful they will agree with my assessment.

The national constitution and human rights law section of the Canadian Bar Association submitted a submission in which they discuss whether the proposed law is constitutional. They are not entirely certain one way or the other.

But they raise the following question, and I'm going to quote from it. They say:

> Another matter that should be addressed is the potential ramifications of an unconstitutionally “elected” Senate in the long term. If Bill C-20 is successfully challenged 20 years from now, and declared an unconstitutional attempt to amend the Constitution of Canada, a number of issues would arise, including:
>
> - Would senators appointed following the consultative elections lose their seats?
>
> - Would legislation passed by the Senate, populated by senators appointed following consultative elections be rendered invalid?

That strikes me as being an unrealistic fear, but I want to get confirmation from the witnesses.

Prof. Peter Hogg: I suppose we might already be in deep trouble, since the Senate has at least one person who was appointed as the result of an election. If it is unconstitutional to take account of an election, we're probably already in trouble.

With respect to the question, this committee is going to make up its mind as to whether there is a serious risk of constitutionality. Of course it will always be open to people to challenge the bill. I suppose a disappointed candidate could challenge the process in some way. I don't think any serious question of constitutionality is likely to wait for 20 years. If it did wait for 20 years and the House was ruled to be unconstitutional, it might be a bit like the Manitoba language reference, where all the laws enacted back to 1896 were held to be unconstitutional by the Supreme Court of Canada. But the court said they could continue to be valid until there was time to correct them. I think something like that would be done by the court to avoid the chaos of saying that for the last 20 years we've been enacting invalid legislation.

I don't think that's a real concern. Of course it is a perfectly reasonable concern as to whether the bill is or is not constitutional.

Mr. Scott Reid: Okay.

Prof. Fabien Gélinas: Concerning the precedent of a senator who was appointed following a consultation, I would like to clarify that it's nowhere on the record that the consultation was taken into account. The Prime Minister was absolutely free to do whatever he wanted at the time.

With respect to the Manitoba language rights reference where the Supreme Court dealt with this difficult issue, I would add that the legislature was illegally constituted under unconstitutional statutes—the legislature itself. So the comparison is obvious, I think.

Mr. Scott Reid: Thank you.

A second question I have is with relation to something that has been suggested in the past, the idea that an alternative to elections is appointment on the advice of recommendations made by the provincial legislatures. That was actually one of the options put forward in the 1980 Supreme Court reference case. The court at that time indicated that this would violate the principle of non-delegation. The idea that delegation ought not to occur is something I assume has not changed as a result of the adoption of the Constitution Act of 1982 and its amending formula. I'm looking for some confirmation as to whether or not this invalidates that potential alternative option as a means of selecting senators.

● (1625)

Prof. Peter Hogg: What's your view on that, Fabien?

The Chair: This is true consultation.

Prof. Fabien Gélinas: I'm not convinced that the Supreme Court would take such a stringent view on the question of inter-delegation, and so I wouldn't be 100% certain that this would hold.

Prof. Peter Hogg: I suppose that some alternative to Bill C-20, supposing there's a vacancy in Alberta, could give the Prime Minister the power to consult the Legislative Assembly of Alberta. I don't think that would be very different from what is now being proposed in Bill C-20, so I think it would probably be okay as well, if that were the route chosen.

Mr. Scott Reid: I have one last question. This one, I think, will be fairly brief.

I've been struggling too with the question of whether an advisory election constitutes an actual election or whether the advice can be set aside. The parallel that occurs to me as perhaps the best—and I guess I'm asking whether you agree with me that this is a valid parallel—is the prohibition plebiscite of 1898, in which a majority of Canadians voted in favour of prohibition. A very large minority voted against it, and of course there was a very strong regional divide. Based on that, the Prime Minister of the day chose to set aside the result.

I'm wondering whether, in essence, that option would remain available to prime ministers if they should see some kind of problem. What I'm really getting at is whether this is in fact to be understood as being an election that is advisory rather than being a de facto way of doing indirectly that which cannot be done directly, imposing an obligation on the Prime Minister and therefore on the Governor General.

Prof. Peter Hogg: It certainly is explicitly only advisory, because the bill ends with the Chief Electoral Officer reporting the results to the Prime Minister, and that leaves it up to the Prime Minister.

I could imagine a situation, Mr. Reid, where perhaps the election had been contaminated in some way. I find it a little hard to imagine, but perhaps some kind of racism had been openly part of the election; the Prime Minister might decide then that this really was one case where he wasn't prepared to accept the outcome. This would, I think, be open under this bill, and I don't think it's an impossible scenario.

The Chair: We'll begin with our five-minute round of questioning.

Madam Fry.

Hon. Hedy Fry (Vancouver Centre, Lib.): I've practised what I'm going to say about the fact that I am certainly not a lawyer. I have heard Mr. Hogg, Professor Gélinas, and the Canadian Bar Association give three very different opinions on this issue. I suppose It's interesting to see how one can split the law the way one can split a hair.

I'm not going to go into the splitting of that, because I'm not lawyer and therefore I can't debate that. However, I like to look at outcomes; this is what I'm good at as a physician. For me, the outcome of this piece of legislation is going to be very important, and if the outcome fundamentally changes the way our parliaments work, then one has to be concerned about what that outcome is going to be. Whether one can get around it by saying that the Prime Minister doesn't have to abide by the results of those elections.... That's one way of getting around the constitutionality, but is it a valid and ethical way to get around the constitutionality if the outcome is going to affect Canadians?

Secondly, if one takes something to the people and asks the people to vote, would the people—who are an institution, if you want to look at them as such—or will civil society believe that by voting they are automatically doing the democratic thing and that the vote should and must be taken into consideration or must be a mandatory thing?

Having said both of those things, because obviously the outcome here is to democratize the system—and no one is against that, we are all in favour of it—and given what the Supreme Court had to say about changing the fundamental way we elect senators.... That's the outcome at the end of the day; whether constitutionally you can get around it or not, that's going to be fundamentally changed. The way the Senate and the House of Commons work is going to be fundamentally changed.

I wonder first about the ethics of it, because that's the outcome—what is the ethical outcome you're looking for?—second, whether it is democratic; and third, given how the people voted on the Charlottetown accord, whether the people want us to do this. I would like to suggest that there's a different process, a more democratic and a more meaningful process of getting this done. One of the ways, as the bar association suggested, would be to go to the Supreme Court with the question.

Could you give me some answers about the ethics of it, the democracy component of it, and obviously whether the Supreme Court should speak to this issue or not?

● (1630)

The Chair: Which one of you is first? Go ahead, Mr. Gélinas.

Prof. Fabien Gélinas: Your question presupposes that it's going to change the system. It's a step toward changing the system, that's for sure, but I don't think we can take for granted that the system will be changed.

It could very well be a matter of being a flash in the pan here. The next Prime Minister might refuse to hold consultations for the appointment of senators. The next Prime Minister, or even this Prime Minister, might have a constitutional agenda that will be put on the table and might negotiate things with the provinces that will change everything fundamentally.

This is all politics, and it doesn't really affect the answer to a legal question. The legal question, of course, is not cut and dried. It is not always as clear as one might expect it to be. There is no question that political principles have an influence on decisions in hard cases, and this could eventually be a hard case if both statutes go forward. I am not saying that it's not difficult.

The question of ethics would be answered by the electorate. If a Prime Minister holds consultations and, for no obvious reason, decides not to follow the result, then there'll be an outcry, there'll be outrage, and there'll be political sanctions. That is my answer.

The Chair: Would you like to make a comment?

Prof. Peter Hogg: Let me say that I agree with everything my colleague has said.

Let me just add something on the question of whether this should be referred to the Supreme Court. That, of course, is not a democratic measure, but it gets an authoritative ruling on the constitutional law. My view is that the constitutionality of the bill is sufficiently clear that the step isn't really necessary. But if one believed that the constitutionality of the bill was reasonably uncertain, it would be a sensible step to make a reference to the Supreme Court and get a ruling straight away as to whether this could be done.

Hon. Hedy Fry: Professor Gélinas answered the question about not being sure of the outcome. Again, I am being possibly particularly naive here, because I'm not speaking as a lawyer, but for me, when outcomes are in doubt, one is very careful about how one embarks upon something new.

You're unsure of what the outcomes are going to be, especially when the outcomes can fundamentally change the nature of our Parliament. This is why I am suggesting that one needs to look at this process very carefully, because there is a risk in the outcomes. You don't know what the outcome is going to be; it could be positive or it could be negative. It could be, by stealth, electing a Senate eventually.

Those are things that concern me, from an ethical point of view, when you're not sure of the outcomes of your risk.

Prof. Fabien Gélinas: There is a question of how risk-averse one is, and people have different temperaments. If it's really a question of how much you want to control the risks, outcomes are never 100% certain—never. It's really a question of degree we're looking at; at least, it seems so to me.

This is a point I had forgotten from your first question concerning the wisdom of going to the Supreme Court. My view is that Bill C-19 is more suspect than Bill C-20, which isn't suspect if taken on its own. Of course, if one goes to the Supreme Court, it would be more effective to send both at the same time to the Supreme Court, but again that is a political decision.

● (1635)

The Chair: Thank you.

We'll go to Mr. Chong.

Hon. Michael Chong (Wellington—Halton Hills, CPC): Thank you, Chair.

My question concerns Bill C-20 in light of the upper house reference of 1980, and specifically some of the provincial concerns that have been raised here and previously about these pieces of legislation. I'd like both of you to respond to these concerns and give us your opinion on them.

The Province of Quebec has traditionally demanded that the National Assembly play a role in the selection of senators to the Senate of Canada, and has also raised issues about the constitutionality of Bill C-20 in the Senate committee hearing. At that committee hearing, Mr. Pelletier noted that in his view the federal bills on Senate reform represent not limited change but fundamental change to the nature of the Senate.

So in that context, and in the context of the upper house reference of 1980, which stated that the Government of Canada could not unilaterally alter or change the fundamental features, or central characteristics, of the Senate with respect to its regional representation and its other essential features, do you agree or disagree with Mr. Pelletier's view on this, or do you share some of his views and not others?

Maybe you could tell us what your views are of this.

Prof. Peter Hogg: To start, it would be an improvement to Bill C-20 if the consultation were with members of the legislative assembly of the particular province. I suppose that could have been an alternative mechanism. But surely if that person believes that Senate appointments should be made in consultation with the National Assembly of Quebec, the consultation of the people of Quebec would at least be second best, if not first best. And since it doesn't make any changes in the representation that Quebec has in the Senate, which is very large compared with its proportion of the population, it seems to me that there isn't a strong federal-provincial issue here—at least that I can see.

Prof. Fabien Gélinas: In terms of the power of the Prime Minister to consult, I don't think there are any legal limitations on that; the Prime Minister can consult whoever he wishes before making decisions. I don't think it goes to the legal validity, in constitutional terms, of decisions that are made.

Concerning the broader issue of the impact of the Senate reference upon the interpretation of the amending formula in the Constitution Act of 1982, my view is that the Senate reference is still completely relevant to the interpretation of the amending formula. It's relevant in the sense that I don't see any reason to believe there was a decision to change the law in 1982 concerning the power of Parliament unilaterally to change the Senate. That power was there under section 91. Section 91 was turned into section 44. I don't believe there was any intention to change the law concerning the unilateral power of Parliament.

That being said, whether this particular reform is changing the fundamental features of the Senate is a very difficult question, and I think the answer would be different depending on whether the tenure of senators were renewable or not, and depending on how many years you're looking at. The relevant criterion under the Senate reference—and I think it's still relevant—is whether it's housekeeping on the one hand or fundamental features on the other hand.

It's not easy to answer that question, and the number of years I think is particularly important, as is the renewable character of the term for senators.

● (1640)

The Chair: Thank you.

Monsieur Paquette.

[*Translation*]

Mr. Pierre Paquette: Thank you, Madam Chair.

Mr. Gélinas, you wanted to make some more comments about Bill C-19. Would you like to take this opportunity to tell us your thoughts?

Mr. Fabien Gélinas: I did look at the constitutionality of Bill C-19. I looked at it when it was S-4. In the current version, a senator's term is non-renewable. Whether it is or is not renewable is very important. This is because, in assessing the essential characteristics of the Senate that were discussed in the 1980 Senate Reference, the role played by the Senate and the importance of the senators' independence in fulfilling their state roles must be taken into account.

In my view, this is absolutely fundamental. Senate independence is not the same as judicial independence. But there is one fundamental characteristic. Senators must not find themselves, as members of the House of Commons do, facing elections at short and specified intervals. The question of independence, the question that has to be asked, in my view, means knowing whether the mandate that senators are going to be given will allow them to continue the unencumbered role they have played up to now in the legislative process. Will they remain independent enough for it to be concluded that the fundamental characteristics of the Senate have not been changed? That is the question, in my view.

I would be much more comfortable if a senator's term were 10 or 12 years. I think that 8 years is marginal. It is not an easy decision. The Supreme Court would ask whether senators were independent enough for it to be concluded that the fundamental characteristics of the Senate have not been changed by the bill.

But a non-renewable term of eight years still allows quite a significant degree of independence. Take the example of the Conseil constitutionnel in France. It is a partly judicial, partly political body whose members are appointed for a non-renewable nine-year term. They are considered independent.

Mr. Pierre Paquette: Mr. Hogg, in the document you presented, you say that the age limit in the Constitution is 75. That being the case, does Bill C-19 represent a more direct amendment to the Constitution?

● (1645)

[*English*]

Prof. Peter Hogg: Yes, Mr. Paquette, it does constitute an amendment to the Constitution, but it is an amendment that is authorized under section 44, because that section allows Parliament to make laws amending the Constitution of Canada in relation to the Senate. And it only exempts from that power the four matters I talked about earlier.

Let's leave the Senate reference aside for a minute, because we don't agree on that, but section 42 withdraws from the unilateral power of Parliament the powers of the Senate, the method for selecting senators, the number of members by which a province is entitled to be represented in the Senate, and the residence qualifications of senators. Since the term limits don't touch any of those four things, the amendment comes within Parliament's power under section 44.

I say that the upper house reference is simply overtaken by these provisions, because what the Supreme Court of Canada said is that certain fundamental or essential things could not be done unilaterally by Parliament. Two years later, the Constitution Act of 1982 specified the things that cannot be done unilaterally by Parliament, and surely that was intended to be a reflection of the fundamental things that cannot be done unilaterally by Parliament, making it clear that what the Supreme Court said was extremely vague.

[*Translation*]

Mr. Pierre Paquette: Your opinion is that Bill C-20 does not affect the provisions of the Constitution. But the government is presenting us with Bill C-20 as Senate reform.

Let me quote once more. It would be a slight exaggeration to say that it is from my favourite author, but it is from my favourite government House leader. He says this:

> However, members of this committee should note that if change cannot happen through reform...then we believe that the Senate should be abolished.

If I understand you correctly, your are of the opinion that this is not about a change to or reform of the Senate constitutionally. In fact, you do not think that it is about Senate reform period. You feel that it is simply about a new form of consultation that the Prime Minister could use. Officially, I mean. Am I mistaken?

Prof. Fabien Gélinas: The Parliament of Canada has the power to change the Senate under section 44 of the Constitution At of 1982. That can be said to be Senate reform because it affects the Senate without changing the Constitution. So I do not think that the terminology changes a great deal.

[*English*]

The Chair: Mr. Moore.

Mr. Rob Moore (Fundy Royal, CPC): Thank you, Madam Chair.

Thank you to the witnesses. I apologize for having to step out for a bit, and I also apologize if my question covers some of the ground that you've already covered.

Mr. Hogg, I look at your conclusion in your brief that you submitted to the committee: that if the act were challenged in court on constitutional grounds, the challenge would be unsuccessful, and that the Parliament of Canada does indeed have the power to enact Bill C-20, and if it were enacted, it would be a valid act of Parliament. Obviously I agree with that.

I'm looking at the first page, your last paragraph, and you didn't go over that in your opening remarks. So I just wanted a bit of a review.

It says that the bill stops with the counting of votes and the report to the Prime Minister. It does not go on to declare that the successful nominees are elected; nor does it say that they will be appointed. The bill does not impose any duties of any kind on the Prime Minister or the Governor General. And it says that obviously the bill assumes that the Prime Minister would be under a political imperative to respect the outcomes of the consultation that he has ordered, but this is not a legal imperative.

Can you explain how you reached that conclusion, but also explain why that is important for the constitutional validity of the bill?

Prof. Peter Hogg: Well, I think it's important, Mr. Moore, because if the Prime Minister were required to use the consultation process and were then required by statute to give effect to the outcome, I think we would have a very strong argument—along the lines of Mr. Paquette's point—that Parliament was doing indirectly what it couldn't do directly.

I don't think it's conclusive. I agree with my colleague that there would still be some doubt, but it is to move the statute into the truly safe constitutional area that those two points of discretion have been left.

● (1650)

Mr. Rob Moore: Some have suggested that the bill—and you alluded to this in your answer—attempts to do indirectly what cannot be done directly. Obviously I don't agree with that, since the bill in no way affects the method by which the Prime Minister and Governor General select a senator.

So where would that line be blurred? You said it's well in the safe ground. How is it that you see it's clearly safe? Where we would be attempting to go too far? Can you conceive of a situation where the bill would be going too far? You're saying quite clearly throughout your report to us, and also in your conclusions at the end, that the bill seems quite clearly on safe ground.

Prof. Peter Hogg: I think you can start with the proposition that the appointing power under section 24 does not say anything about the Prime Minister at all; it just speaks about the Governor General. It doesn't restrict in any way the kinds of consultations that the Prime Minister can undertake or the considerations the Prime Minister can take into account.

All the bill is really doing is providing a mechanism, a purely optional mechanism, for a formal consultation in respect of the wishes of the electorate. It's not adding anything that can't be done now. It's formalizing exactly how the consultation will take place. It will take place as part of a general election or a provincial election. You'll use the single transferable vote method of counting, etc.

So that's why I say it's in the safe ground—it's optional and it simply provides a mechanism of consultation that is not very different from what the Prime Minister is free to do right now.

Mr. Rob Moore: If there are any other comments you or Mr. Gélinas would like to make, you can interject at any time.

I have one last point. You mentioned that the Prime Minister may be under a political imperative. You see this as distinct from a legal imperative. That's what puts this bill on safe ground. No matter how strong the political imperative is, as long as it's only a political imperative, would the bill remain on safe constitutional ground?

Prof. Peter Hogg: I think so. I agree with the proposition that when people vote in a consultation for members of the Senate they will expect their views to be respected. I think that's the view the Prime Minister will take, and I don't think there's anything unethical or fraudulent about it. I think the Prime Minister will feel the same way as the people who are voting. But the truth of the matter is that the Prime Minister doesn't have to respect the result. You could imagine unusual situations. For instance, a consultation could be contaminated in some way that would lead the Prime Minister to feel that the result should not be respected.

Mr. Rob Moore: Thank you.

The Chair: Mr. Angus.

Mr. Charlie Angus: I'm not sure which professor reminded us that the Senate is a relic of a much less democratic time. We're still trying to come to terms with amending this in a much more democratic era. But many things have also changed in how Canada has been structured. We are now in an era in which our provincial governments play increasingly important roles in the delivery of services. We have our large municipalities, the cities, wanting to become de facto states of sorts. Regional interests are becoming stronger. I don't think anyone would accuse Mr. Danny Williams of not being heard when it comes to representing the interests of his region, and Newfoundland and Labrador is a small province.

I'm wondering, if we have three levels of government and two of them are very strong, has the role of the Senate become a little less important in balancing off the role of the federal government?

● (1655)

Prof. Fabien Gélinas: Of course this is a 100% political question.

Mr. Charlie Angus: I'd love a 100% political answer, please.

Prof. Fabien Gélinas: I will try....

The Chair: You're allowed to give answers within your comfort level.

Prof. Fabien Gélinas: Yes, of course.

I will actually drag it back to a more comfortable area. I will say that to a large extent, since 1982, a significant part of the role that had been played by the Senate and that was expected of the Senate is now being played by the Supreme Court of Canada. This is something that I think is part of the malaise with the Senate. It's not necessarily a question that should be analyzed in terms of democracy.

I personally don't think that democracy means only majority rule in every aspect. We are proud to have independent courts of law that are not elected—judges are not elected—and this is an absolutely fundamental feature of our democratic system. And to a certain extent, I think, the Senate can play a significant role. It is true that the Supreme Court has taken some of that away from the Senate since 1982. That doesn't mean there's no role left for people who are not necessarily elected.

Mr. Charlie Angus: I'm glad you brought up the role of the Supreme Court, because it certainly has changed very much in terms of interpreting our national law.

I'm trying to find out how we, in this day and age, manage to maintain a relic like the Senate, which seems to be often appointed on a partisan basis. There have been some excellent candidates and there have been some pretty sketchy people in there as well.

An hon. member: [*Inaudible*]

Mr. Charlie Angus: Yes, but the difference is that in the House of Commons we have to go back to the people, and they decide whether or not we should be in the House. I know some of my Liberal friends certainly think that party bagmen can stay in there till the age of 75, that it's a perfectly legitimate dumping ground. I personally don't agree.

One of the arguments is that they play an important role in protecting regional interests. I have a senator from my region, the great Senator Frank Mahovlich. I say "great"; he was a great hockey player, number 27. He came from Schumacher—the same town, by the way, as the industry minister, Jim Prentice, comes from. I have nothing against Frank Mahovlich, but the only time I ever see him in my riding is during elections to try to have me defeated. That seems to be a regional role he plays, to come up and promote the Liberal flag.

I'm asking all this because I don't see anything in this bill that would set out how we would ensure that regional interests are guaranteed. In Ontario, for example, if we have five candidates picked, they could come from anywhere. There's nothing to say that they are going to be aboriginal or they're going to come from the north, or one from the city and one from the rural southwest.

How can we be assured that this Senate will actually represent its so-called regional interests if it's done on a very ad hoc, hit-and-miss basis?

Prof. Peter Hogg: I don't think there is any answer to that. If you look at the Australian Senate, for example, where an equal number of senators are elected from each state, it votes entirely on party lines. The protection of the states from which the senators are drawn, if it's a consideration at all, is an awfully hard consideration to discern. And similarly, our own Senate typically votes on party lines. Now, they'll often give up in the end, because they recognize that they are not an elected body and shouldn't frustrate the House of Commons on other than the most important things. But I think the influence of party tends to be inconsistent with the protection of regional interests.

● (1700)

Mr. Charlie Angus: I have one last question.

The Chair: That will have to be your last question, Mr. Angus.

Mr. Gourde.

[*Translation*]

Mr. Jacques Gourde (Lotbinière—Chutes-de-la-Chaudière, CPC): Thank you very much, Madam Chair.

I thank the witnesses. We are fortunate to have testimony of such high quality today.

I am not a constitutional expert; I am a regular guy. People in my constituency believe, as I do, that an elected Senate would be more representative of Canadian values. But I have questions. Correct me if I am wrong, I do not understand everything.

On the power to appoint, I thought I understood that, even if we succeeded in getting an elected Senate, section 24 would more or less bring things back to the way they were before, except that the Prime Minister could use the nomination list or ignore it entirely. I am concerned by the suggestion that freely elected people are not what the Prime Minister wants. From a moral perspective, what obligation to Parliament would he have about this list?

Prof. Fabien Gélinas: If you want an elected Senate, you can use the procedure for amending the constitution. You get the consent of the provinces and you change the Senate to an elected body. There is no legal reason why you cannot do that.

Mr. Jacques Gourde: I did not expect such a simple answer.

Are you in whole-hearted agreement, Mr. Hogg?

[*English*]

Prof. Peter Hogg: I do agree that we could switch to an elected Senate if we went through the amending procedure. But as I said earlier, if a consultation is held and the Prime Minister is confronted with a list of the wishes of the voters as to who should represent them in the Senate, he will feel a moral and political obligation to respect that as well, in the great majority of circumstances. So I think the concern that he will then whimsically go for somebody he prefers is not very likely to happen, because the politics of that would be so difficult for him.

[*Translation*]

Mr. Jacques Gourde: I understand that, under section 24, the Governor General proposes names for the Prime Minister's list. Did I understand correctly?

Prof. Fabien Gélinas: Legally, the Governor General makes the appointment, always on the Prime Minister's advice.

From a moral perspective, it comes back to the distinction you make between a legal imperative and a political imperative, as Mr. Moore mentioned. It is useful to recall the difference between these two kinds of political imperatives. A political imperative is the result of promises made by a politician whereas a legal imperative has a much more significant normative force. It deals with constitutional conventions, or constitutional property, which is something else. This is not simply the fear of losing votes, it is a feeling of obligation because of what the Constitution of Canada deems to be obligatory. So, if a convention arises from a practice, it becomes obligatory just as strongly as in the legal sense, though the legal sense has different authority. You have to keep that distinction in mind when you are talking about a moral obligation.

In practice, it means that the current Prime Minister would have a moral obligation to observe his own policy, but that would not mean that the prime minister who succeeded him would have to do the same. Perhaps he would have no moral obligation to do the same thing. If that is the case, he could just not hold consultations, which is quite possible under the bill.

● (1705)

Mr. Jacques Gourde: Mr. Hogg, do you want to add a comment?

[*English*]

Prof. Peter Hogg: I don't think I can add anything to that. I accept what my colleague says.

The Chair: Thank you.

Mr. Maloney.

Mr. John Maloney (Welland, Lib.): Is the system broken, and does this bill remedy that? Is there a compelling need to implement a hybrid Senate? Will its operations be any different, except that it's going to cost the taxpayers of Canada $150 million a panel to have this system implemented?

What are your comments? Will anything be different?

Prof. Peter Hogg: Of course it will take a long time, because all existing senators are grandfathered and will be there until age 75, but eventually you will have a Senate in which people retire at the end of every eight years, assuming you pass Bill C-19, and a consultation is held to appoint a replacement.

They will feel that they have the political power of an elected body. That takes us to the questions that were worrying Mr. Murphy at the beginning, that the Senate will eventually become a more assertive and powerful body because of that. I think that will be a consequence.

Mr. John Maloney: And leading to the potential of a deadlock, which this act doesn't provide a formula to resolve.

Prof. Peter Hogg: Exactly.

Mr. John Maloney: Mr. Gélinas.

Prof. Fabien Gélinas: Again, that's deadlock in the sense that a bill will not be adopted as an act of Parliament, which in a sense resolves the deadlock. I think that's an important clarification.

Mr. John Maloney: Mr. Angus was delving into the area of the role of the Senate as representing regional interests and also minority interests. Does this legislation diminish, augment, or increase that role? Or will it just be the same? Or is there any way to ensure a better regional representation or better representation of minorities?

Prof. Peter Hogg: This is just speculation, but it is possible that as the Senate evolves into a more completely elected body, the influence of political parties will become stronger than it is now, and it's already pretty strong now. As I said earlier, I don't think party discipline and the protection of minorities are really consistent things. The tendency, I think, will be to follow the national policies of the party whose support led to the election.

Mr. John Maloney: Is this increased partisanship a good thing or a bad thing, in your opinion—the increased influence of political parties?

The Chair: That's a really political question.

Prof. Peter Hogg: That, I think, takes me outside the envelope of my limited knowledge.

The Chair: You'd make an excellent politician.

Mr. John Maloney: A 2007 U.K. white paper on the House of Lords favoured a combination of elected and appointed lords, arguing that a fully elected House would tend to resemble the House of Commons. It would tend to increase the level of partisanship in the House and would risk turning it into either a permanent block or a rubber stamp for the policies of the government of the day.

We're talking about a hybrid. Have you ever considered an elected and appointed body?

● (1710)

Prof. Peter Hogg: You'd have that for quite a long time, you know, because all the existing senators are grandfathered. So as consultations are held to bring people into the Senate, you're going to have a mixture of people who were selected under a consultation and people who, before the passage of the bill, were appointed in the normal way. So it's going to provide a bit of a social laboratory, if you like, as to how that works. Perhaps sometime in the future it might be determined that that's not a bad body to have.

Again, that's a question that's very difficult to answer.

Mr. John Maloney: Mr. Gélinas.

Prof. Fabien Gélinas: I just want to add something about diversity. If my recollection is correct, the Senate, at least in the recent past, has had more diversity than the House of Commons, and this is an effect of party politics, obviously. So if we have a system where senators are elected or appointed on the basis of a consultation that involves party politics and the machinery thereof, it seems to me there is a fairly serious risk that diversity will go down in the Senate. In my view, this is a reason why I would not personally vote for the reform.

The Chair: Thank you, Mr. Gélinas.

We'll proceed to Mr. Goodyear, who will have the last round of questions.

Mr. Gary Goodyear (Cambridge, CPC): Thank you, Chair.

Through you, Chair, thank you to our guests for coming. I've enjoyed the discussions we've had on this bill.

I have a comment and then a question.

I've had the opportunity to travel with the parliamentary Commonwealth group, which has given me a great opportunity to meet some of the smaller countries in the Commonwealth: Barbados, the Turks and Caicos, and so on. What I noticed there was that we have countries that are run, frankly, by small numbers of members of Parliament—15, and in some cases 8 or 11. As good a job as they do, it became clear to me that to have a second upper chamber, an area of second thought to go over some of the decisions made by the members, was probably a good idea. But when we have a Parliament as large as ours, with 308 members, with all the facilities offered to us—the researchers, the analysts, witnesses, the funds to bring in experts like you—I remain unconvinced that we need a Senate to continue.

As you had mentioned, institutions tend to change in time, and perhaps it's time. That's a decision we are wrestling with and will continue to wrestle with, but it's a point that I make.

The question I have here is that as I read through Bill C-20, I understand the issues with constitutionality, but I'm gathering from you, for the most part, that at the end of the day this is not in direct violation of the Constitution. Would you say that this is a significant move in democracy, in a democratic way, toward a Senate that reflects better the nation and the needs of the nation, the opinions of Canadians, and a move toward reforming the Senate in a democratic way that does not violate the Constitution? Would you agree with that statement?

Prof. Fabien Gélinas: Personally, I think the move is significant to the extent that it is likely to change the expectations of the people. It will change the expectations in a way that relies on a notion of democracy that has not been fully worked out, in my view. But this, of course, will be mostly lost, it seems to me.

For example, issues will arise as to whether most of the cabinet members might come from the Senate, issues such as that, or the relative role of the Senate in the House of Commons. It doesn't seem to me that we've quite worked it out, and at the same time, we will most likely change the expectations of the people fundamentally regarding an elected Senate.

● (1715)

Prof. Peter Hogg: I think it is a move towards an elected Senate. Other federal countries typically do have an upper house. They typically are elected. Australia and the United States spring to mind.

As for your small countries, I was on a visit to the Bahamas a few years ago and I visited their Senate. Their Senate meets in a room about half the size of this one. There are about 10 of them, and they were debating whether Oprah Winfrey should be shown on Bahamian public television. It was very, very interesting. They were certainly fulfilling a sober second thought there.

And they were elected.

Mr. Gary Goodyear: Point well taken.

Prof. Fabien Gélinas: I would venture to say that the senates of sunny countries get more visitors.

Mr. Gary Goodyear: Do I have time left?

The Chair: You have one minute.

Mr. Gary Goodyear: I'd be happy to share it with my colleague.

Mr. Scott Reid: On the observation about the Australian Senate being a highly partisan body, I observed the same thing. Some of us went down and were guests of the Clerk of the Australian Senate, who confirmed the extraordinarily partisan nature of that body. But he also drew our attention to the fact that it was largely the result of their peculiar balloting process, in which you can effectively tick off the party list with one tick. Something like 90% or 95% of voters do that.

All the Australian states are bicameral. Other Australian states have adopted methods that seem to provide some protection against excessive partisanship, where individuals can be voted for as individuals. Given that you have multiple candidates running at the same time, you sometimes get people who are more independent within their party—or are even outright independents. The clearest example of this is in Tasmania, where in their upper house they effectively have a great deal more independence and less partisanship.

You can see I'm not really asking a question here; I'm making a statement. But I just wonder if you agree with me that certain mechanisms can be built in, such as the ones used in Tasmania—the assurance that the party can't choose where to place you on the ballot, for example—that will allow open nominations as opposed to closed nominations, that will allow people to be elected on their own merits and not to simply be pawns of the party bosses.

Prof. Peter Hogg: I didn't have a good sense, in reading Bill C-20, of exactly how it was all going to work. I notice that the nomination process is not restricted to the parties, so there will obviously be nominees who don't come from parties. The question is, can they get elected if they're not supported by a party? It's going to be interesting to see how it plays out and whether you really need the support of a party to get to the top of that preferential list. If you don't, then we will have a body of independents who ameliorate, to some extent, the partisanship of party political institutions.

The Chair: Mr. Hogg, that will be the last word.

I'd like to thank our guests for their scholarly presentations. As you can see, this is a committee filled with studious individuals who will make very good use of your teachings. Thank you for coming.

The meeting is adjourned.

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