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Chair

The Honourable Albina Guarnieri

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● (1530)

[*English*]

The Chair (Hon. Albina Guarnieri (Mississauga East—Cooksville, Lib.)): Seeing a quorum, I think we'll begin.

[*Translation*]

Pursuant to the Order of Reference of Wednesday, February 3, 2008, the committee will resume its consideration of Bill C-20.

[*English*]

Welcome back to the committee after a week of immersion in constituency issues.

Before we get down to business, I would like to introduce and extend a warm welcome to our new clerk, Mr. Jim Latimer. He has extensive experience; I'm sure he's no stranger to many of you. I know that I speak on behalf of all members when I extend our heartfelt thanks to our outgoing clerk, Christine Lafrance.

We're privileged also to have a new library researcher, Karine Richer. Welcome.

Today we have a bit of nostalgia for any of you who remember the Special Joint Committee on a Renewed Canada, which I was privileged to serve on in 1992. I can tell you that no one gave us more to think about than one of our guests today with his concept of push-pull federalism. So without further reflection, let me introduce our witnesses: Professor Errol Mendes; the able scholar, Professor John D. Whyte, professor of law, Law Foundation of Saskatchewan, University of Saskatchewan; and appearing via broadband—this is probably a modern version of being here in spirit—Charles-Emmanuel Côté, assistant professor of law, Laval University.

Without further ado, I'd like to turn the floor over. We're beginning with you, Professor Mendes.

[*Translation*]

Prof. Errol Mendes (Professor, Constitutional and International Law, University of Ottawa, As an Individual): Thank you, Madam Chair.

I am going to present my ideas in English, however I would be glad to entertain your comments and respond to your questions in French. Thank you.

[*English*]

I suggest that Bill C-20, entitled the Senate Appointment Consultations Act, is giving a false impression to the regions of Canada, especially western Canada, that substantial democratic reforms are being attempted by the present government to do indirectly what cannot constitutionally be done directly under our Constitution. As many experts have pointed out, this act will entrench, enlarge, and enliven not the triple-E Senate that Bert Brown talks about, but the gross inequality of western Canada, the provinces, and indeed even Ontario in the Senate.

Let me explain further. The present distribution of seats in the Senate reflects the Canada of the 1860s. Due to the then population figures and the participation of the founding parts of Canada, the maritime provinces, Ontario, and Quebec each got 24 seats. Newfoundland, on joining Canada, got six seats. British Columbia, with a population now of four million, and rapidly growing, has six seats, while Nova Scotia, with a population of less than one million, has ten seats. Prince Edward Island, with four seats, has 21 times more power in the Senate than British Columbia, taking into account population. Alberta's growing population is also under-represented. Even Ontario may rightly feel unequal, as it has only 22% of the seats, but 40% of the population. However, this is expected of a federal government that attempts to deny Ontario's significant number of House of Commons seats under Bill C-22, which I have a lot to say about, given the opportunity and time.

So if the Prime Minister goes ahead with this major betrayal of the spirit of the triple-E Senate, or anything that vaguely resembles it, it would add to the democratic legitimacy of the inequality of western Canada. Indeed, any further attempts at constitutional change to redress the inequality could be blocked by the elected senators of the smaller provinces, in perpetuity.

In addition, the elected senators will rightly feel they have as much legitimacy as the elected members of the House of Commons to veto legislation, which again would put western Canada and Ontario at a disadvantage, not to mention the possibility of a gridlock. Bill C-20 has no provision on how to resolve an impasse between the two Houses. It is indeed astonishing that this could have been overlooked.

A disguised election for the Senate would be, in my view, an unconstitutional attempt to circumvent the express wording of section 42 of the Constitution Act, which clearly states that the general amending formula in subsection 38.(1)—namely the Parliament of Canada, plus two-thirds of the provinces, representing 50% of the population—applies to the powers of the Senate and the method of electing senators. In my view, Bill C-20 is an attempt to do indirectly what cannot be done directly without the clear instructions of section 42. It is patently unconstitutional.

I am aware that the Government of Quebec and indeed other provinces agree with this legal opinion, and that alone should give pause to the federal government, which has so enthusiastically passed the motion recognizing the Québécois as a nation. Surely that nation should be consulted and have a say over one of the Houses of Parliament that oversees legislation that could affect that nation.

It should also be noted that the House of Commons legislation gives a federal veto over constitutional amendments to Canada's regions, following the 1995 referendum in Quebec. Should not that veto power now extend to all the regions of Canada in an attempt to change the Constitution, whether directly, indirectly, or by stealth?

It should be kept in mind that the Supreme Court of Canada, in the famous patriation reference case, informed Prime Minister Trudeau that he would breach constitutional conventions if he did directly what he could do directly—namely, seeking the repatriation of the Constitution without the substantial consent of the provinces. In this case, we may have a more serious attempt to do indirectly what cannot be done directly under the constitutional conventions of this country and indeed under the Constitution Act of 1867.

There is even a question, in my view, as to whether the federal government has any jurisdiction under section 91 of the Constitution Act of 1867 to pass legislation that is intended to do indirectly what it cannot do directly. It is hardly a power under the peace, order, and good government provision to undermine the existing amending provisions of the Constitution.

Some justice department lawyers and other constitutional lawyers advising on this bill have argued that as long as the Prime Minister retains his discretion under the existing Constitution to recommend to the Governor General who shall be appointed to the Senate, an advisory federal election framework would be constitutional.

● (1535)

I would like to ask those experts, what would happen the very first time the Prime Minister refused to recommend an appointment of a duly elected person under the advisory election framework if all the others who had been so elected were appointed? What would the Supreme Court of Canada say about this refusal to appoint someone who has been elected? What if the court declared the whole process unconstitutional, so that those who were appointed were in limbo as to whether they could continue sitting? What would happen to the legislation that the Senate, which may have been partially elected, had passed? Would it be valid, or would it be null and void?

The enormity of these potential consequences requires, at a minimum, a broad consultation with all the partners in the Canadian federal state, and preferably a reference to the Supreme Court of Canada regarding the constitutionality of the entire framework, not only of this bill but the attempted Bill C-19, which deals with the eight-year limited term for senators, on which the Senate, in my view, rightly withheld judgment until the Supreme Court of Canada pronounced judgment.

The greatest of ironies lies in the professed reasons for introducing this bill. It refers to the need for Senate reform to reflect the democratic values of Canadians, one that equitably reflects Canada's regions, and to maintain the Senate as a chamber of independent, sober second thought. I suggest that if this bill passes, it will entrench regional inequality, create democratic gridlock, not enhance the democratic values, and even call into question the independence of the not really elected senators.

As has been pointed out by Chief Electoral Officer Marc Mayrand, there are problems even in the political financing aspects of this bill. While party-sponsored advertising is not permitted under this bill, there is a possibility of massive spending in the transfer of goods and services, which, again, could make them beholden to deep pockets for the elections.

In addition, the House leader, Peter Van Loan, in introducing the original version of this bill, argued that it was the accumulation of the historic struggle for the rights of women, minorities, and aboriginal peoples to vote. Will they be represented under this framework if it passes? Undermining the Constitution is hardly a democratic value of Canadians. And the bill also, as I've mentioned, entrenches the inequity of Canada's regions.

Perhaps most ironically, the principle behind the consultative election for the Senate is that it reserves the right of the Prime Minister to ignore the results of the vote of all Canadians. That is hardly democratic. This may lead many, especially those in western Canada, and perhaps even in the rest of Canada, to the conclusion that the real reason for this attempt at an indirect and, in my view, unconstitutional amendment is to create an illusory perception of actually doing something on Senate reform for election purposes.

In my view, it is very dangerous to play politics with the most fundamental documents and institutions of this country.

Thank you, Madam Chair.

● (1540)

The Chair: Thank you.

Mr. Whyte, you have the floor.

Mr. John Whyte (Professor of Law, College of Law, Law Foundation of Saskatchwan, University of Saskatchewan, As an Individual): Thank you, Madam Chair.

I want to begin by saying that it is a great privilege to be invited to participate in the deliberations of a national government, and I thank you for this invitation.

There is no doubt that the composition of the Parliament of Canada is anomalous. It is unsuited to prevailing principles of political legitimacy. This unsuitability arises from the appointment, not the election, of members of one of the two legislative chambers in a bicameral legislative arrangement; that is, a legislative arrangement whereby each house has the right to veto legislation.

It might be a mistake, however, to see this situation as an acute derogation from the democratic principle as it is typically worked out in complex rule-of-law states. There are always competing statecraft considerations, some that make the appointment of senators tolerable in a democratic state.

First, senators are appointed by the government, and therefore appointments reflect majoritarian preferences. They hold office for life, so the Senate provides a forum less dominated by intense political rivalry that arises from imminent elections. In recognition of the higher democratic legitimacy of the Commons, the Senate is generally careful and restrained in its exercise of veto.

The purpose of the appointed Senate is to represent divisions, regional and provincial, that are less well reflected when there are closer party ties.

The function of the appointed chamber is to consider legislation on bases less partisan than those in the Commons, in which the defeat of a measure can trigger an election.

As Bill C-20 says, it is "a chamber of independent, sober second thought" and there is a good reason for it. Indeed, the composition of the Senate is anomalous, but it is not statecraft without good purposes. It is not something that a democracy like Canada cannot tolerate.

Nevertheless, the case for changing it in order to establish ongoing democratic accountability for legislative actions is strong. A democratic state is one in which popular approval of lawmakers is the norm.

But the changing of the Senate needs to be carefully considered. My friend Professor Mendes has already told you what he thinks are the possible downstream imperfections that are likely to be produced by this change and other changes.

Here are some sensible questions. If elections are not for a term, but until age 75, in what way is ongoing democratic accountability actually enhanced? If term appointments are for 15 years non-renewable, again how is accountability enhanced? Is not the basis on which senators are currently appointed their support by a political party? And is that not the same basis upon which we put people on a ballot for election? And is not the appointer of the senators the party that generates the most votes? And are those not exactly likely to be the senators who win in the consultation process? Are we actually changing anything?

If the Senate is designed to reduce partisanship in the consideration of legislative proposals, will the proposed electoral process undercut that aim? If the Senate is meant to reflect regional interests, will the force of party discipline and loyalty that is generated through elections diminish that purpose? If the fact of appointment of senators creates a restraint on the Senate to not normally frustrate the Commons, will this restraint disappear with electoral choice? Will the rules of responsible government collapse? Will the underlying requirement that a government must be able to achieve its legislative agenda disappear?

But as sensible as these concerns are, as appropriate as it is to worry about what we might be doing with Bill C-20, the bigger question is actually about process. In the past 22 months the nation has been faced with three government initiatives of major constitutional significance with respect to the basic structure of our national Parliament: the idea of term limits on Senate appointments; the refusal, except in one case since the formation of the current government, to fill Senate vacancies; and finally, the establishment of electoral consultations for the appointment of senators. Each of these initiatives presents serious questions concerning constitutionality.

I believe the first violates section 38 of the Constitution Act, 1982. The second clearly continues to violate by the day section 32 of the 1867 Constitution, where there is a mandatory requirement to appoint senators on vacancy. And the last, the one we're considering today, violates sections 42 and 38 of the 1982 Constitution.

● (1545)

Moreover, each alters or will alter the way Parliament works, the way the branches and agencies of the national government represent and reflect interests, the way that interests will be accommodated, and the way political relationships operate. All of these changes in the structure of government are occurring without analysis, debate, or choice among alternatives. We are experiencing an attempt to reconstitute the national Parliament in the absence of constitutional discourse. This makes sense, of course, if the government wishes to precipitate change, any change, but is indifferent to the effects of that change, notwithstanding the permanence of the changes that are being made.

One of the reasons we have a Constitution and a constitutional amending process is to force governments that simply wish things were otherwise not to unilaterally make changes without reasoned debate and the careful building of consent that is meant to be part and parcel of constitutional politics.

It may be that it is cumbersome or inconvenient to amend the Constitution to provide for an elected senate, but making it cumbersome and inconvenient to change a law or process is of course the purpose of putting that law or process into the Constitution in the first place. The inconvenience of changing the law is designed precisely to force us to have those inconvenient conversations that we might not otherwise have, except for the fact that for one reason or another our predecessors judged it was important that we do so.

In this case, we know the reason of our predecessors. It was part of the Confederation bargain with the existing political communities of Canada—an agreement, by the way, whose force and moral meaning in our nation is not spent. Our fidelity to the constitutional text and process dictates that we live with the determinations made by our predecessors. If we want to change Canada's Parliament, we must engage in the constitutional processes set out in part V of the Constitution Act, 1982.

I don't want to be naive about this. Intergovernmental constitutional reform of the sort required by sections 38, 41, and 42 is likely to be held up by traditional demands: from Quebec, amendments that could produce Quebec's consent to the 1982 Constitution; and possibly, through convention, from national aboriginal organizations demanding participation and inclusion in the reforms.

Of course, it might be even more difficult than we imagined. Any change to the Senate may well affect the provisions relating to Quebec alone, the ones relating to regional representation from within the province, and might not be satisfied merely by consent of a seven-and-fifty formula but would require Quebec's actual consent. I don't mean to minimize the difficulty.

This difficulty gives rise to the belief that there must be some route for legislated Senate reform. But there isn't. We need to be nation enough to conduct these inconvenient discussions. We might benefit from them.

When I spoke to the Senate a year or so ago on Bill S-4, I said that the situation of general discomfort with the current Senate, the apparent small space available for unilateral constitutional amendment, the simple appeal to democratic values, and the mistaken popular sense that the Senate is not terribly significant in national governance have all worked to license constitutional reform that may be initially appealing but is being pursued, I think, irresponsibly.

Turning specifically to Bill C-20, the plan to seek electoral advice on whom to appoint to the Senate is quite simply a change in the method of appointing senators: the precise language of paragraph 42 (1)(b) of the Constitution Act, 1982, the precise matter that is precluded from unilateral federal change.

There are four reasons legislative reform through Bill C-20 is constitutionally difficult.

First, paragraph 42(1)(b) talks of the "selecting" of persons for appointment, not the means of appointment. The method of selection will now be that government will consider—and under the normal imperatives of electoral politics—only those who win elections to determine who should be selected for Senate appointment.

● (1550)

Is it not ironic that in seeking to justify this initiative to democratize the Senate, the reformers assert, and must assert, that they do not at all consider themselves to be bound by the democratic process they now so badly want?

Second, by section 32 of the Constitution Act, the discretion to determine who is fit and qualified to be appointed to the Senate is assigned to the federal cabinet—it says the Governor General, meaning the cabinet. Bill C-20 has constructed an electoral mechanism to advise the Senate as to who should be appointed.

A clear constitutional responsibility specifically assigned to a particular agency of government is to be eroded or constrained by another element of public government—the electors. In administrative law we say that the statutory decision-maker has declined its jurisdiction, or it has submitted to dictation from an external source, or it has fettered its discretion. These actions are all ultra vires.

Of course, it will be argued that the consultation process and its results will not curtail cabinet discretion, and that consultation is not designed to limit the list of those considered for appointment, but to add names to that list—one that also contains names not resulting from election.

If one reads Bill C-20 one will see it is not believable that consultation will not determine for the cabinet who is to be selected. The size of the process; the visibility of the process; the context of a federal general election and its heightened political engagement, in most cases; the political energy and the higher public attention paid to province-wide votes—bigger votes than any member would ever experience—all preclude the possibility of cabinets disregarding these electoral results.

The saving clause of Bill C-20, that this process is to ascertain the preferences of electors on appointments to the Senate "within the existing process of summoning senators", does not save the bill's constitutionality. Indeed, the precise process of summoning—orders in council—is not altered. It is the method of selecting senators for summoning that the government seeks to alter, and that is exactly what paragraph 42(1)(b) states must be accomplished by formal constitutional amendment.

Third, the electoral process in the bill does not satisfy the specific requirements relating to appointing senators from Quebec. Arguably, the cabinet could overlay the electoral process in the new act with the constitutional constraint that all Quebec appointments will match the electoral districts to be represented, but in province-wide elections this is not likely to be possible, barring, of course, the decision to simply ignore subsection 23(6) of the Constitution Act of 1867. In fact, that would have to happen, since Quebec would not tolerate a voting system that was not followed in Quebec alone.

There are other differences between Bill C-20 and the Constitution. There are differences relating to qualifications, citizenship, and age. There's the difference between section 32, which makes appointments mandatory, and Bill C-9, where it makes the convening of a consultation process discretionary. There are significant differences between the constitutional requirements and the process established by Bill C-20. This is not necessarily unconstitutional. In operation, the chances of its being unconstitutional are almost absolute, but it is not necessarily unconstitutional because it's possible that the administrators of Bill C-20 will ignore, in order to comply with the Constitution, all its provisions. This seems unlikely.

Finally, the Constitution is not a tax code. It requires fidelity to its structures, its relationships, its designs, and its principles. The proponents of the amendment have admitted that they are unable to institute an election process since they have taken what is obviously an election process, kept all its attributes, and then changed it to a "consultation". Then, in the "whereas" clauses, they seek to deny both the purpose and the effect of the legislation. The process they call consultation is in fact an election in everything but name.

● (1555)

It would bring Parliament into disrepute, and it would do grave damage to the Constitution, to our constitutional commitments, and to the rule of law, if Parliament attempts an obvious and self-confessed sleight of hand to amend the Constitution in contravention of amending provisions.

The Chair: Mr. Whyte, could you just quickly wrap up?

Mr. John Whyte: I have one more sentence.

The Chair: Very timely.

Mr. John Whyte: As subclause 2(2) of the bill states, "Words and expressions used in this Act have the same meaning as in the Canada Elections Act unless a contrary intention appears." Well, it doesn't.

Thank you.

The Chair: Thank you very much, Mr. Whyte.

We'll proceed to Mr. Côté. *Vous avez la parole.*

[*Translation*]

Mr. Charles-Emmanuel Côté (Assistant Professor, Faculty of Law, Laval University, As an Individual): Thank you, Madam Chair.

I would like to thank the members of the committee for the privilege of testifying before you today, by means of technology.

I share the same doubts as those expressed by my eminent colleagues as far as the constitutionality of Bill C-20 is concerned. I will now share those doubts with you.

To begin with, I think that one must reject any restrictive interpretation of the exclusion of the method for selecting senators under section 44, which deals with the federal Parliament's authority to unilaterally amend the Constitution. To my mind, there is no logical reason why one would impose a restrictive interpretation of this exclusion when it comes to the senator selection process.

In my opinion, both the text and historical context which led to the adoption of this constitutional amendment procedure support such an interpretation. Both the French and English versions of the text match and the reference on Parliament's authority with respect to the upper chamber further supports this interpretation, that is, a broad interpretation of the exclusion regarding the senator selection process.

Indeed, it is the senator selection process and not simply the appointment process or the power to appoint senators which is excluded from the unilateral jurisdiction of the federal Parliament. The selection process, in my opinion, includes the entire process which precedes, and directly leads to, the appointment of a senator by the Governor General. This would include the manner in which the selection process is carried out, the practices adopted, and the procedure that is followed or the absence of such a procedure.

The 1980 reference concerning the Authority of Parliament in Relation to the Upper House further supports, in my opinion, this broad interpretation of the method used to select senators. It is generally acknowledged that section 42 essentially codifies any potential changes to the essential characteristics of the Senate specifically listed in the reference.

I would remind you that in the reference, the Supreme Court of Canada considered that the non-elective nature—and I stress the word "nature"— of the Senate is a fundamental characteristic of it. The Supreme Court then specifically ruled on the fact that the direct election of senators was not within the federal Parliament's purview.

Among the other questions asked of the Supreme Court of Canada in this reference, questions which it left unanswered due to a lack of sufficient evidence, and specifically in the federal government's order in council under which the reference was made, reference was also made to the possibility of senators being selected by the House of Commons, and then appointed by the Governor General, or selected by the legislative assemblies, and appointed by the Lieutenant-Governor. It is my opinion that when the drafters wrote subsection 42(b) in 1982 and used the expression "method of selecting senators", that they were perfectly aware of this context, that is of the various senator selection methods that were targeted. So, they settled on an overarching generic expression: "method of selecting senators".

To conclude, it is my belief that what is excluded, and that which does not fall under the purview of the federal Parliament, is not only any change to the senator appointment method under section 24 of the Constitution Act of 1867, but any authority with respect to the senator selection process. This broad interpretation therefore allows us to go beyond the formal distinction between a mandatory process or simply an optional or consultative process.

In my opinion, any legislation dealing with the process for selecting senators would not fall under the federal Parliament's purview, and, rather, would be subject to the normal procedure governing constitutional amendments, that is the 7/50 rule, stipulated in section 38.

Now, more specifically relating to Bill C-20, it is my belief that in light of this analysis of section 44, Bill C-20 exceeds the authority of the federal Parliament. As with any piece of legislation, Bill C-20 must necessarily survive an examination of its constitutional validity. For this to occur, well-established jurisprudence indicates that the real nature of this bill must be qualified and that it must be associated with a parliamentary head of jurisdiction. Moreover, in order to make such a qualification, both intrinsic and extrinsic evidence in relation to this bill may be brought to bear, notably in relation to its legal and practical effects.

● (1600)

In my opinion, the only possible federal authority which may be argued in support of Bill C-20 is, in fact, section 44 of the Constitution Act of 1982, which gives the federal Parliament jurisdiction with respect to the Senate subject to, interestingly, the exclusion regarding the method of selecting senators. However, in my opinion, it is clear that the real nature of Bill C-20 has to do with the method of selecting senators. The purpose is to create a new consultative election process as part of the overall senator selection process.

In my opinion, the optional and consultative nature of this new process is not material. The very essence of Bill C-20 is to add a process which did not exist previously as part of the method of selecting senators.

Moreover, the practical and legal ramifications of Bill C-20 further support this thesis as to the real nature of the bill. The practical effect of Bill C-20, if it were used—and one would imagine that it would indeed be used since there is a push to have it adopted—would be, even though it is theoretically optional, to add a new process to the method of selecting senators. Furthermore, a predictable or potential legal outcome of Bill C-20 may be the development of constitutional conventions which would, once again, intervene in the senator selection process.

And finally, I believe that this conclusion is analogous to the spirit of the 1980 reference on Parliament's authority with respect to the upper house, which essentially denied that the federal Parliament had any jurisdiction in matters relating to the essential characteristics of the Senate. Now, it is foreseeable that, should this bill pass and be applied, that when there is a critical mass of senators appointed following a consultative election, they will feel just as legitimate in terms of their democratic representativeness as members of the House of Commons. As a result it is foreseeable that the Senate's role in the federal legislative process may be bolstered, and that senators will demonstrate less restraint in the legislative process in relation to decisions made by the House of Commons. And, at the end of the day, I think that that would have a direct impact on the fundamental nature of the Senate.

In closing, given these serious doubts concerning Bill C-20's constitutionality, I believe that it would certainly be more prudent to have the bill submitted to the Supreme Court of Canada so that it may decide as to the bill's constitutionality, and clarify any doubts, if need be.

Thank you very much.

● (1605)

[*English*]

The Chair: Merci, Monsieur Côté.

We'll begin with our first round.

I'd like to ask members to make every effort to be concise and keep within the timeframe simply to allow every member to ask a question, because we've got a long list here. Please be good enough to direct your question to the individual or individuals you'd like to have answer.

Thank you.

We'll begin the first round with Mr. Murphy.

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

I want to begin by saying that I agree with the commentary made by all three of our experts today. I have two crisp questions for each of them, and I'll attempt to keep my questions very short so there'll be time for adequate answers.

I think, Professor Whyte, you put it well—that the Senate now is generally carefully restrained. And Professor Côté, you put it well when you said that in the new beast, under the Bill C-20 regime, the senators might feel, since they were elected, just as legitimate as members of the House of Commons. So with two competing equally powerful houses and no real system for the elimination of gridlock, what would be the outcome?

The second question is a little more intense, I think, from a legislative point of view. Professor Hogg was here. He's widely respected. He said very clearly that although the vote in the selection process would likely be in all cases respected by a Prime Minister, this would not, however, violate section 24 and would not violate section 42. It is just another way of selecting senators, which is now not delineated in section 42(c). It's just a convention. Perhaps a new convention would arise that every prime minister accept the results of the election process for senators, but that's not the case. And he says this in very black letters, I might add. This is a sort of immunization; a good lawyer will do that, expecting that the other side will glom onto Hogg and disrespect your view with respect to interpretation.

The idea—and Professor Hogg was very clear—is that the Prime MInister and cabinet still suggest to the Governor General, who actually appoints senators, and there's no change because the Prime Minister has that parachute, where he has the right not to respect the outcome. What do you say to that?

Prof. Errol Mendes: Let me try to be brief, because I know that my colleagues will probably want to add to what I say or repeat what I say.

Firstly, if there's any reason basically to throw away this legislation it is the gridlock aspect. Think about what could happen if, as you say, Mr. Murphy, the Senate felt that it could veto almost everything the House of Commons does. We decry what happens in the Congress, and we have the potential to have even worse here.

Going to Peter Hogg, much as I respect his opinion, I think he failed to ask the critical question of what would happen if the Prime Minister refused to appoint someone after they had been duly elected. Given everything that my colleague John Whyte has said about our having gone first through the entirety of the federal electoral apparatus, if a prime minister, despite all of that, were then to say no, I will not appoint you to the Senate, then I can see that person going straight to the courts and asking that the courts declare the whole process unconstitutional—or that they be appointed to the Senate. It has the potential for constitutional chaos.

● (1610)

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

Mr. John Whyte: What a steep threshold to get over.

With respect to two electorally legitimate houses coming to different conclusions on a measure, clearly that would pose a threat to the theory of responsible government and the fundamental constitutional requirement that the government be able to manage a legislative agenda in the legislative chambers.

I think the answer to this problem as we face it, and as other nations have faced it, is a set of conventions, perhaps conventions relating to committee negotiation or a joint committee to negotiate differences in bills, as they do in Washington. Perhaps there will be a convention that the failure of a government to manage a legislative agenda due to the intransigence of the Senate does not express lack of confidence.

There are a number of conventions that could evolve around how responsible government works in a bicameral legislature in which both houses are elected. These will evolve. I do not think this will be beyond managing.

I think there will be moments when it feels like we're close to a constitutional crisis, such as in Australia in 1975, but I do not think they will be frequent and beyond managing. In truth, as a nation we must all be aspiring to come to an age when we have democratically elected legislatures across the piece. So we should face that future.

On the second matter, there is a theological difference between Professor Hogg and us, I guess. Professor Hogg is a very well known and respected constitutional lawyer—and by the way, his view was echoed by Dean Patrick Monahan, his successor at Osgoode Hall, who has the same position. They are, with all the kindness I can muster in the world, well-known, black-letter constitutional lawyers. Other constitutional lawyers live by the spirit of the Constitution. They see the Constitution as representing an expression of where a nation is at a certain point in its narrative, and that sets a guideline that can drive the nation as it goes forward in terms of moral commitments and honourability.

The agreements made in 1867 and 1982 are agreements that we the people—and I know this is an attenuated conception of we the people—decided to live together this way, with these moments of mutual respect and these understandings of how power will be exercised. You cannot abridge these and maintain the integrity of the Constitution in the minds of Canadians. There's a spirit to the Constitution, and Professor Hogg fails to grasp it and its fundamental importance to Canada as a good state.

The Chair: Thank you, Mr. Whyte.

[*Translation*]

Mr. Côté, I can see that you are writing something. Do you have anything to add?

Mr. Charles-Emmanuel Côté: Yes, I do. I have a comment to make in relation to both questions.

As far as a mechanism to break through any potential gridlock is concerned, I believe that, for the time being, the only mechanism we have is cited in section 26 of the Constitution Act of 1867, and that is for the Prime Minister to potentially appoint up to eight additional senators. In order to exercise this authority, would he use senators on the list, or would he proceed in a traditional manner? I don't know the answer to this. And it is indeed an important question.

I'm aware of some of the details surrounding the crisis in Australia in the 1970s. Despite the fact that there was a mechanism in place for such deadlocks, Australia experienced a serious constitutional crisis. Clearly, proceeding with the consultative election of senators without thinking further about a mechanism to break through a gridlock poses an additional problem, in my opinion.

I obviously have a lot of respect for Professor Hogg, and I have learned a lot from his books. I have a broad understanding of the arguments he gave in his testimony, and it is my sense that he has opted for an extremely strict interpretation of the exclusion of the federal Parliament's authority based on paragraph 42(1)(b) of the Constitution Act of 1982. In my opinion, as far as the senator selection process is concerned, the act has a far broader scope than simply the power of the Governor General to summon an individual to the Senate, which is provided for in section 24 of the Constitution Act of 1867. I think that the 1980 reference clarifies this text, which is already clear. It makes it evident that the intention was to remove from the federal Parliament's jurisdiction far more than any simple technical amendment to section 24. The context clearly demonstrates, in my opinion, that the drafters' intention went beyond that, and they intended to limit even further the federal Parliament's jurisdiction in such matters.

● (1615)

The Chair: Thank you.

Mr. Paquette.

Mr. Pierre Paquette (Joliette, BQ): Thank you very much.

Mr. Hogg was not the only one to have such an opinion. Mr. Fabien Gélinas defended more or less the same thesis, basically saying that from a legal standpoint the government had found an indirect way of doing what it was not able to do directly. The fact remains that according to these two individuals, Bill C-20's constitutionality is legally defensible because there is no obligation to appoint senators selected in the consultative process. Rather, it involves, quite simply, changes to issues that fall under Parliament's areas of jurisdiction.

I'm not an expert in constitutional matters, and my knowledge on the subject is quite limited, in this particular case. Jacques Gourde even admitted at the last meeting that he was not a specialist either.

I'd like you to explain to us exactly what would fall under the jurisdiction of the House of Commons should there be Senate reform or constitutional amendments. That's very much what Mr. Hogg and Mr. Gélinas focused on. And I admit that I didn't really understand.

Mr. Charles-Emmanuel Côté: To begin with, I would say that the 1980 opinion to some extent clarified this issue. Among the questions asked of the Supreme Court which remained unanswered due to a lack of evidence was whether the federal Parliament could unilaterally change the name of the Senate. In my opinion, and I'm saying this for argument's sake, any change to the name of the Senate may be the unilateral prerogative of the federal Parliament, which may change the name to, for example, the House of the Provinces or the Regions, or the House of the Federation. This would simply involve a name change.

Moreover, there are criteria with respect to senators' qualifications which, in my opinion, may be unilaterally altered by the federal Parliament. Paragraph 42(1)(c) states that the following is not within the federal Parliament's jurisdiction, and I quote:

> (c) the number of members by which a province is entitled to be represented in the Senate and the residence qualification of senators;

Therefore, the conditions with respect to their assets or property may, in my opinion, be unilaterally modified by the federal Parliament, to the extent that that would not affect the Senate's powers. There is nevertheless scope for minor changes and internal matters.

Now, there is the matter of appointing a *Président* of the Senate, as opposed to an *orateur*. That's a poor translation, and the French word *Président* is more appropriate. So, at the time, the Constitution Act had to be amended to make this change. These are the types of quite minor changes which may be made.

● (1620)

Mr. Pierre Paquette: I would like to allow others to add to what Mr. Côté said. I would like to know whether the House of Commons has ever passed any legislation that changed the Senate.

Prof. Errol Mendes: First of all, I would like to say that I agree completely with Professor Côté.

[*English*]

The only legislation I can think of reduced it from lifetime to age 75, but that was with the consent of the Senate also.

I want to add one more thing to the discussion so far.

The idea that you can take a convention, as Professor Hogg and Professor Monahan have done, and try to say that it will arise over time ignores the fact that something very significant happened with the patriation reference case when Pierre Trudeau tried to repatriate the Constitution without the provincial consent. I'm sure you remember that.

The court actually said to him, "Yes, you can do that legally"—that's something people don't realize, that you can do it legally—"but there are conventions that stop you from doing it, and you have to get a substantial consent of the provinces if you're going to do that." He was basically told you cannot do directly what you can do directly, whereas here the government is attempting to do indirectly what it can't do directly.

In my view, there's actually a convention arising out of the patriation reference case that stops them from passing this legislation in the first place. That convention kicks in right away, which stops the ability of the federal government to do this without the proper amending process and, as I've said, without the proper consultation with the provinces, including Quebec.

The Chair: Mr. Whyte, would you like to add something?

Mr. John Whyte: I'm not interested in saying that this bill is unconstitutional because it breaches convention. I'm interested in saying it breaches the Constitution because it is illegal.

Those lawyers who say this is just the Government of Canada—and the House of Commons and the Senate, if it passes—doing indirectly what it cannot do directly, with respect, seem to me to be people who have not read the secession reference, who have not read Sparrow, who have not read Oakes, who have not read Haida Nation. Are they reading the Supreme Court of Canada?

The Supreme Court of Canada isn't interested in what people can do indirectly when they can't do things directly. The Supreme Court of Canada for 20 years has been trying to preserve the constitutional integrity of this nation through standing up for the structures that were put in the Constitution and ensuring that they are honoured and not eroded and not bypassed. We are not living in a jurisprudential age in which we are parsing small technical differences; we are trying to preserve a constitutional arrangement and trying to get constitutionally mandated consent for the restructuring.

It happened, if at all, initially in the 1980 Senate reference. At that time the Supreme Court of Canada said that when you change an institution of the national government as fundamental as that, you've got to take account of the interests that are constitutionally recognized that are being affected by this and get their participation.

These are rules of law.

[*Translation*]

Mr. Pierre Paquette: I would like to ask a question, Mr. Chair. Since we are a legislative committee, we will have to make some recommendations to the House of Commons. Should we recommend that the bill be referred to the Supreme Court immediately to determine whether or not it is constitutional, or should we rather recommend that the bill be withdrawn and that we move on to something else?

● (1625)

[*English*]

Prof. Errol Mendes: My advice would be both: kill this legislation, but also—

[*Translation*]

Mr. Pierre Paquette: Mr. Parizeau used to say that all parts of the chicken are good.

Prof. Errol Mendes: Yes, that is right.

[*English*]

The Chair: Get their advice.

[*Translation*]

Mr. Pierre Paquette: Could you give us your opinion, Mr. Côté?

Mr. Charles-Emmanuel Côté: There is a political judgment involved that goes beyond my expertise regarding the appropriate decision in this case. I would say that the message is not necessarily the same. If there is a request for a reference to the Supreme Court, the message is that it might be a good idea to reform the Senate. So, we would be setting the parameters for a future reform. It may be seen as an openness to the idea of talking about the Constitution in this country, and that would be a helpful effect of this bill. If the bill is simply allowed to die, that would put an end to everything. I think it all depends on the message you want to convey.

Mr. Pierre Paquette: Would you like to add something, Mr. Whyte?

[*English*]

Mr. John Whyte: Under section 55 of the Supreme Court Act, the prerogative of reference to the Supreme Court belongs to the Governor General in Council alone. That doesn't mean, of course, that there could not be a resolution of the House of Commons recommending that the cabinet make that reference, but it of course would not be binding, and you could not refer directly.

Should you make that recommendation to the current cabinet? I don't see the point of it. The current cabinet knows that this is available and is either interested in proceeding according to the rule of law, as elaborated by the Supreme Court of Canada, or is interested in failing and maybe blaming or pushing.

I guess I think that this committee is not going to shape the exercise of that prerogative power of the cabinet of the Government of Canada.

The Chair: Thank you.

Mr. Moore, you have seven minutes.

Mr. Rob Moore (Fundy Royal, CPC): Thank you, Chair, and thank you to all the witnesses we have here today.

Obviously we have two or more conflicting views as to the constitutionality of this piece of legislation. My colleague Mr. Murphy was right. That was a very good question about some of the comments Professor Hogg made, and I have a few more.

Professor Hogg, in speaking of this bill, said:

> Bill C-20 stops with the counting of the votes, and the report to the Prime Minister. The Bill does not go on to declare that the successful nominees are elected; nor does it say that they will be appointed. And the Bill does not impose any duties of any kind on the Prime Minister (or the Governor General). Obviously, the Bill assumes that the Prime Minister would be under a political imperative to respect the outcome of the "consultation" that he has ordered, in which case he would advise the Governor General to appoint the successful nominees to vacancies in the Senate. But this is not a legal imperative.

Professor Hogg was quite clear. Obviously all of us probably have in mind what the ideal situation would be. We know that the NDP has views on the Senate, as do the Liberals, the Bloc, and our party, but obviously there are those constitutional constraints. Professor Hogg was very clear that there was not a legal imperative.

To address a point you made, Professor Mendes, I believe that Professor Hogg did consider the scenario whereby the Prime Minister, at some point, after this process had been in place for a while, would be faced with the prospect of not appointing one of those individuals who had been selected. In fact, he says:

> I think that's the view the Prime Minister will take. 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.

That was in the context of a question about future appointments. Are we saying that Professor Hogg is just flat out wrong? I know that he is an eminent legal scholar. He was quite clear that right now, passage of this bill and also implementation of the bill and also any future appointments flowing from this consultation would be well within the right of this House. In fact, passing this legislation would not infringe on any constitutional issues.

● (1630)

Prof. Errol Mendes: Let me begin by saying that not only is Professor Hogg wrong, but he's not yet on the Supreme Court of Canada.

You as legislators have to take into account the risks entailed in passing legislation. If one of those risks includes the potential for legislation to be struck down by the Supreme Court of Canada, with the attendant consequences of the legitimacy or the legality of sitting senators and the legitimacy or the legality of legislation being passed, that is a serious risk that you as legislators have a fundamental duty to address and not take the word of just one law professor, no matter how eminent he is, or not take our opinions, no matter how eminent we may think we are.

One of the fundamental things that you as legislators have to do is to take into account the potential risks that the country will face from your actions, and this is one area where I think it would be negligent in the extreme not to take into account the potential risks that flow from such legislation, in terms of gridlock, in terms of potential constitutional challenges, and in terms of this legislation being unconstitutional from the get-go, as my colleagues have just said.

The Chair: Thank you, Mr. Mendes.

Mr. Rob Moore: I do have follow-up questions, if no one has a burning desire to reply.

Mr. Whyte.

Mr. John Whyte: As you know, a lawyer is someone who can think of a thing or a concept without managing to think of the thing that is inextricably bound to it. That is what we are witnessing here. This act puts in train a process of selecting senators, and we are managing to think of the cabinet sitting there choosing a senator without at all thinking of the process that brought the name before them. It's ludicrous.

Is it legally wrong, though? Yes. The process in Bill C-20, if followed to the letter, will abridge specific constitutional provisions relating to age, relating to requirement, relating to representation. Secondly, the precise constitutional authority assigned to the cabinet to appoint a senate in its discretion is curtailed unconstitutionally by the limitation it has accepted through enacting and applying Bill C-20.

You can argue that it suffers no limitation by virtue of the operation of Bill C-20. It will make its decision independent of its enactment and operation and result of Bill C-20. But no one believes that is true. What is happening is that we are reshaping the way the Senate of Canada is to be formed in the future.

Professor Côté said over and over again, as clearly as could be, that when you reshape the way the Senate of Canada is formed, you are falling within paragraph 42(1)(b) and it would be unconstitutional.

You cannot extricate a process that operates inevitably in the exercise of a constitutional discretionary power and say that it doesn't operate in the exercise of that power. I do not believe the Supreme Court of Canada plays those mind games. For that reason, I think Professor Hogg is predicting this one wrong.

The Chair: Mr. Moore, do you have further questions?

[*Translation*]

Would you care to respond, Mr. Côté?

Mr. Charles-Emmanuel Côté: I would just like to add that I recently reread an article by Professor Hogg in which he said that during the time preceding the reference on Parliament's jurisdiction with respect to the upper chamber, a number of constitutional experts had testified before a parliamentary committee saying that the federal Parliament could take unilateral action without any doubt, and that, in the end, the Supreme Court of Canada said they were wrong. So there you have it.

● (1635)

[*English*]

The Chair: Do you have one brief question?

Mr. Rob Moore: I do, on the subject of gridlock.

Professor Mendes, someone who you have certainly supported in the past, Scott Brison, speaking on the issue of gridlock, said:

> Some people say this creates the potential for gridlock. The competitive friction between two Houses is not a bad thing. In fact, it can prevent politicians from doing dumb things unilaterally unchecked.

I think it's abundantly clear that the issue of gridlock, in and of itself, does not raise constitutional issues. But one person's gridlock is another person's check on decisions that we make in the House. The assertion we would make is that any potential so-called gridlock or any potential ability of the Senate, as a place of sober second thought, to say "We do not agree with what the House of Commons has put forward" is simply an enhancement of the democratic process.

Is there any comment on that, on the fact that I didn't hear anyone make this point? I'd like a confirmation, if my interpretation of what you're saying is in fact true, that the prospect of gridlock, so to speak, does not necessarily raise any constitutional issues in and of itself.

Prof. Errol Mendes: Mr. Moore, I presume your constituency is in British Columbia.

Mr. Rob Moore: That's James Moore. Mine is in New Brunswick.

Prof. Errol Mendes: In New Brunswick. Would you be happy with an elected Senate that does not reflect the equality of the regions of Canada, where part of that elected Senate really acts as gridlock against the consensus of all of Canada from the House of Commons? Would you be happy with that situation where the preponderance of senators from one part of the regions of Canada, because of the inequality, would basically stop legislation in its tracks?

I agree, it is as yet not an issue of constitutional validity. But in terms of the functioning of the most democratic institution of this country, it is absolutely critical to address this issue.

The Chair: Mr. Whyte, you look very pensive. Would you like to answer?

Mr. John Whyte: Yes, gridlock will affect a constitutional principle, although not necessarily badly. It's not necessarily worrisome.

The constitutional principle is that the government is responsible to the legislature. It is the core of parliamentary democracy. And when a government is not able to pursue a legislative agenda because it cannot command control of the legislative chamber, it must resign. We've believed that for centuries. It doesn't have to be that way, but that's the way it is.

When we get to two legislative chambers in gridlock, we're going to have governments that can't control the legislative agenda, and we're going to have to think differently about the principles of responsible government. I don't think that's a disaster. I think we could certainly work out principles of responsible government that coped with gridlock.

So in answer to your question, you bet it affects the constitutional principle. Does it affect it disastrously? I don't think so.

[*Translation*]

The Chair: Mr. Côté.

Mr. Charles-Emmanuel Côté: I have nothing to add.

[*English*]

The Chair: Merci.

We'll proceed with our next round.

Mr. Maloney.

Mr. John Maloney (Welland, Lib.): Bill C-20 today has come under significant criticism. Is there any way that you feel this bill could be massaged to make it constitutional and credible, or are we just stuck with the suggestion that the bill should be scrapped?

Prof. Errol Mendes: My simple answer is that the bill should be scrapped. It is completely unconstitutional.

Mr. John Maloney: Professor Whyte.

Mr. John Whyte: Well, I don't want to be charged with unrealism. I think Canada should engage in a constitutional discussion about its national Parliament. It's time Canada engaged in that discussion—it's past time. I know there are horribly intense interests that will hold that discussion up, but we could be better for having it.

● (1640)

Mr. John Maloney: Taking into consideration that some day we will have an elected Senate with regional interests being reflected, how do we also reflect the interests of minorities, disadvantaged people, and women in an elected Senate? Can we not protect that or preserve those values?

Mr. John Whyte: We absolutely could if we sat down and asked what we want our upper house to do. When you have bicameral legislatures, the first reason is to get a second thought. Sometimes it is structured so that you get a second sober thought, a less partisan thought. Finally, it normally has different representational goals from those of straight representation by population, including the representation of the vulnerable or minorities. Of course, all that could be structured.

By the way, the single transferable vote mechanism in Bill C-20 also could have some beneficial effects on diverse representation. It's hard to see exactly how, but it could. Proportional representation is generally thought to have some kind of beneficial effect on broader representation. That part of Bill C-20 could be a plus.

Prof. Errol Mendes: Your question actually gets me to reveal what I think should be the proper way to go about this.

First, I agree with my colleague John Whyte that there should be proper consultations done with all the provinces. To my knowledge that hasn't been done, despite the fact that the federal government, as I said, has bestowed the notion that the Québécois are a nation and yet at the same time ignores the request from the Quebec government to engage in consultations. I know that Quebec, for example, is so serious about this legislation that they may even take it to court, as will some other provinces.

It starts with proper consultations with the different partners in Confederation. I think we're mandated to do that anyway by the legislation we passed in the wake of the referendum, when we promised to consult all the regions of Canada on a constitutional amendment.

Second, I think we have to look at thinking outside the box. I think Madam Guarnieri will remember that one of the things I liked about the Charlottetown accord was the possibility of having an interim stage of indirect elections to the Senate via the provincial legislatures, with the consent of the House of Commons and the Senate.

There was consensus there. When people say that proper reform could never be reached, they ignore the fact that in the Charlottetown accord there was national consensus on an indirect form of election to the Senate. That shows that it can be done.

[*Translation*]

Mr. Charles-Emmanuel Côté: In response to your first question, I would simply say that it is impossible to save the constitutional validity of Bill C-20. I think it is fundamentally invalid constitutionally.

[*English*]

Mr. John Maloney: I have a question.

We are considering Bill C-20 and we also have term limits in Bill C-19. Can we consider these bills separate unto themselves, or do we have to consider them in light of each other?

Prof. Errol Mendes: When I appeared before the Senate on what was then Bill S-4, I basically said that the two bills have to be considered together because they're part of a plan by the present government to amend the Constitution by—and I'm going to use a word that I refrained from using—stealth.

You cannot amend the Constitution of Canada by stealth. The two statutes put together are an attempt to amend the Constitution by stealth.

Mr. John Whyte: It makes sense, of course, to reform the Senate all at once and not to be electing people for life or fifteen years or eight years—we don't really know what. It doesn't make sense to be limiting terms to fifteen years or eight years when we don't know how they'd be chosen. It's no way to design a national legislature, to throw up a sort of jump-ball reform and see what shakes out. People play basketball that way, but they don't design nations that way. Of course they should be worked out together.

On Bill S-4 and Bill C-19, again, Professor Hogg and I disagree. He thought there was no constitutional problem and that it perfectly fell within section 44 of the unilateral federal amending power. I thought that it didn't.

My analysis on the constitutional validity, which I did give to the Senate, is that it's more tenuous. It's a harder question.

Very briefly, let me say that I think the structure, the composition, the term, and the qualification of the Senate are part of the essential federal arrangement, the federal accommodation. The Senate is part of our historic federal accommodation, and you can't just make a long list of changes that don't fall within paragraphs 42(1)(b) and 42 (1)(c) and say that everything is open to unilateral federal amendment. That's not Confederation.

● (1645)

The Chair: Thank you, Mr. Whyte.

Mr. Maloney, time has expired.

We'll proceed with Mr. Reid, please.

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

Listening to the comments of our three witnesses today, my own conclusion is that we have a combination—I don't want to be unfair to all of them, for I'm thinking here primarily of Professor Mendes—of legitimate political and policy concerns, with which I will confess I don't happen to agree, and constitutional nonsense masquerading as scholarship.

Professor Mendes, you didn't provide a written text today, or if you did it wasn't translated to be passed out, at any rate, and I don't have your comments written down in front of me. But in your responses to some of the questions you reiterated a series of points in almost identical words to what you said when you were before the legal and constitutional affairs committee of the Senate, in which you proposed a preposterous nightmare scenario. And you should know better.

You had three rhetorical questions. You said:

> What would happen the first time a prime minister refused to recommend appointment of a duly elected person under the so-called advisory election framework, if all the others had been appointed?

Second, you asked:

> What would the Supreme Court of Canada say about such a refusal if they were ever asked to determine the constitutionality of this process?

Number three, you asked:

> What if the court declared the whole process unconstitutional so that those who were appointed were in limbo as to whether they could continue sitting?

Then you went on to elaborate, as you did again, the notion that somehow legislation would be tossed aside; that we would not be in a constitutional crisis in a formal sense, but rather in a crisis in which we have no more rule of law.

This is patently ridiculous—everything you've said here. Let me go through the three rhetorical questions you asked but didn't answer.

What happens the first time a prime minister doesn't appoint a senator?

The Chair: You know, our witnesses haven't come here for abuse.

Mr. Scott Reid: Are you going to take this out of my time?

The Chair: Mr. Reid, please, show a little courtesy. We don't have to be insulting. You can make your point; nobody is censoring you. Show a bit of courtesy, please.

Mr. Scott Reid: I thank you.

I just want to go through and provide the responses that I think are appropriate, Mr. Mendes. Once you have that, you'll be able to comment on whether you think I'm right or wrong.

Prof. Errol Mendes: But can I interrupt?

I want him to keep on abusing me, because it's a sign that someone who sinks to the level of abuse has lost the argument.

So please continue with your abuse, Mr. Reid.

Mr. Scott Reid: All right; here we go.

The Prime Minister not appointing someone after the process has already started, first of all, is a political question. But the fact is that we already saw that practice engaged in after the first elected senator was appointed. Jean Chrétien proceeded to appoint senators and to ignore the Senate elections that had taken place in Alberta.

I note similarly that following the 1898 plebiscite on prohibition, Sir Wilfrid Laurier chose to not follow the results, although the referendum passed, and he was successfully able to do so. So this could occur; that question is actually answered.

In your second question you asked what the Supreme Court would say. Well, what they wouldn't do is refer back, as you did, to the 1981 reference case in which they said there's a conventional obligation, because there wasn't an amending formula at that time, and there now is an amending formula. So the reference to a conventional obligation that was cited at that time with regard to an amendment to the Constitution, about whether the right formula was chosen, would not actually apply in this case. That's clearly the case; 1981 is before a bright line that occurred legally with the passage of the Constitution and its amending formula.

Number three is what kind of chaos ensues if the court strikes this down. Presumably it would be the same kind of chaos that occurred pursuant to the 1985 Manitoba reference case in which all of their laws were struck down. The courts then sat down and said "You have to re-enact the laws". They went out of their way to ensure that chaos would not ensue.

I suggest that striking down the law—which I think is extraordinarily unlikely, but if it were to occur—would mean that a new process had to be found, not that laws passed by the Senate with other incumbents elected or appointed under that law are now invalid.

These seem to be me to be reasonably obvious responses.

I finally notice that you didn't cite the 1919 judicial committee of the Privy Council decision, in which a referendum that had been passed by the Manitoba legislature was struck down because it impinged too much on the prerogative of the crown, which is the real issue here. The judicial committee of the Privy Council in that decision pointed out that it is possible, if one is respectful in the formal sense of the prerogatives of the crown, to engage in alternative and more democratic methods of law-making. That seems to be a very relevant precedent.

Thank you.

● (1650)

The Chair: Thank you, Mr. Reid.

I will allow Mr. Mendes response time.

Prof. Errol Mendes: As I said, I'm not going to sink to the level of Mr. Reid. I think he's demonstrated his ability to stay mature as a legislator in this hearing.

What I will address, though.... I did ask the same questions in this hearing. I asked the same three questions, so I'm glad you raised the point. Again, Mr. Reid, your duty as a legislator is to take account of the risk you are putting forward to the country. You are not the Supreme Court of Canada—neither am I—but it's a risk you have to take into account when you pass legislation.

And yes, there will be consequences, if advisory elections take place and senators are appointed. And if the Supreme Court of Canada pronounces the legislation unconstitutional, they will be severe consequences.

You may have taken to heart the fact that the patriation reference case occurred before the amending formula came in. Well, fine; so did the upper house reference case. Are you dismissing that one too?

Even if we accept your position, as my colleague John Whyte has stated, the clear provisions of the amending formula state that what you are doing is unconstitutional.

I will not sink to your level of abuse, because it demonstrates that essentially you have decided not to talk about the issues, but essentially have sunk to a level I will not go to.

The Chair: May I please request that everybody direct their comments through the chair, and let's maintain the decorum with which this committee has operated to date.

Madame Picard, *vous avez la parole*.

[*Translation*]

Ms. Pauline Picard (Drummond, BQ): Mr. Whyte would like to make a comment.

[*English*]

The Chair: Oh, I'm sorry. Mr. Whyte, would you like to add some comments to the substance?

Mr. John Whyte: I don't want to undercut anyone here, Madam Chair, but I do want to say that Mr. Reid mentions two cases, and they are both extremely interesting in this discourse. One is the Senate reference, which he says has been trumped by the 1982 Constitution. It's a good question whether it has. I think he's wrong, but I understand why he would say it.

And I would have thought the secession reference, which also operated in terms of a new written amending formula, but derived its ultimate normative weight from a far prior history of Confederation understanding to give its terms meaning, is some indication that the court will lean back or go back to pre-1982 conceptions of Confederation to understand how to interpret the 1982 Constitution. I don't think it died that sharply. But you're right; it's a different era.

The Initiative and Referendum Act is very interesting, and he is right. That is an act that said that when an initiative and referendum automatically implement a new law, that's unconstitutional; if it's only advisory, it would not be unconstitutional.

That is what is justifying Professor Hogg's decision, by the way: that this is only an advisory—as opposed to automatically an implemented—decision by the electorate. Hence the clause from Mr. Moore: the election is held; it dies.

I think that's not the way the constitutional power in section 32 of the 1867 act will be read, as standing absolutely outside the process that got the cabinet into making the decision.

I agree that the Initiative and Referendum Act represents a bright line attitude that, if followed in this case, would support Professor Hogg, but I think would not be followed.

● (1655)

The Chair: Thank you, Professor Whyte.

Madame Picard, *vous avez la parole.*

[*Translation*]

Ms. Pauline Picard: Thank you, Madam Chair.

I would like to say that I am very sorry that we showed a lack of respect for you. This opinion is not shared by all committee members. Please accept our apologies.

Talking about constitutional law is quite complex when one is not a constitutional lawyer. Nonetheless, I have made note of some of the things you mentioned. One was that in order for this bill to be approved, Quebec's consent would absolutely be required. You said it would be very difficult to amend the Constitution without Quebec's consent. I know that the provinces must also agree to amend the Constitution, but I would like to know which part could mean that Quebec's amendments would delay matters a great deal.

[*English*]

The Chair: Would you like to go first?

Prof. Errol Mendes: We passed legislation that said that in future constitutional amendments we would have the consent of the regions of Canada after the 1995 referendum, and that includes Quebec. You could basically override that by saying that we'll do it indirectly so we don't need the consent of Quebec. That's my point.

My point is that if we are going to have a sustainable reform of institutions in this country, given everything that has happened we absolutely have to have the consent of the major regions of Canada, including Quebec. If we don't, we're ignoring not just the legislation that we passed after the 1995 referendum but also the more recent announcements that proclaimed the Québécois as a nation. Basically we're saying that we don't need to consult Quebec on one of the most fundamental institutions that has an impact on Quebec. Even from that angle, I think the Government of Quebec has a right to demand consultation, and, if they don't get it, to seek a reference to their provincial court of appeal to stop this legislation.

The Chair: Mr. Coté.

[*Translation*]

Mr. Charles-Emmanuel Côté: I have very little to add. The letter of the Constitution requires that seven provinces representing 50% of the population, the House of Commons and the Senate must approve a resolution that would introduce such a reform. An additional layer was added after the 1995 referendum, with the legislation on regional vetos, in which the federal Parliament agreed not to pass any resolution without the approval of the various regions. As regards this legislation, Quebec is a region, and that means that its consent would in fact be required, even though, before this act was passed, Quebec's specific consent was not required under the Constitution, in my opinion. This is something that was added during the post-referendum period, when the legislation on regional vetos was passed.

[*English*]

The Chair: Mr. Whyte.

● (1700)

Mr. John Whyte: This is fairly technical.

I think that this present bill creates a selection process for senators that when implemented will not be able to sustain the constitutional commitment in section 22 of the 1867 act that the senators either hold property or reside in the appropriate one of the 24 electoral regions of Quebec. If it cannot sustain that provision, then Bill C-20 is effecting an amendment of a term of a Constitution that applies to one or more provinces but not all provinces and therefore triggers the requirement of bilateral consent. It seems to me highly arguable that Bill C-20 is not valid unless the Province of Quebec consents.

Now, it could be argued that the exercise of appointing senators under Bill C-20 in the case of Quebec will be constrained less by the election and more by the section 22 requirement that the senator hold property or reside in the appropriate district. But as I said in my initial submission, that's going to be a fairly unattractive position for Canada to be in: where elections determine who is a senator for most provinces except Quebec, where the elections count for little.

I think that Quebec in this particular amendment is in a very strong legal position if it wishes to. It may not. In a more general Senate reform process, almost any reform we can think of will abandon that really obsolete provision relating to the 24 electoral divisions and again would trigger section 43 giving requirement to a Quebec veto independent of the seven-and fifty formula.

I think that if we're going to deal with the Senate, we're going to deal with Quebec. And if we're going to deal with Quebec, we're going to deal with 1982. That challenge is what the country is facing.

[*Translation*]

The Chair: Do you have another question, Ms. Picard?

Ms. Pauline Picard: No, thank you, Madam Chair.

The Chair: Mr. Gourde.

Mr. Jacques Gourde (Lotbinière—Chutes-de-la-Chaudière, CPC): I would like to thank our witnesses for being here today.

Any amendment regarding the selection of senators seems difficult but certainly not impossible.

How do you think we should go about getting an elected Senate? Given that the Supreme Court applies and interprets laws, but does not pass them, in my opinion, it must take into account the provisions of the legislation that is passed by the House of Commons.

What risk would there be for Parliament if the Supreme Court were to strike down the legislation providing for an elected Senate?

[*English*]

Prof. Errol Mendes: As I said, if this bill is passed and the advisory elections take place and the legislation is then struck down, what is the status of those senators who were elected? That is a risk you face by passing this legislation.

None of us knows for sure what the Supreme Court of Canada would say on that, but let's say it did strike it down. That is a serious impediment to the functioning of the most critical democratic institution in this country. For that reason, it is actually critical to get consensus on the constitutionality. Don't take my word for it, no matter how low an opinion you have of me, but try to get a general consensus as to the constitutionality of legislation before you go ahead and pass legislation that runs the risk of seriously imperilling the functioning of one of our Houses of Parliament.

[*Translation*]

Mr. Jacques Gourde: Mr. Côté.

Mr. Charles-Emmanuel Côté: The risk that the Supreme Court would rule on the unconstitutionality of this bill, if it would pass, is quite high. As to how to go about establishing an elected Senate—because this is something that could absolutely be considered—the Constitution does provide us with some tools to achieve this objective. The government simply did not choose the right tool. In my opinion, the tool that should be used to establish an elected Senate is the normal constitutional amendment procedure—the 7/50 formula.

[*English*]

The Chair: Do you have any comments?

Mr. John Whyte: I have nothing additional, thank you.

The Chair: Thank you, Mr. Whyte.

[*Translation*]

Do you have any other questions, Mr. Gourde?

[*English*]

Mr. Jacques Gourde: No.

The Chair: Do you have a comment, Mr. Preston?

Mr. Joe Preston (Elgin—Middlesex—London, CPC): I have nothing.

The Chair: Do you have a comment, Ms. Fry?

Hon. Hedy Fry (Vancouver Centre, Lib.): Thank you very much, Madam Chair.

I always find it extremely interesting to listen to all the opinions we get from legal scholars, none of which seem to agree with each other in many instances.

That aside, we heard from Mr. Hogg, who very clearly fixated on the letter of the law. I found that interesting, because if you view the law as having a spirit—and courts tend to interpret the law as not based purely on the letter, but on the spirit—then the problem here is that if the provinces were to be involved, or if they were not to be involved, to get around the provincial involvement you wouldn't have to challenge the Constitution. Therefore, this is doing that. This is suggesting that.... We're speaking about certain elements of politics, but you have to bring politics into the issue because it is changing a major institution and the way it functions.

The politics of the thing would say that we do not have to listen to the voter. I am using the voter as an advisory committee, so to speak. Now, provinces may get very involved in an election and therefore may not approve of the fact that this bill is not transparent and seeks to get around the Constitution by stealth—some may think it's a good thing and others may not, as you have all rightly pointed out—and therefore provinces may challenge the validity of the election, the validity of the way the selection occurred, and you could have all this debate and argument that could create a huge firestorm in this country. Is that what we really want?

A bill should be transparent. It should say not only what it wants to do in letter but also what it wishes to do in terms of recognizing the spirit of the law.

Given that on July 20, 2006, the Council of the Federation issued a communiqué endorsed by all provinces and territories and asserting the principle that the Council of the Federation must be involved in any discussion on changes to important features of key Canadian institutions such as the Senate and the Supreme Court, and given that this is not being done because there is no consultation, then we could face that as well; the provinces will feel they were slighted, and so will the Council of the Federation. That's a very recent decision.

The Canadian Bar Association made a suggestion. I would like to know what you think of the suggestion, and if you think it's a good idea, what questions would you put? They suggested that Bill C-20 go to the Supreme Court for the Supreme Court to decide whether it is constitutionally valid according to the spirit and the letter of the Constitution. If you think that should be done and if governments are transparent they would have no problem doing that because then they would be proven to be right or accept that they are wrong, what are the questions you would pose to the Supreme Court?

● (1705)

Prof. Errol Mendes: As a member of the Canadian Bar Association, I completely agree with the suggestion by the Canadian Bar Association. I think the simple question that could be asked is what I've said in my presentation: Can you do indirectly what you cannot do directly by amending the Constitution?

Secondly, is a requirement of consultation with the provinces needed that, in keeping with the requirements for the general amending formula, as my colleague John Whyte has pointed out, would have to be triggered to have a proper amendment process?

Finally, I would love a general question to be asked: Can you essentially carry on separate pieces of reform of critical institutions, such as in the Senate tenure bill and this bill, and not link them together? I think that's another critical issue, which is bubbling under the surface.

Those are the three areas I would recommend to the Supreme Court of Canada.

[*Translation*]

The Chair: Would you like to add something?

Mr. Charles-Emmanuel Côté: If a decision were made to follow the recommendation made by the Canadian Bar Association, the main question would have to deal specifically with the constitutionality of Bills C-19 and C-20. If the questions were to be too abstract, there would be a risk that the Supreme Court might decide not to make a ruling. That is exactly what happened in the 1980 reference, when the Supreme Court refused to reply to a series of questions that it considered too abstract, and for which some factual evidence seemed to be lacking. In my opinion, the reference should deal more specifically with these specific bills.

[*English*]

The Chair: Thank you.

Mr. Whyte.

Mr. John Whyte: Madam Chair, with respect to Ms. Fry's concern about provincial objection, there would be the general concern that arises around the central accommodation of Canadian federalism being altered unilaterally.

The very specific concern is to remember that clause 13 of Bill C-20 allows for consultations to occur in the context of a provincial general election. One can imagine a province establishing a general election and having it, so to speak, hijacked by the federal Senate election—a bigger, louder, more weighty election than anything the poor province was trying to pull off. That would be unhappiness. We can predict provincial push-back on that very pragmatic basis as well as on the more theoretical basis.

As for a reference to the Supreme Court of Canada, I think one could just ask them the question: Is it within the legislative competence of the Parliament of Canada to enact legislation that establishes non-renewable term limits for senators and that bases appointments to the Senate on an electoral process taken prior to appointment? That would get to the heart of the issues we're discussing today, and they would give you an answer. It's precise enough, I think, and as I say gets to the heart of it.

● (1710)

The Chair: Thank you, Mr. Whyte.

Your time has expired, Madam Fry.

Mr. Reid, we are back to you.

Mr. Scott Reid: Thank you, Madam Chair.

My question is again for Professor Mendes.

The central point I was trying to get at in the response I had to the third of the hypothetical questions he posed to the Senate committee was that it seems to me the Prime Minister's prerogative is not what's being discussed here, constitutionally speaking; it's the royal prerogative, the Prime Minister being a legal construction and the crown being a constitutional construction. That's why I cited the precedent of the 1919 reference case vis-à-vis the Manitoba Initiative and Referendum Act.

He didn't have the opportunity in his response to comment on that, so I would be grateful if he could now indicate the degree to which he thinks that precedent is or is not applicable.

Prof. Errol Mendes: Mr. Reid, much as you want me to respond to what you would like to respond to, let me just repeat what I've said: that the attempt to do an end run around the constitutional amendment processes in the Constitution Act of 1982 supersedes any of the cases you have mentioned. It is clear that this is the operative provision this committee should be focusing on. As my colleagues have said, we are in total agreement that those cases you have cited do not take precedence over section 42 or section 38 of the Constitution Act of 1982.

Mr. Scott Reid: How much time do I have?

The Chair: You have five minutes. You have lots of time.

Mr. Scott Reid: Thank you. I have my own little timer. I forget to set it.

With respect, Professor Mendes, I think you may have the arguments backwards. I was arguing that the case regarding whether or not the patriation reference was no longer relevant because of the fact that we had these amending formulae in place, and therefore that constitutional conventions that had existed at that time had been replaced by the black letter of the constitutional law that now exists, and that part of the reference is no longer applicable.... Although I think it could be argued that the Parliament of Canada can proceed with what is within its legal prerogative unless it is stopped by the fact that it is acting in an ultra vires manner. So I think you have the arguments backwards.

I do think, however, the question here about the royal prerogative is one of the things that would come up in arguments before our Supreme Court. You may not think it's very important, but I'm interested in knowing whether you think it's applicable or not, and if you could indicate what the reasons might be for that.

Prof. Errol Mendes: Okay. Let me be clear. Let me try to be as clear as possible.

First of all, you're wrong in saying the conventions are no longer valid things to think about. You're absolutely wrong about that. The patriation reference case was based on conventions, and because the preamble to our Constitution states that our Constitution is similar to that of the United Kingdom, conventions still play a part. In fact, the very Office of the Prime Minister is a convention that is not entrenched in the Constitution, apart from a very, very small reference to it in one part. The whole concept of responsible government is based on convention.

So all of these conventions that have existed do continue, including the royal prerogative, including conventional restraints on executive power. However, none of them supersede the written Constitution, and in particular none of them can supersede the amending processes of the Constitution.

So where there is a conflict between any prerogative power or any conventional power and the actual details of the written Constitution, and in particular the amending processes, they take precedence.

● (1715)

Mr. Scott Reid: The convention I was referring to, Professor Mendes, was the convention regarding consulting the provinces on changes to the Constitution of Canada, and there is no question in anybody's mind that has been replaced by the amending formulae that were set in place in 1982. That's what I'm referring to.

With regard to the prerogatives of the crown, I think you've just made my case for me: that the prerogative of the crown remains effectively untouched by the amendments that took place in 1982. Therefore previous cases that dealt with the prerogatives of the crown are highly relevant, and therefore a leading case on this subject, which is the 1919 case, is entirely relevant.

Therefore, I ask you again how you interpret the applicability of that case to this kind of situation.

Prof. Errol Mendes: Let me try to be really clear. Insofar as any prerogative is not consistent with the amending processes, in particular section 42 and section 38, the royal prerogative has to give way. If there is an indirect attempt to do an end run around the constitutional provisions in section 38 and section 42, that, in my view, will be regarded as unconstitutional and ultimately declared so by the Supreme Court of Canada.

So you may refer as much as you want to that 1919 case. The present situation, under the Constitution of Canada, is that there is no prerogative power—

Mr. Scott Reid: Have you read the case, Professor Mendes? Have you read the judgment?

Prof. Errol Mendes: Do you want to test me on it? Do you want to give me an exam on it?

Mr. Scott Reid: Well, I'm curious, because you seem to be avoiding giving an answer to that question.

Prof. Errol Mendes: I've just given you an answer to the question, Mr. Reid, that that case has been superseded by the procedures of the Constitution. But if you like, maybe after this you can give me a test and I can answer it.

The Chair: As interesting as this exchange is, the time has expired.

Mr. Murphy, you have the last round. I understand the bells are going to go shortly, but you have five minutes.

Mr. Brian Murphy: Thank you.

It's heartening to me that Mr. Reid and Professor Mendes could at least come together on a final point of agreement, in that conventions under our current constitutional framework do exist.

In my first two-part question I guess the answers were mostly concentrated on the deadlock issue, and we delved a little bit into convention. But it is curious to me.... I am a person with legal training; sometimes it's an asset and sometimes it's not. But in this case Professor Hogg—again I'll put it to you as far as I understood it, and I have his verbatim testimony here—was very clear that the convention that exists now with respect to the Governor General appointing senators is really that the Prime Minister suggests names to the Governor General. And no matter how he comes up with those names—out of a hat, coin flip, phone call, selection process—nothing changes. That is what Professor Hogg said, in a nutshell.

Professor Whyte took the view that he was perhaps incorrect because he took too much of a literal, black letter approach to the sections of the Constitution as they meld with the conventions. I'll give you a chance to maybe elaborate.

I would like all three of you to address the question of whether Professor Hogg is on solid ground in that respect.

Secondly, is he correct when he says that it's unsure as to whether a new convention will evolve with the selection process? We all seem to be going down the road, Professor Whyte in particular, that there will be a new convention, that the elections will mandate that the Prime Minister nominate the senators through the Governor General. Professor Hogg in fact said in his testimony that there may be a contaminated election where that may not be the case. Will there be a new convention, if this goes through, that will bind the Prime Minister, and will it therefore become constitutional law?

The second, minor point, if we had a point: Do you think it's therefore important that when we select Supreme Court judges, we ask them their interpretation of whether the Constitution is convention-based or black-letter-based, or whether it should be interpreted in the spirit or be black-letter-interpreted?

Just two light questions.

● (1720)

Mr. John Whyte: Conventions are not practices. Conventions are not law. I think when it comes to the question of constitutional amendment, we live—Mr. Reid, I agree with you—in a legal world, in a world of law: the provisions of part V of the Constitution Act of 1982, the elaboration of that in the secession reference, and I would argue the carrying forward of some conceptions around amendment from the Senate reference of 1980. A debatable point, but law.

Is the law being corrupted by new conventions? I don't even think that it will be a new convention that the people who are chosen through this consultation process will be appointed. I think it will be a practice. My point is that when you create a practice through legislation to constrain, to govern—not necessarily absolutely, but just constrain and govern—a clear constitutional prerogative or discretionary power, you are changing that power, the section 32 power. A change is going on. A change is being made.

Professor Hogg and Mr. Reid, through pointing to the Initiative and Referendum Act, are saying that no real change is going on, that there is an absolute, full, section 32, 1867 act discretionary power to appoint people, untrammeled.

Well, that's not the actual case on the ground, and it's not going to be the actual case on the ground. Furthermore, there are all kinds of things about this bill that actually violate more specific provisions of the Constitution. I'm only making this law point—not convention point—that when you construct through legislation a significantly constraining influence on the exercise of constitutionally defined discretion, you are unilaterally altering the constitutionally defined discretion.

I'm not interested so much in the quantum of restraint. I think the restraint is enough. It's heavy. It's burdensome. It's there. At ten o'clock we don't ask when the sun rose. After an election we don't ask when did the influence really hit.

I'm sorry—that's too metaphorical or elliptical. What I'm trying to say is let's not get into the game of asking whether it really does control the outcome. The answer is that it controls the outcome, and that is to alter the power of section 32.

The Chair: Thank you, Mr. Whyte.

[*Translation*]

Mr. Côté, the last word goes to you.

Mr. Charles-Emmanuel Côté: I will try to use it wisely.

My last comment has to do with the letter of the Constitution. Paragraph 42(1)(b) talks about the method of selecting senators, not the method of appointing senators. I think that what the federal Parliament does not have the authority to do goes beyond the specific amendment to section 24, it has to do with the entire process regarding the selection of senators. That is what is stated in paragraph 42(1)(b).

That is all I wanted to say.

[*English*]

The Chair: Seeing that the bells are not ringing, Mr. Mendes, would you like to add something?

Prof. Errol Mendes: I would like to respond to Mr. Murphy's question. I don't think you can create a convention by breaking a constitutional obligation. So that's all.

The Chair: That's it.

Thank you very much.

I'd like to thank the witnesses for bringing their studied perspectives on the constitutional and legal elements of the bill we're studying.

[*Translation*]

I would like to thank all of you.

● (1725)

[*English*]

This concludes our proceedings. See you all next week.

Thank you.

The meeting is adjourned.

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