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Chair

The Honourable Albina Guarnieri

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● (1535)

[*Translation*]

The Chair (Hon. Albina Guarnieri (Mississauga East—Cooksville, Lib.)): I call the meeting to order. Good morning, everyone and welcome to our witnesses.

Pursuant to the order of reference of Wednesday, February 3, 2008, the committee will resume its study of Bill C-20.

Today, we are fortunate to have three professors as witnesses.

[*English*]

Today we are joined by a delegation from Kingston, Ontario, the old capital of Upper Canada. We have Ronald Watts, professor emeritus at Queen's. He's a former director of the Institute of Intergovernmental Relations and president of the International Association of Centers for Federal Studies. As we all know, our federal system needs a lot of study these days, so welcome.

We have Richard Simeon, by way of video. Mr. Simeon was also a professor of political studies at Queen's and was director of both the school of public administration and the Institute of Intergovernmental Relations. Among his many national and international achievements is his publication, *Small Worlds: Provinces and Parties in Canadian Political Life*. We always say it's a small world here on the Hill, so we're fortunate to welcome Professor Simeon.

We have with us Andrew Heard, the author of many publications, including *Canadian constitutional conventions: The marriage of law and politics*. Of course, around here lately, the two have been on trial separation. Welcome.

Without further ado, we'll begin with Mr. Watts.

Professor Ronald Watts (Professor Emeritus of Political Studies, Principal Emeritus, Institute of Intergovernmental Relations, Queen's University, As an Individual): Madam Chair, let me express my appreciation for this invitation to present my views on Bill C-20.

l wish to draw attention to two concerns about Bill C-20 in its present form. The first has to do with the legislative procedure, and the second with the lack of context in terms of the relation of the selection process to the character, functions, and role of the Senate within Parliament.

Turning to the first, the first concern relates to the use of ordinary legislation to effect what is, in substance, a constitutional amendment. The explicit objective outlined in the preamble to Bill C-20 appears to be to replace patronage in the appointment of senators by a more democratic electoral element in the process of selection. Bill C-20 indeed appears to have been very carefully crafted to create a procedure that neither contradicts nor purports legally to alter in any way the Governor General's power of appointment or the Prime Minister's right of advising the Governor General.

But it violates the spirit of the Constitution Act, 1982, which explicitly states in subsection 42(1) that an amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with subsection 38(1), and specifically lists the powers of the Senate and the method of appointing senators in paragraph 42(1)(b).

Subsection 38(1) requires not only a resolution of the Senate and House of Commons for such amendments, but resolutions in two-thirds of the provinces that have, in aggregate, at least 50% of the population of all provinces.

The purpose of this amendment procedure, outlined in subsection 38(1), is to ensure a broad consensus for amendments to the basic features of our constitutional structure. Difficult as this may make amendments, nevertheless, this requirement is fundamental to Canadian federal democracy. The effort to avoid this procedure by reforming the Senate on the sly through the devious use of ordinary legislation constitutes, in my view, an anti-constitutional process. It purports to seek a democratic objective by resorting to a non-constitutional and hence ultimately anti-democratic process.

The Supreme Court, in 1978, declared that, “To make the Senate a wholly or partially elected body would affect a fundamental feature of that body”, and the Supreme Court went on to give clear and unanimous guidance that Parliament could not unilaterally alter “the fundamental features or essential characteristics of the Senate”. No matter how democratic the objectives of Bill C-20 may be, and no matter how difficult the process of constitutional amendment may be, those objectives should be pursued by the appropriate constitutional process, rather than in the devious manner proposed by Bill C-20.

A second concern arises from the proposal in Bill C-20 to alter the appointment process for senators without relating these alterations to the broader context of the role, representative basis, functions, and powers of the Senate as a part of the parliamentary structure. Any reform of the Senate must take account of three factors that are in fact interrelated: the representation of the regions and provinces, the mode of possible election, and the powers of the second chamber.

To consider just one of these aspects—without its relation to the others—by a piece of discrete legislation is likely to create unintended consequences in the relationship between the Senate and the House of Commons. For instance, if the current powers of the Senate—equal to those of the House of Commons except for the introduction of money bills—remain for a Senate whose members gain the legitimacy of an electoral base, this could produce a serious challenge to the principle of House of Commons primacy and of cabinets responsible to it.

● (1540)

It is no accident that in virtually all federations with parliamentary institutions elsewhere, even in those parliamentary federations with relatively strong second chambers such as Australia and Germany, the constitutional powers of the second chamber have been more limited. It is only in federations with separated executives and legislatures, not parliamentary ones, such as in presidential congressional systems, that equally powerful second chambers have proved sustainable. Furthermore, of the seven federations in which all the members of the second chamber are directly elected, only Australia is parliamentary in form. In other parliamentary federations elsewhere, other than Canada—some eight of them—most rely on election by state legislators, appointment by state governments, or by a mixture of processes.

In Canada, despite the almost equal formal constitutional powers of the Senate in practice, its lack of electoral legitimacy has induced senators generally to play a secondary role on most occasions, because of the democratic legitimacy accruing to the House of Commons. That raises the question, would a Senate composed of ambitious politicians with what becomes an electoral base, and with their individual importance enhanced by a smaller chamber than the House of Commons, willingly eschew exercising their full constitutional powers? There's a very real risk that senators with an electoral mandate, even if provided indirectly by legislation but without modification of the current formal powers, would exercise those powers that they have not dared to exercise in defiance of the House of Commons when they were clearly unelected.

Here we might note our pre-Confederation history in the united Canadas. In 1856, with John A. Macdonald's support, an elected second chamber was adopted. But after eight years of its assertiveness complicating the operation of responsible government, Macdonald admitted publicly that the elective system did not, and I quote, “fully succeed in Canada as we had expected”. Consequently, in 1864 it was he who introduced into the conference at Quebec the resolution for appointed members of the Senate.

Does this mean that I support the status quo and am opposed to the reform of the Senate? Not at all. First of all, my own comparative study of some 25 federations throughout the world has convinced me of the importance of an effective federal second chamber toward making a federation effective, including parliamentary federations.

To those in Canada who would argue for abolition of the Senate, I would point out that of 25 federations in the world, only five do not have federal second chambers. These are: the United Arab Emirates; Venezuela; and three small island federations, each with less than one million in total population, of Comoros, Micronesia, and St. Kitts and Nevis. Virtually all the other federations, although in varied forms, have found a federal second chamber desirable and necessary for at least two functions: legislative review, and the inclusion of distinctively regional views in the federal decision-making process.

For information on this federal experience elsewhere, I am leaving with the clerk of the committee copies of a recent paper of mine entitled “Federal Second Chambers Compared”, which will lay out in much more detail the experience of other federations in relation to second chambers.

As far as the function of independent legislative review and related activities are concerned, such as investigative reports, the Canadian Senate has in fact, as pointed out in many of the contributions to the book edited by Serge Joyal entitled *Protecting Canadian Democracy*, provided a very useful complement to the House of Commons. Indeed, individual senators such as, to name a few, Hugh Segal, Lowell Murray, and Michael Kirby have made a superb contribution to the work of Parliament.

● (1545)

But as to the second major function of second chambers in federations generally—that is, providing a channel for the involvement of distinctly regional viewpoints in policy-making within institutions at the federal level—the Canadian Senate's lack of political legitimacy has meant that by comparison with other federations it has fallen short of the functions performed by second chambers in most federations. These are the functions that Canadian political scientists have come to refer to as intra-state federalism.

That these functions are important was recognized by the Canadian Supreme Court when it declared, in 1978, and I quote:

> The Senate has a vital role as an institution forming part of the federal system....

It went on to say:

> Thus, the body which had been created as a means of protecting sectional and provincial interests was made a participant in this legislative process.

Given the current weakness of the Senate in performing this federal role, Senate reform, in my view, is important and urgent. Here I would draw attention to the paper by Tom Kent entitled “Senate Reform as a Risk to Take, Urgently” in the “Special Working Paper Series on Senate Reform 2007-2008” of the Institute of Intergovernmental Relations at Queen's University.

Reform is needed to make the federal coherence of Canada more effective. As one of the most decentralized federations in the world, we not only need provincial autonomy, but federal institutions that bring provincial views more inclusively into federal decision-making rather than depending solely on the processes of executive federalism.

To achieve this reform may require elections to the Senate by a different electoral process than that of the House of Commons, but also a more rational basis of representing regional and provincial interests and an adjustment of the Senate's constitutional powers to avoid deadlocks. One possibility is along the lines proposed in the Charlottetown agreement. This is not the place to go into that prescriptive detail.

Reform requires looking not only at the method of selecting senators, but relating this to the role, functions, and powers of the Senate within Parliament. While such full reform is urgent for the welfare of Canada as a federation, it will require constitutional amendment, difficult as that may be, to redefine not only the method of electing senators but also the basis of representation and powers of the Senate.

Piecemeal reform by stealth, unrelated to the broader functions of the Senate, such as proposed by Bill C-20, not only does not go far enough, but it is even risky and dangerous insofar as it does not take into account its likely effect upon the relative role and powers of the Senate.

Thank you.

The Chair: Thank you, Mr. Watts.

Mr. Heard, you have the floor.

[*Translation*]

Prof. Andrew Heard (Associate Professor, Department of Political Science, Simon Fraser University, As an Individual): Thank you, Madam Chair.

First of all, I would like to thank you for inviting me. It is a pleasure and an honour to be here today.

● (1550)

[*English*]

Bill C-20 represents a novel attempt at Senate reform that deserves substantial attention. Unfortunately, unlike many bills before Parliament, serious questions arise about whether this piece of legislation is within the legislative powers of Parliament. On balance, I'm persuaded by the argument that Bill C-20 is unconstitutional.

It can be readily agreed that Bill C-20 does not alter any provisions of the Constitution Act. Bill C-20 directly conflicts, however, with the Constitution Act, 1867, in specific details relating to the qualification of senators. These conflicts relate to citizenship, residency, and financial assets. While these conflicts are substantive, they could and should be easily corrected.

On the broader details of the election of nominees, however, there are no substantial conflicts with the wording of the relevant constitutional provisions. However, the constitutional validity of legislation hinges on much more than the absence of manifest conflicts between the wording of an act and that of the Constitution. Fatal conflicts can also involve a clash with judicial interpretations of the substantive content of constitutional provisions.

Potential problems for Bill C-20 arise principally from the Supreme Court of Canada's opinion in the upper house reference. The court held unanimously that Parliament could not alter any "essential characteristics" of the Senate, and neither could Parliament legislate direct elections for the Senate.

When the Supreme Court examined the issues in the upper house reference, the relevant powers of Parliament were then found in subsection 91(1) of the Constitution Act, 1867. This section declared that Parliament could amend the Constitution of Canada with five exceptions. Read literally, subsection 91(1) appeared at the time to have granted power to Parliament to alter or abolish the Senate, because the Senate is not mentioned in the five exceptions to Parliament's unilateral powers. Nevertheless, the court ruled that the essential characteristics of the Senate were beyond the powers of Parliament.

Several legal authorities have argued that the repeal of subsection 91(1) and its replacement by section 44 of the Constitution Act, 1982, have rendered the upper house reference moot. It is not clear, however, why this should be so. The essential characteristics referred to by the court that required protection were not mentioned in subsection 91(1). Indeed, they were read into or drawn from the preamble to the Constitution Act, 1867. These characteristics were not changed by the enactment of the Constitution Act, 1982.

Furthermore, the limitations on Parliament's power to legislate on the Senate were read into subsection 91(1) by the court when no such restrictions were present. The new unilateral amending powers of Parliament found in section 44 now contain several explicit prohibitions against Parliament acting unilaterally to pass amendments relating to the Senate, including the method of selecting senators mentioned in paragraph 42(1)(b). Rather than consigning the upper house reference to the dustbin, the constitutional changes in 1982 appear to actually reinforce that decision.

The ultimate question that must be resolved is whether the indirect nature of the popular consultation process does in fact save Bill C-20. Clearly, legislation to institute direct elections would run afoul of the upper house reference and paragraph 92(1)(b) of the Constitution Act, 1982.

The answer to this question hinges on how literal an approach one takes to constitutional jurisprudence. Some argue that Bill C-20 is constitutional because of the absence of a direct conflict with the legal powers and discretion of the Governor General in sections 24 and 32 of the Constitution Act, 1867. However, there is considerable evidence that the Supreme Court of Canada would not take such a literal, black-letter approach. The history of Bill C-20 and its predecessor, C-43, clearly shows that the pith and substance of the bill is to achieve an elected Senate.

When trying to establish the true nature of legislation, the courts often ask what deficiency the legislature is trying to remedy. In the case of Bill C-20, numerous government statements plainly declare that the problem they wish to address is the unelected nature of the Senate.

● (1555)

It is the government's intention that only those individuals chosen by the electorate will take seats in the Senate. In essence, the remedy provided by Bill C-20 could not be any different than if direct elections were instituted.

Bill C-20 does contain legal discretion on two key matters, which supporters of the measures say are crucial to its constitutionality. There is no obligation—no legal obligation on a government—to hold an election for Senate nominees, and there is no legal obligation to appoint any nominee once they have been declared winners. One can point to the history of senatorial elections in Alberta for evidence that future governments might exercise discretion not to recommend that the Governor General select elected nominees for the Senate. Jean Chrétien and Paul Martin ignored the winners of Alberta's senatorial elections for eight Senate appointments between 1996 and 2005.

However, Prime Ministers may well not be able to ignore Bill C-20 once enacted. First of all, it makes a tremendous difference that this election process would be enacted by the Parliament of Canada and not by a provincial legislature venturing out of its legislative domain. Secondly, a question arises as to how the courts would react to a suit brought by a nominee elected under the Bill C-20 process but overlooked for Senate appointment. Clearly, in my view, the courts would not issue a writ of mandamus requiring the Governor General to appoint the nominee; there simply is no legal obligation under Bill C-20 to enforce.

However, there is every likelihood that the courts would not leave the matter there. In the Quebec secession reference, the Supreme Court could have simply stated that Quebec does not have the right to secession under either Canadian or international law. Instead, the court went on to declare that the Government of Canada would have a moral obligation to negotiate separation if a clear majority of Quebec voters had agreed to separation in a clearly worded referendum. In the patriation reference, the Supreme Court also could have simply said that the federal government can, in law, unilaterally request changes to the Constitution that affect provincial powers, but it went on to declare that substantial provincial consent was required by convention. Thus it is highly probably that the Supreme Court of Canada would also comment on the government's political obligations to respect the people's wishes under the Bill C-20 regime.

It would be all but impossible for a government to ignore the clear wishes of the people in a nominee election process conducted with all the seriousness and substance of a regular election for members of the House of Commons. If Bill C-20 were enacted, it would not take long for a constitutional convention to be established that prime ministers should only recommend elected nominees for selection to the Senate. The democratic principle would impose a moral and political obligation from the outset. In the end, then, the theoretical discretion left to the Prime Minister and the Governor General in Bill C-20 may quickly prove to be a mirage.

In conclusion, for all intents and purposes, Bill C-20 creates an electoral process to transform the Senate from an appointed body into an elected chamber. Bill C-20 represents an attempt to radically alter the essential characteristics of the Senate as it was created and has operated since 1867. The chosen method for this drastic reformulation is also intended to exclude the provincial governments, whose consent would be required if this reform were proposed through a formal amendment. The Senate was a foundational institution in Confederation, over which considerable debate was expended in order to create this country.

In 1982, the first ministers agreed that amendments to the powers and methods of selecting senators should only be done through the general amending formula. As such, the Senate is not something for the national Parliament to radically reform without the consent of the provinces.

Thank you.

The Chair: Thank you, Mr. Heard.

We'll now turn to Mr. Simeon, through the wonders of modern science.

Mr. Simeon.

Professor Richard Simeon (Professor, University of Toronto and Harvard University, As an Individual): Thank you very much, Madam Chair. It's certainly a privilege to be able to testify before this committee, and I thank you very much for the opportunity. I also apologize to you and to my colleagues present that the press of commitments means I have to talk to you via video.

I confess that I am deeply ambivalent about Bill C-20 as well and about how to respond to it. I share most of the concerns that have been raised by my colleagues, but I think I do perhaps come down at a slightly different point.

There is much to be said in favour of Bill C-20, I think. After decades of frustration in our debates about Senate reform, it does break a logjam and opens the possibility of real change without plunging us into yet another round of failed constitutional negotiations. It does bring an element of real democracy into the process of selecting senators, thus potentially making the Senate more representative, responsive, and accountable.

It promises a check on the excessive concentration of the power of appointment in the hands of the Prime Minister—a major part of the democratic deficit in Canada and the fundamental reason for the weakness of the Senate as an effective body representing regional and provincial interests in central institutions.

It creates the possibility of a Senate that is perhaps more effectively able to represent provincial voices in the federal Parliament. Professor Watts referred to Tom Kent's argument, and I think I agree with him that the legitimacy of the central government will be enhanced by election, and that will place some sort of potential check on the ability of premiers to have a monopoly of representing the provincial views on national issues. I think that would make for a healthy federalism.

So there are some good things to be said here, but of course I have some real doubts about Bill C-20 as well, and they are partly procedural and partly substantive.

First, on procedure, there are several elements here. The two reforms under discussion, consultative elections and a fixed term for senators, are a very limited second best to more fundamental reform. I realize the scope of the bills is sharply limited by the government's desire to find a way to make changes by Parliament alone, rather than through formal constitutional amendment.

But the cost of that is that a full review of the Senate, as Professor Watts said—one that would include the roles and powers of the Senate and the allocation of seats across provinces—will not take place. And yet all these factors are linked and need to work together. For example, do we want to enhance the power of the Senate, as this bill likely does, without addressing the gross underrepresentation of western provinces in Senate seats?

Second, we have not had a full public discussion about Senate reform here. There's been virtually no public involvement in this process, even though over the years many imaginative proposals for different kinds of reform of the Senate have been made.

In addition, as has been pointed out, the Senate is a vital element in federalism, so the lack of intergovernmental consultation here is a problem. A number of provinces, including a unanimous Quebec legislature, have objected to the bill. Several provinces already have or are considering their own legislation to generate potential Senate nominees. Indeed, I think that suggests an interesting alternative avenue that we might explore.

What if all provinces were to hold elections for nominees, the results of which would be submitted to the Prime Minister? He would retain his constitutional discretion over appointments and could ignore the result if he felt the provincial processes were undemocratic, but it seems to me a way to achieve a lot of what's intended here without raising quite the same constitutional difficulty that this bill does.

The federalism perspective casts another light on the issue of the constitutionality of Bill C-20. I do defer to those legal experts, such as Peter Hogg and Patrick Monahan, who have told you that the bill is drafted narrowly enough that formal amendment is not necessary, but even they admit we could easily find ourselves in a constitutional grey area, especially if the bill is strengthened.

But the reason we require the amendment for major change in the Senate is that the interests of provinces are so deeply engaged. Whether or not this bill is constitutional in the large “C” sense of that word, it does suggest, as has been pointed out, a new set of rules that could in the long run significantly affect the role and powers of the Senate and thus would be a change in our operating or conventional Constitution, with potentially important implications for federalism.

● (1600)

So, yes, there are real procedural problems.

Next I'll make some observations on the substance of the bill.

Perhaps the most troubling aspect for me is its uncertain character: the government may or may not decide to hold a consultative election; it may or may not decide to appoint those who have won the election; elections may be held in some provinces and not in others.

It seems to me that if we are to have Senate elections, let's do it. They should take place everywhere. The results should be binding, and so on. It would be a major confusion for citizens if, whenever there was a vacancy, they were unsure about whether there would be a vote and what its effects would be. It also seems odd that we would legislate the complex and detailed rules set out in the legislation and mobilize all the resources of Elections Canada to manage an election whose status and effect are unclear.

Second, I raise the question of when senatorial elections would be held. The bill contemplates holding them at the time of either a federal or a provincial election. The Chief Electoral Officer has argued persuasively that coordinating with provincial election law could be very complicated, so it's most likely that senatorial elections would coincide with federal elections, but there are problems with that: the likelihood is that the Senate election would be lost or drowned in the broader focus on the general election; Senate election results would be driven by the preoccupations of the national parties; and it would be difficult to keep funding and other activities of the Senate apart from general elections.

It would be far better, I believe, to conduct Senate elections separately, on fixed dates. Perhaps one day every two years could be set aside as Senate election day, with elections held for all vacant Senate seats on that day. That would make it simpler to administer, it would reduce partisanship, at least somewhat, and it would provide provincial electorates with a much greater ability to reflect on how they wish their interests to be represented in Ottawa.

I also have a word or two about the single transferable vote system that is provided here, but I don't want to say much about that because I'm running out of time. Let me just say that if we're going to introduce two major sets of changes—a change to the electoral system and fundamental changes to the Senate—then we should realize that an enormous public education process is necessary here. We've had two failed referendums about electoral reform in Ontario and B.C., and that's partly because in neither case was there proper provision for an educational process.

There are a number of other issues. The funding provisions are unclear, and campaigning will be expensive, so it's unclear why political parties can contribute services but not direct funding, or why there are no direct limits on direct contributions to candidates, which is different from other elections. And should there not be some form of public subsidy for senatorial election candidates? These kinds of questions all have a bearing on whether and how much we want Senate elections to be inoculated against party influence, and indeed how seriously we take these elections. Much clarification is necessary.

The most important question is, of course, what the effects of the changes would be in the very long run. Political scientists and constitutional designers have a very poor track record in predicting the consequences of institutional change, but clearly, as has been said, this is pretty fundamental. Once the system is in place and accepted, the Senate would have far more legitimacy, and hence influence, than it has at present. It would be a significant alternative centre of power, especially since its powers would remain intact. We might say that the House of Commons would remain the confidence House, with the power to make and unmake governments, but that's a convention, and it could easily change with a more legitimate Senate. However, I'm not sure that these doubts and uncertainties about the long-term future should stop us from doing something now to get this ball rolling.

Let me conclude by saying that I do not love this bill. I see it as an incremental ad hoc effort whose main outlines are shaped by the desire to make some change without falling into the pit of constitutional change. One certainly might argue that we should have the larger debate, even if it does take a long time; after all, there's no outcry in the streets for urgent reform, no crisis calling out for action, and so on.

● (1605)

Nevertheless, on balance, I would say, despite my misgivings and my preference for an alternative route, let us make this change but with a few alterations. I would like to see the following happen: that the bill be strengthened in some of the ways I've already suggested; that elections be held in all provinces, for all senatorial appointments; that they be honoured by the Prime Minister; and that there be an election day, and so on.

I realize that such strengthening might well tip this over into a change that does require formal amendment. Perhaps the best way would be to strengthen the bill in the Commons; seek a Supreme Court reference on its constitutionality; and see where it does or it does not transgress the amendment procedures. Then the court would be able to clarify for the House the scope and limits of what Parliament can do unilaterally and thus guide the final debate on this bill.

Thank you very much, Madam Chair.

● (1610)

The Chair: Thank you, Mr. Simeon.

I can see that all your interventions have provoked many questions.

We'll begin our first seven-minute round with Madame Folco.

[*Translation*]

Ms. Raymonde Folco (Laval—Les Îles, Lib.): Thank you, Madam Chair.

I would like to thank all three of you for being here. Your knowledge of and insight into the Constitution and the bill we are considering today are distinguished indeed.

I have two major questions to ask you. The first deals with executive power in relation to the appointment of the people winning the elections. Nowhere in Bill C-20 does it say that the Prime Minister is required to appoint the people who have been elected by popular vote. He may, at his discretion, submit the list to the Governor General. So he could choose half of the people on the list, or more, or none, or give the Governor General a list of people who have not been elected by popular vote.

This bill does not affect the Constitution and could therefore be passed like an ordinary bill. Why does it not give more details about the Prime Minister's responsibility vis-à-vis that list? That is my first question.

My second question deals with the power of the provinces. I think that it was Mr. Heard who told us, and let me read his last sentence:

[*English*]

...the Senate is not something for the national Parliament to radically reform without the consent of the provinces."

[*Translation*]

However, we know that the way in which senators currently represent their provinces is not the same in all provinces of Canada. For example, in Quebec, senators represent a specific region, which is not the case in the other provinces. How can we change the role, the appointment process and the responsibilities of senators without asking the Government of Quebec for its position on the matter?

The questions go to whichever of the three witnesses wants to reply.

[*English*]

The Chair: Mr. Watts or perhaps Mr. Heard, would you like to begin answering?

Mr. Heard.

Prof. Andrew Heard: There are a number of quite complicated issues mixed up in your questions there. Excuse me if I just focus on a couple of them, perhaps.

There's the issue of why the bill doesn't deal specifically with the Prime Minister's role and discretion in recommending nominees. I think the Prime Minister is left out of this bill because the Prime Minister is not mentioned in law with respect to Senate appointments to begin with. In order to keep this bill arguably constitutional, the less said about the Prime Minister the better. From a drafting point of view, I would suspect that's why the Prime Minister is not mentioned and why there is no discussion about the Prime Minister's requirement, or not, to recommend nominees who haven't been elected.

In the second set of questions, you asked about the role of representation of a senator with respect to his or her province and how that differs from one province to another. You mentioned the specific and particular role of representation that Quebec senators have because they represent one of 24 specific districts within the province. That particularity poses great difficulties for the drafting of this bill, on the one hand, and also questions about how this bill has come to be proposed and this change suggested without the agreement of the provincial government, particularly your interest, the Province of Quebec.

I've been trying to think how to draft a change to this bill that would accommodate the specific district representation of Quebec senators. I'm not sure how it can be done. The simplest would be to change the section of the bill that talks about the qualification for being a candidate, just to say that candidates should be qualified under section 26 of the Constitution Act, 1867, and then just say that if you're qualified under that, you're qualified under this.

But that doesn't get over the particular problem of districting in Quebec, because one could be qualified to represent one district in Quebec but that may not be the district in which a vacancy can appear. However, it may be a practical solution, because my understanding is that appointments to the Senate from Quebec often involve senators purchasing property in a district they have had no specific tie to beforehand. So it may be sufficient to say that you are qualified under section 26 as it is now, you're qualified to represent one district, but if you're appointed to represent another district and you hurry off and buy some real estate in that district, you're qualified.

So I think from a technical point of view, an amendment is in fact needed to ensure that candidates in the Senate elections are qualified to sit in the Senate. Right now, you can run in this election and not be qualified to sit in the Senate. In making those changes, we can correct that particular problem for Quebec.

The final political issue is that this change is being suggested and proposed without the agreement of the Province of Quebec. In fact, the Province of Quebec has stated quite clearly that they are opposed to this bill, and Bill C-19 as well.

I think that is wrong constitutionally. I think an agreement was made in 1982 that didn't include the Quebec government at the time, but the rest of the provincial governments agreed that if substantive changes were made to the Senate, they should be done with the agreement of provincial governments. So this is one reason I believe the government is proceeding with the wrong process to achieve what may otherwise be an admirable goal.

● (1615)

The Chair: Thank you, Mr. Heard.

Do you want to give an opportunity to any of the others?

Ms. Raymonde Folco: That's what I was going to ask, if Mr. Watts or Mr. Simeon wished to add to this.

The Chair: Mr. Watts.

Prof. Ronald Watts: I will be brief on this. I don't have anything to add on the second question, other than the fact that it does point to one of the reasons we have the process of constitutional amendment that we do, requiring provincial participation in the process.

With regard to the first, I'm assuming that the reason it's not necessary or has not been put into the bill to state whether the Prime Minister has obligations or not is simply the assumption that once you have the electoral process operating, public pressure will force the Prime Minister to follow the expression of public will. In other words, the assumption, I think, in Bill C-20 as it's currently worded, for all the criticisms I make, is that public pressure will create the convention that a Prime Minister will always have to follow whoever is nominated by the consultative process.

The Chair: Mr. Simeon.

● (1620)

Prof. Richard Simeon: I agree with that, but I still think it leaves the bill with an ambiguity that should be resolved. I would like to take away that discretion from the Prime Minister. This would make it a cleaner and sharper bill. Of course, if we wrote into the law that the Senate election result was binding, then it would simply be a matter of the Governor General's taking note of the result and there would be no necessary role for the Prime Minister.

The Chair: Thank you.

Your time has expired.

[*Translation*]

Mr. Paquette, the floor is yours.

Mr. Pierre Paquette (Joliette, BQ): Thank you, Madam Chair.

Thank you to our three presenters, it was very interesting. As the weeks go by, we are becoming real... no, that is an exaggeration: we are beginning to understand a little about constitutional law.

When he appeared before the committee, Professor Peter Hogg supported the government's contention—it was the government house leader who came here to introduce the bill—that the optional nature of the Prime Minister's choice vis-à-vis the consultation on the senators means that the Constitution is not affected.

All three of you can answer, it will be interesting. Is the optional nature the key in constitutional terms? Has the government not sought to do indirectly what, constitutionally, it cannot do directly? I would also like you to revisit the matter of constitutional conventions in this context. Are we in the process of creating an elected Senate by any other name, as some of you mentioned in your presentations?

[*English*]

The Chair: I believe his question is directed to both of you.

Mr. Watts.

Prof. Ronald Watts: Your statement is exactly what I've been trying to argue— that Bill C-20 is an example of Parliament's trying to do indirectly what it can't do directly. My argument is that if an institution as fundamental as the Senate is going to be altered, we ought to do it directly. I think it needs to be done, but I think it ought to be done directly, difficult as that may be. Richard is right in pointing to the difficulties, but just because it's difficult doesn't mean we should be devious about it. The difficulties are inserted in the amendment process of the Constitution to ensure a broad consensus in support of amendment. That's why it's important to have the provinces concur. That's why it's important to have widespread public discussion.

My concern is not with the objective of the bill, but with the means. And I don't think the objective justifies the means.

The Chair: Mr. Heard.

Prof. Andrew Heard: In a Senate committee, Professor Hogg and Professor Monahan have both argued that the existence of discretion for the Prime Minister and the Governor General are determinative of the constitutionality of this measure.

I disagree. I believe the court will concern itself with more than the lack of binding on the discretion of the Governor General. It will be concerned with the effects of the process set out here, as well as with the intent of the process. Once the process is under way and elected senators are included in the chamber, the powers of the Senate will change dramatically. There's no doubt that the intention is to populate the Senate with elected senators. The effects of this would be profound. The Supreme Court would look at the effects of the legislation and not simply the black-letter relationship between this process and a process that's detailed in the constitutional documents.

You talk about the convention. I think there would be a convention, and only the elected nominees would be appointed. I have argued that there would quickly be a convention in respect of term limits for the House of Commons. This is what the public understands and expects. A law passed by Parliament, it is thought, should be followed. So I think there would quickly be a convention so that the effects of this legislation would soon be very different from the bare legal framework it describes. Rather than simply consultative, it would become determinative.

● (1625)

The Chair: I think Mr. Simeon wants to add something.

Prof. Richard Simeon: Thank you, Madam Chair.

I read the testimonies of Professor Hogg and Professor Gélinas on this point quite skeptically. They persuaded me in the end that this was probably on the right side of the Constitution at the moment. But they both pointed out that to the extent this bill becomes more explicit and reduces the discretion of the Prime Minister—as indeed I would wish it to do—we move into a grey area where we get closer and closer, if not actually over the line, into an area where we absolutely need a constitutional amendment.

That's why I ended my presentation by suggesting that the committee and the House make this a better bill. Then—as the Senate committee also suggested—before it's finally passed, refer it to the Supreme Court as a reference. The Supreme Court can clarify this issue, about which there's considerable debate at the moment, of exactly where Parliament is able to act alone to improve the Senate and where it must have provincial consent.

The Chair: Thank you, Mr. Simeon.

Monsieur Paquette.

[*Translation*]

Mr. Pierre Paquette: Thank you.

The possibility has been raised that the regions of Canada could use the legislative provision that was passed after the Quebec referendum of 1995, that is, the right of veto. Quebec, which has already come out squarely against Bill C-20, would have the right to veto it because of the legislation passed after the 1995 referendum.

What do you think?

[*English*]

Prof. Andrew Heard: Are you asking whether the regional veto legislation would be followed?

[*Translation*]

Mr. Pierre Paquette: I am not talking about the right of veto that we lost in 1981-1982. Professor Mendes told us that a bill was passed in 1995 giving a right of veto to the five regions of Canada. In his view, the Government of Quebec could use that right of veto to block the bill we are presently studying.

[*English*]

Prof. Andrew Heard: That veto right would only apply to the process for a formal amendment to the Constitution. I don't think in this context the Quebec government could try to exercise that veto. It could have a reference question on whether or not there was a convention that required provincial consent for a change like this. We have precedent from the patriation period, where the Supreme Court was quite willing to discuss the content of constitutional conventions relating to federal institutions in the Constitution.

The Chair: We'll proceed to Mr. Comartin.

Mr. Joe Comartin (Windsor—Tecumseh, NDP): Thank you, Madam Chair. I thank the professors for being here and Professor Simeon for being here by remote.

Professor Heard, I'd like to go back to the constitutional convention—and, Professor Simeon, perhaps you could also comment on this. We don't have a constitutional convention, as I remember from constitutional law, unless we actually go through a process and begin to use the procedure—in this case, the consultation process. So if we, as Professor Simeon is recommending, had a reference to the Supreme Court, there would be no convention for them to consider. Is that correct?

Prof. Andrew Heard: They would not be able to talk about a convention per se, in the sense that the traditional view of convention is that you need some precedent as well as discussion in principle. So you need a constitutional principle that is being protected, some statement by the actors that they feel bound by a rule, and some precedent. That's the formula the Supreme Court looked at in 1980.

I think they would carry on and examine the principle involved and any statements from politicians about whether they would feel bound by this in advance. The Prime Minister has quite clearly indicated he would follow this process. That's quite an important statement in setting the foundation for a convention.

● (1630)

Mr. Joe Comartin: There's no historical precedent in Canadian constitutional law where constitutional convention has been found before it has actually been a practice and utilized for some time.

Prof. Andrew Heard: There is an example when the prime ministers of Great Britain and the dominions got together during the imperial conferences, where they came to a number of agreements about how Britain would interact with the dominions. They signed some formal agreements about how those processes would play out. One of them was that dominion ministers would be the ones to advise the King on who would be nominated and appointed as governors general in the dominion. The first precedent came when the Irish did that, but it was quite clear that everyone knew beforehand that's how it should be done.

So I have argued in previous work that you may not necessarily already need a precedent for there to be an obligation that exists. Those imperial conferences in the 1920s created a set of conventions where it was clearly understood that obligations occurred before the first formal uses of them.

Mr. Joe Comartin: We're getting into a challenge here. But at that point we were accepting the constitutional conventions that were in existence elsewhere within the British empire.

Prof. Andrew Heard: These agreements transformed those conventions, because prior to these agreements the conventions were that the British ministers would advise the King on whom to appoint as a governor general, and they wouldn't necessarily even consult with the dominion governments. So this was quite a radical change, and a step towards our independence, to say that dominion ministers would recommend the new governors general to the King.

The Chair: Mr. Simeon, I see that you're writing. Would you like to add something?

Prof. Richard Simeon: Yes, I'd like to come in on this, if I could, Madame.

First of all, I think we should note that how a convention solidifies into constitutional law is one of the great mysteries of constitutional law. I think there are different ways in which that can come about.

The most obvious way, as has been mentioned already, is through history and precedent, that this is the way it's been done, and been done over again, which then takes on a certain legitimacy and expectation on the part of all political actors. That's what the Supreme Court relied on in the patriation reference, saying that under black-letter law, yes, Ottawa, you can do it, but under convention, no, because you must have substantial provincial consent.

But the Supreme Court, in the Quebec secession reference, also displayed a second basis for developing a convention. That was not based on history and precedent but on what the Supreme Court said were the fundamental values underpinning Canadian federalism. That's what made it a constitutional convention that Ottawa would have to negotiate with Quebec.

Thirdly, there can be a catalytic event, which I think can establish a convention very quickly. Arguably, the Charlottetown reference is such an example. Some people—and I think I would be one of them—would argue that even though we've only done that once, we will never again make a substantial constitutional change without popular consent.

So there are many ways to skin the conventional cat.

The Chair: Thank you, Mr. Simeon.

Mr. Watts, would you like to enter into the fray here?

Prof. Ronald Watts: No, I'll stand with what my colleagues have said.

The Chair: Thank you very much.

Mr. Comartin, you still have some time.

Mr. Joe Comartin: To pursue this further with all three of you, if there isn't a reference, do any of you believe there won't be a court challenge, either from the Province of Quebec or one of the other provinces, or perhaps from one of the political parties?

Prof. Ronald Watts: To start, I would certainly be surprised if there were not.

Prof. Andrew Heard: I agree. I expect there would be too.

Mr. Joe Comartin: So going back to Professor Simeon's recommendation, the reference should flow immediately from the Supreme Court, rather than wait for the litigation to come from somewhere else.

Prof. Ronald Watts: I think that would be the wiser course of action—although one might consider what Richard Simeon has suggested and look first at what modifications you might make to the bill before it's referred. But ultimately I think it would be wiser to refer it first, rather than waiting for it to be challenged.

● (1635)

The Chair: Thank you.

Mr. Simeon.

Prof. Richard Simeon: I absolutely agree with that.

The Chair: Thank you.

You're still under time. You have one minute.

Mr. Joe Comartin: I'll pass for now.

Thank you, Madam Chair.

The Chair: Thank you.

Mr. Reid.

Mr. Scott Reid (Lanark—Frontenac—Lennox and Addington, CPC): Thank you, Madam Chair.

Pursuing the discussion of conventions a little further, my understanding of a convention—and I am prepared to be corrected if I have understood them incorrectly—is that fundamentally what distinguishes a convention from any other principle is that it is enforceable by public opinion. If public opinion is willing to tolerate a divergence from what had appeared to be a convention, then in fact it wasn't actually a convention, if public opinion is not willing to accept that.

I don't mean public opinion in the sense of public opinion polls; I mean public opinion as expressed at a more fundamental level—for example, at the next election. Then it suggests that the convention either exists or doesn't exist based on that. Do you understand convention differently than that, or do you understand it the same way I do?

Prof. Andrew Heard: I think there is quite a complex role that public opinion plays in conventions. I wouldn't agree with a blanket statement to that extent. I think public opinion is sometimes very difficult to know on a specific event, and particularly in reference to an election—whether an election either casts doubt on a past government's actions or legitimizes them.

One of the problems we have with our electoral process is that we have no idea, and it is very difficult to know, if there is majority support for a particular action or against a particular action, because governments are elected to majority position without a majority vote. So it's very difficult to interpret raw election statistics as to whether or not they support what has or has not happened.

The other thing about conventions is that, I would say, there are times when governments get away with something, and in hindsight and over time it's quite clear that a convention was broken. Whether or not there was a public outcry at the time, the consensus afterwards is that the government should not have done something or the government should have done something. Public opinion at a particular time is informative for us to try to determine whether a convention exists, but it's not determinative in and of itself.

Mr. Scott Reid: Professor Heard, I had actually put the question in a general sense to all the witnesses, but I'm glad you answered it, because I wanted to ask you the following question.

I wasn't sure if you were suggesting that the creation of a convention or a law that will likely have the effect of creating a convention is a basis on which one would judge the constitutionality or unconstitutionality of the law. That is, if it aims to create a convention or has the practical effect of creating a convention, this in and of itself would be a basis for saying it is unconstitutional—where the law might otherwise not be unconstitutional.

Prof. Andrew Heard: The courts have at times used conventions to understand the effects of the legislation or understand unwritten aspects of legislation. They have, at times, used convention to enforce the relationship between the cabinet and the House of Commons, so that you can deal with someone as a cabinet minister through legislation that deals with them as a member of the House of Commons because of the convention of responsible government.

They have, at times, used convention to understand and make judgments about the constitutionality of legislation. There are limits to what they do with that, definitely. What they are concerned with is the effect of legislation to a significant extent, and where conventions can help understand the effects of the legislation, then they will bring them into consideration.

Mr. Scott Reid: I hope you understand why I'm asking these questions, because the argument has been in the air.

I don't know if anybody has formulated it overtly, but the degree to which these elections are binding, or become de facto binding, seems to be viewed by some of the people who have appeared here as witnesses, and in some of the questions, as being a consideration as to whether or not the law winds up becoming unconstitutional. This is despite the fact that nobody would make the argument that the royal prerogative, in the purest black-letter sense, is being violated.

Clearly, on paper at least, the crown retains its absolute discretion, in much the same way that the crown retains the discretion it has failed to exercise for 300 years to refuse to sign laws into effect after both Houses of Parliament have passed them.

I'm trying to get clarity on that point, simply because that could affect how one were to deal with the legislation, how one were to try to amend it in order to make it constitutional, etc. I guess I've made that more as a comment than a question, but I suppose that would probably invite some comment from you, so I might invite that.

● (1640)

The Chair: Mr. Watts.

Prof. Ronald Watts: I'm inclined in a situation like this to almost come with a counter-question, that is, if one judges from the preamble of the bill that the essential objective is to democratize the process, why do we defend it by arguing that the democratic aspects can be ignored? We're talking out of two sides of our mouths here. We say that the whole idea is to democratize the process, but we defend its constitutionality by saying, “But of course we don't have to be democratic in the way we use it”. I just don't understand that double-talk.

Mr. Scott Reid: I suppose the answer to that is, there is a very strong popular will to have a more democratic Senate and there is a constitutional injunction against having a fully democratic Senate. That would be the answer to your question, Professor Watts.

Prof. Ronald Watts: My response would be, well, then, change the Constitution. The Constitution is not sacrosanct. Yes, we've had problems in the last three, four decades, in changing the Constitution, but in a discrete, particular area like this, I think the Constitution is not immutable. It's meant to be adjusted to fit the developments of the country. I would argue that's where the change should be made.

Mr. Scott Reid: I appreciate that, and I just want to make the point here that you have switched from making a constitutional argument to making a political argument, and that is that it is desirable to change the Constitution. We ought not to regard it as sacrosanct; we ought to be willing to open it up. These are all political arguments. They are not, as far as I can tell, constitutional arguments.

I do think for the purpose of trying to go through the exercise that this committee has to go through, it will be important for us to distinguish between the political argument as to whether this legislation is desirable and the constitutional argument as to whether this bill is constitutionally permissible.

Prof. Ronald Watts: By all means, make the distinction, but the constitutionality is not the only issue here. It's the desirability that is expressed in the preamble. It's a political bill; it's not just a constitutional bill.

The Chair: I don't want to neglect Mr. Simeon.

Would you like to add to this debate?

Prof. Richard Simeon: Can I just add something to that?

I agree completely with my colleagues that very quickly, once this bill is passed, it would become politically very, very difficult for the Prime Minister not to accept the result of an election. But I think at the beginning the sanction for that would be political. It would be a convention in the sense that it was expected by most political actors, and the Prime Minister would pay a price if he didn't do it. But I think it would take a certain amount of time—and for that to happen repeatedly—before the Supreme Court would use convention in the harder sense that it has solidified into a judicially enforceable convention, that it has become part of our Constitution. My guess is the Supreme Court would take a while before they said it's become a convention in that second sense.

The Chair: Thank you.

Mr. Savage, the next round is five minutes.

Mr. Michael Savage (Dartmouth—Cole Harbour, Lib.): Thank you very much, Madam Chair.

Thank you to the speakers. This is not my normal committee, but I'm very interested to be here, and I appreciate the fact that you brought your learning to us.

Mr. Watts, as a student of history, I was interested to learn about John A. Macdonald and the fact that in 1864 he came to the belief that elected senators weren't a good idea and that an appointed chamber would be better.

Coming from Atlantic Canada as I do—Nova Scotia—the Senate has played an important role for Atlantic Canada. As members know, when Confederation happened there were 24 members from Upper Canada, 24 members from Lower Canada, 24 members from the two provinces of maritime Canada, which entered Confederation then. I think when Prince Edward Island joined in 1873—the 1870s—they fit into the 24 from the Maritimes. So that regional component has been important to maritime Canada.

Looking at it in Nova Scotia, it's not quite like Quebec in that you have the distinct 24 regions, but, for example, we've always had an Acadian senator from Nova Scotia. We had African Nova Scotian senators before we had African Nova Scotian members of Parliament. We had some very great champions in the whole area of society in Nova Scotia, cultural society. We had poverty advocate Sister Peggy Butts, appointed by former Prime Minister Chrétien in the 1990s. In my view, they've all brought some great honour to the Senate and to the parliamentary process in Canada.

A number of people have expressed to me a concern about the Senate. Is it worthwhile? I'm going to say that having been here for a few years now, I've seen the work you referred to, from Senator Segal to Senator MacDonald, to the work that Senator Kirby did on a couple of major commissions. I know a lot of good work is done in the Senate. Today I introduced a private member's bill from the Senate into the House, which has passed the Senate and come to the House of Commons. I must tell Canadians that quite a bit of work is done by the Senate.

Even as a Nova Scotian I would say the fact that we have more senators than British Columbia or Alberta doesn't make sense to me. We need to make some changes in the Senate. I think anybody would accept the fact that we need to make changes. Each of the four founding provinces of Canada, if I can use that term, the original four—Quebec, Ontario, Nova Scotia, and New Brunswick—have objected to this legislation, and we've talked a lot about the process here.

My only question to you is simply, would there not be a better way? Would this not have been something better started? You've referred to it as a political bill, and in essence everything that comes to the House of Commons is political, but this certainly seems to be more politically based than policy based. Is there not a better method of consultation, perhaps a first ministers' conference, to start the ball rolling, to decide on what kind of reform should be done with the Senate?

I'll ask anybody who wants to answer that.

● (1645)

Prof. Ronald Watts: I'll fire off to start with, but let my colleagues go on.

Just briefly, that's at the heart of my plea about the second point I was making in saying that my concern about this bill is that it deals with one aspect without dealing with the interrelated and equally important aspects that affect the contribution the Senate can make to Parliament and to the federation as a federal institution. Therefore, it seems to me, all fears of the problems of constitutional amendment aside, we do need to look at it fundamentally in terms of the role it plays within Parliament and the federation.

The Chair: Thank you.

Mr. Heard.

Prof. Andrew Heard: I think the issue of distribution of seats is very much tied up in the powers of the Senate and how the Senate uses those powers. This is why, in 1982, it was agreed that any changes to the method of appointing senators or the powers of the Senate should be dealt with through the general amending formula. The effect of having elected senators would alter the behaviour of senators in a number of ways. Some we can tell ahead, some we won't, but it's more likely than not that they will feel more emboldened, so the level of interaction and amount of legislation they amend and the position they take on bills that come from the House of Commons will probably be more strident than it is now.

Having more powers and more of an influence in the policy process, provinces across the board will be concerned about their representation and how many hands on that power they have. This is why I feel, from a constitutional point of view, the Supreme Court would be sensitive to this issue, and a bill that might have an effect on the powers of the Senate would be something they would say should be protected, or is protected, under the amending formula.

● (1650)

The Chair: Thank you.

Mr. Simeon.

Prof. Richard Simeon: There are just a couple things about that. First of all, as I said at the opening, I think the process being followed here is very much second-best, and I would very much prefer a proper constitutional process.

I don't think it's purely political. I think there is a genuine fear that opening the constitutional Pandora's box would just lead us into endless debate and frustration and so on, and I pay some attention to that. That's why I think we should explore what Parliament can do in this regard.

But the other thing I want to say is, as I said, we don't know exactly what an elected Senate would be like and how it would behave and how partisan it would be, and so on and. I know that many people would say, "Oh, this is turning the Canadian Parliament into something much more like the American Congress, with two powerful legislatures", and so on.

First of all, as I say, we're not sure about that. Secondly, I'm not sure that would be such a bad thing. We have now the tyranny of party discipline. We have the tyranny of one-party government. We have the tyranny of simple majority rule in the House of Commons. Is that so great? Maybe more and more powerful voices and so on coming at the issues from a somewhat different perspective would not be the end of parliamentary government as we know it but would be something better. I'm not predicting that, but I'm saying we shouldn't just hold onto the existing parliamentary system we have as if it's a perfect working model.

The Chair: Thank you.

Mr. Hill.

Hon. Jay Hill (Prince George—Peace River, CPC): Thank you, Madam Chair.

I just want to perhaps pick up on where Mr. Simeon left off a couple of seconds ago.

One of the things that really frustrates me, maybe a bit more because I'm a westerner, has been this whole defence of the status quo in particular by the Liberal Party of Canada over my political lifetime—I've been here almost 15 years now—by both Prime Ministers Chrétien and Martin, where every suggestion that was made to make any change to the status quo situation of the Senate of Canada was met by, "We're not going to do anything piecemeal". That was their standard response in question period, in interviews, every time they were asked during debate, during election campaigns. In other words, it kind of fits in with what Mr. Watts is suggesting, which is that if we want to bring about meaningful Senate reform, the only way to do it is to open up the Constitution and do it "properly".

I can tell you that this is very frustrating for vast numbers of Canadians, I believe, who want to see our institutions evolve somewhat. I think what we have to deal with sometimes is what is within the realm of the possible. I think that's what Bill C-20 is dealing with—what is possible.

I don't have in front of me today the full list of how many times over the last 100-plus years successive governments and parliaments and scholars have tried to initiate some substantive constitutional change to the Senate, but I think all of us would agree, as would anybody who's taken even a superficial look at it, that it's been an extraordinarily frustrating exercise to go through, and that's even with the people who are still alive that have gone through that, whether it was the Charlottetown accord that led to the referendum, or before that the Meech Lake accord, which are the two in recent memory.

My understanding—and this is where I would look for some direction from the three gentlemen—is that even in the United States, their elected Senate evolved in a piecemeal fashion, if I can call it that. My understanding, at least, is that the individual states began to elect their senators. Over a period of time, and as Mr. Simeon was trying to indicate, I believe it gradually evolved to become the norm, as opposed to appointment. Eventually, it created enough of a groundswell from the public that it became the accepted standard, and they ended up with a fully elected Senate south of the border.

I would ask the learned gentlemen if they could point to other democracies in which Senate reform came about in a piecemeal manner. It started slowly and grew as public pressure said, well, maybe there is a better way to do this.

● (1655)

The Chair: Mr. Watts.

Prof. Ronald Watts: I guess that's directed to me, because I was the one who was arguing about the importance of taking other aspects into account.

I worry about taking the contrast between piecemeal, very small, on the one hand, and opening up the whole Constitution on the other. I'm not arguing that we open up the whole Constitution; I'm saying that we open up the issue of the Senate. It's an important part of the Constitution, but I think the danger in looking partially at one aspect is that you get into a situation where that aspect is interacting with the existing powers of the Senate.

If you look at parliamentary systems—leaving aside those like the United States, Mexico, Brazil, and Argentina, which have congressional presidential systems—we have, on paper, the most powerful Senate in the world amongst constitutional federations. We get away with it because, by convention, the Senate is unwilling to defy the House of Commons when the House of Commons clearly has popular support. If you change it so that the Senate is based on an electoral basis, and you don't change its powers, then you can get into a very risky and dangerous situation. That's my concern about looking at it only piecemeal, at one little bit.

You asked about the American process. You're partly right, yes, that's the way it happened, state by state. But in the end, it was a formal constitutional amendment that applied everywhere in the United States. It was a formal constitutional amendment in 1913 that made elections to the Senate by direct election rather than by state legislatures.

When one looks at piecemeal processes, there are some successful ones—and some unsuccessful ones, too, such as Malaysia. Malaysia started with something like three-quarters or two-thirds of its senators indirectly elected by the legislatures and a small portion appointed. By a process of convention, they've come to the situation now where three-quarters of their senators are appointed.

That's not very desirable progress—bit by bit, piecemeal—but that has occurred there. That points to the dangers of a piecemeal approach to reform when it interrelates with other aspects.

I don't want to open up the whole Constitution. I have lots of scars to bear from those efforts over the last 40 years. I recognize fully the frustration and danger of those. But the fear of that is leading us into the danger of going to the other extreme, of trying to do such piecemeal reform that we don't take account of how it interrelates with what is actually already in the Constitution. And that's my concern.

The Chair: Would either of the other two like to make a comment?

Mr. Heard.

Prof. Andrew Heard: I would just add a brief comment.

I understand and share the frustration you express. Coming from British Columbia, I hear a lot of concern about Senate reform there. One thing I would caution, though, is that there are certain things one can achieve through political practice and convention and certain things one can achieve through ordinary legislation. What one can do through legislation has its limits. What one can do through convention has its limits. Certain things can only be done through constitutional amendment.

An informal change could quite easily be undertaken by a government. They could say, "We're going to act on a list of nominees from provincial governments. We're going to break the patronage mill that we've had up until now." There's nothing to stop the Prime Minister from saying, "I'm going to appoint after consultations with the premiers from now on." That would be an important change to the Senate and an important change to federal-provincial relations. But if one were to bring in legislation to say that, one might run into difficulties.

This is one of the ironies of constitutional innovation. There are some things you can do informally that you cannot do once you try to write them down in law. One of the concerns I have is that the particular process that is chosen now may have problems from a legal point of view, but that's not to say there aren't other things you might do legally, as opposed to this particular process.

● (1700)

The Chair: Mr. Simeon, would you like to enter into the discussion?

Prof. Richard Simeon: Yes, the discussion is going in an interesting way. We're talking about two kinds of fear here.

First, we have the fear that's just been expressed of the potential difficulties of two houses with formally equal powers, with both of them being elected rather than only one, and the possibilities of danger, risk, and so forth. That's certainly true. I think it should be noted, however, that the transition to a fully elected Senate as well as a fully elected House would take quite a while. We'd have a long time to see how it would develop.

On the one hand, there's the fear of passing the bill. On the other, there's the fear of opening a Pandora's box of constitutional amendment and the worry that if we do it we'll get into another endless debate. There's the fear that we couldn't keep it focused on the Senate. As in Charlottetown, the agenda would get bigger and bigger.

Given these two sets of fears and the desire not to just be bogged down in the status quo, it seems to me that it would be a good thing for all of our political institutions to explore the range of things they can constitutionally do. This is the reason I wanted to propose that we let Parliament use its imagination, test the limits of its constitutional powers, and then consult the court to see if it is still within bounds. If so, great. If not, the court will tell Parliament and Parliament will have to draw in its horns.

I would say the same thing about the provinces. I know the provinces don't have any rights at all in the appointment of senators, though I've often thought they should. But there's absolutely nothing to prevent provinces from having elections in order to generate a name they want to put in front of the federal government and the Prime Minister. This seems perfectly fine to me. It's testing the limits. It may or may not work, but it's an example at the provincial level of trying to open up a process that we've all agreed is not very effective as it stands.

[*Translation*]

The Chair: Mr. Lévesque, the floor is yours.

Mr. Yvon Lévesque (Abitibi—Baie-James—Nunavik—Eeyou, BQ): Thank you, Madam Chair.

Thank you, gentlemen, for having given us your expertise and for having travelled here to do so. Thank you also, Mr. Simeon, for making yourself available.

I have several questions, all of equal weight. Parliament should sit in your class for a week to get a clear idea of the factors involved in passing the bill as it is presented.

Among other things, the House of Commons is being compared to the upper house, or the Senate. The Senate is called the upper house precisely because, I believe, in the spirit of the conventions and the law...

Might the Supreme Court be tempted to consider the spirit of the conventions if it were to decide on the legitimacy of a bill like this?

If we compare Bill C-20 to Bill C-19, which has also been brought forward, do we not automatically have to open the Constitution? But there is one major change. To my knowledge, no negotiations have taken place with the provinces. We are moving towards an upper house with powers not greater than but equal to the powers of the House of Commons. At the same time, we are exposing senators to the pressures of civil society, the same pressures that members of Parliament are under today. In that context, the quality of decision-making in the Senate... Doubts start to creep in. Mr. Simeon and Mr. Heard spoke about that too.

I would like to hear your comments.

● (1705)

[*English*]

The Chair: Mr. Heard.

Prof. Andrew Heard: I believe the Supreme Court would pay close attention to the conventions and how they affect this bill.

This relates to some of the questions from Mr. Reid and Mr. Comartin earlier. I think one of the issues is whether the court would simply deal with the black letter of the law, or would it expand it to public expectations and constitutional conventions? My belief is that the Supreme Court would treat this as one of those areas where it cannot simply take the black letter of the law; it must look at the context and the effects of it. It would therefore look at the public expectations and whatever conventions would or would not operate around that area of law.

I mentioned the Quebec secession reference earlier, where in terms of the black letter of the law, the Supreme Court could have, and perhaps should have, said Quebec does not have a right to separate in international and domestic law, period. But they went on to say something else. I think the same thing would apply here. There are some areas of law where you cannot simply stop with the black letter of the law and the Supreme Court would talk about the expectations of the public and what conventions would relate.

In some respects, the court in the Quebec secession reference created a brand-new convention. Everyone now believes the federal government has an obligation to negotiate separation if a clear majority votes in favour of it. I would say that's now one of our conventions of the Constitution. We don't need a referendum to tell us that is in fact a constitutional obligation on the government; this was something authored by the Supreme Court of Canada, quite curiously.

My belief is that the Supreme Court would take this area of law with respect to the Senate, look at it in the same kind of political context, and make some very strong statements about the obligations of the federal government and their relations to provincial governments in dealing with the central institution of this federation.

The Chair: Thank you.

Mr. Simeon.

Prof. Richard Simeon: I think one thing we're perhaps avoiding a bit—and it might be an issue if the Supreme Court were to really explore this in the kind of detail that Professor Heard just mentioned—is the wrong we're trying to right here. This is a completely undemocratic Senate. It is appointed by prime ministerial power, which is essentially unlimited. As Ron Watts pointed out, it is utterly unable to perform the balancing and regional representation that senates are designed in most federations to perform and so on. We have a failed institution here.

If one had to say what's wrong with Canadian federalism, we would say it was this aspect of it, this inability of the central government fully to represent all Canadians and fully to be an arena in which the interests of regions and the national majority would be negotiated and accommodated. So that would be part of the discussion as well.

The Supreme Court has said, as it did in the secession reference, that federalism is the fundamental Canadian constitutional value. We have an anti-federal Senate. It said that democracy is the fundamental Canadian value. We have an undemocratic Senate. This is why I want to explore all the different possibilities. We want to move off an institution that is a blot on the Canadian political system at the moment.

The Chair: Thank you, Mr. Simeon.

We'll now turn to Mr. Preston.

● (1710)

Mr. Joe Preston (Elgin—Middlesex—London, CPC): Thank you very much.

I thank you all for being here. I'm learning as I go, so this is great. It's not my regular committee either, but I'm really charged with what I'm hearing.

I want to start with some of the things that have already been said. I continue to hear that it's an admirable goal, that what we're trying to do is at least a step forward.

But Mr. Simeon, I think you said the process is second best. However, then you said let's explore what the Parliament of Canada can do. I'll ask you the question then. If this is second best but you want us to explore what the Parliament can do, what are you suggesting?

Prof. Richard Simeon: Should I try to answer that, Madam Chair?

The Chair: Yes, please, Mr. Simeon.

Prof. Richard Simeon: Well, I think in my initial presentation I did make a suggestion. The suggestion would be to try to fix some of the weaknesses in the current bill. Most of the weaknesses have to do with the fact that it's not clear whether this is or is not finally an elected Senate, because the Prime Minister retains the discretion—we don't know how he'll use it—to decide whether or not there will be a Senate election, whether to accept the results, whether it will be in some provinces but not in others. That seems to me to be far too much uncertainty in the bill.

The other big recommendation I made was that the election not be held coincident with a federal election or a provincial election, but on a separate day.

What I would like the committee to do is strengthen the bill, tighten it, clarify it, so it becomes more clearly an elected-Senate bill.

But then, we understand that gets close, and maybe over the line, to doing something that Parliament does not have the constitutional authority to do. There is not a consensus on that question. Lawyers like Peter Hogg and Pat Monahan and Fabien Gélinas have said that this bill is okay. But even they worry that once you add Bill C-19 to it and tighten it up, then it might cross the line.

What I would like to see the committee do is craft the best bill they can, then submit it to a Supreme Court reference. That will test the waters and test whether and how the federal Parliament on its own can try to improve the Senate. If the Supreme Court says, “No, you've crossed the line”, then we have to go the constitutional route.

Mr. Joe Preston: Well, Mr. Simeon, I agree with your first part, that this committee should try to craft the best piece of legislation it can. But we have said here also today that public consultation, or at least public opinion, needs to be gathered on the subject, whether it's a full constitutional review or.... So I disagree with getting as far as we can or the best that we can and then narrowing the consultation to just the Supreme Court. I'm not certain that's public consultation. I'm not certain that's bringing the public into it. I think that's narrowing it, after the best work we could possibly do.

I'd like some comment on that.

It doesn't have to be just you, Mr. Simeon, but please go ahead.

The Chair: Is anybody up to the challenge?

Mr. Simeon, would you like to accept the challenge?

Prof. Richard Simeon: I just have to say I accept the power of that comment. I guess the question is whether one tries to move ahead with what's on the table right now or steps way back, because I do believe, yes, that in the whole question of improving democracy in Canada we need much more public deliberation. And even though their proposals did not get accepted, I thought the citizens' assemblies in B.C. and Alberta were a model that actually might work in an area just like this.

So I accept the contradiction in my own thinking here.

The Chair: Thank you.

Mr. Watts.

Prof. Ronald Watts: This is why I argued earlier on that Senate reform is urgent and important and that it's why we may have to go through a constitutional amendment procedure for the Senate, because that procedure involves wide consultation. That's the whole point of the requirements in the constitutional amendment process, that when you're dealing with something that is a fundamental value in our political system, it requires that breadth of consultation and involvement.

I'm not a defender of the status quo, for the reasons that Richard has already stated. As a comparative scholar of federal systems, I've come to the conclusion that there are many things in which there are lessons we can teach other federations. But one area where in comparative terms we are weakest is in the form of our federal second chamber. Not that it hasn't done some good things, but in terms of its function in creating a cohesive federal system, it is not performing that function. And that's not the fault of the individual senators; it's the form of the structure that was set up. So that's what we have to deal with.

That's why I think this is fundamental, important, and urgent.

● (1715)

The Chair: Mr. Preston, I see you're eager. I'll allow one very short question.

Mr. Joe Preston: I guess I wanted to follow up on what Mr. Watts just said. We keep talking about whether we can open the Constitution on just Senate reform. Do the three learned gentlemen believe we can do that?

I, for one, don't believe it can be opened on just one piece of Senate reform, for example. We keep hearing the question, if we open the box, what else jumps out? I'll ask you.

Prof. Ronald Watts: I can reply to that one. If you look at the experience of most other federations, you will find they have many discrete constitutional amendments. We've even had some on things like education in Newfoundland—

The Chair: Excuse me.

Hearing the bells, I'm informed that I have to suspend immediately, unless there's unanimous consent to continue.

Actually, since we're just next door, we could continue for another five minutes or so.

Hon. Jay Hill: I don't think the vote is going to happen until one of us is over there anyway.

The Chair: Good point. We have our whip here.

Mr. Watts, please continue.

Prof. Ronald Watts: I've lost where I was now, but as I say, I think it's urgent. I'm not a defender of the status quo. And for reasons drawn from the comparative study of federal systems, I think we need to do it.

Mr. Joe Preston: I'd like to hear from Mr. Heard and Mr. Simeon as to whether they agree with you on the ability to do a discrete opening.

Prof. Andrew Heard: I'm skeptical about the ability to have a discrete amendment. It can happen. I will be delighted to be surprised, but I think there are probably bigger priorities in terms of democratic reform that relate to this house rather than the upper house.

The Chair: Madame Folco, you have the last round.

Sorry, Mr. Simeon. Do you have a comment?

Prof. Richard Simeon: No, I agree with what my colleague just said.

The Chair: Thank you.

Madame Folco.

Mr. Scott Reid: He has two colleagues. Which colleague is he in agreement with?

The Chair: I'm sorry.

Mr. Simeon, would you like to clarify what comment you agreed with?

Prof. Richard Simeon: Well, I agree that it's urgent, that the weakness of our Senate is the largest single weakness in our federal system. And as much as I would like to be able to focus a big public deliberation on the Senate and keep it limited to that, I'm just afraid that given the way our constitutional politics have developed, that would be really hard to do, much as I would like to.

The Chair: Thank you, Mr. Simeon.

Madame Folco, you have the last word.

[*Translation*]

Ms. Raymonde Folco: Thank you, Madam Chair.

Up to now, we have discussed fundamental questions. My question is more about the details.

Under the Senate election process as I understand it, a certain number of people would be allowed to stand for the position of senator in a given province. For example, if there were three vacant positions in a province, a certain number of people would be told that they could stand for election to those positions.

Under the present system of election to the House of Commons, when you run in an urban riding, the population density means that you can be elected to represent a lot of people in a small area. It is exactly the opposite if you run in a rural riding; the area is large but the population density is low.

I have already asked this question to other witnesses. It would be easier for me to stand for the position of senator if I came from Montreal, because I know a lot of people there who would vote for me. If I run in Val-D'Or, looking for votes is difficult because voters are spread over a wide area. It seems to me that there is a systemic injustice in the method of voting and the way in which different people come forward.

Do you have any comments on that?

● (1720)

[*English*]

The Chair: Mr. Heard.

Prof. Andrew Heard: I think in the particular context of Quebec elections—

Ms. Raymonde Folco: Excuse me. I wasn't thinking of Quebec particularly. I just took that as an example because that's where I'm from, but it could be British Columbia.

Prof. Andrew Heard: I don't know how one can avoid that problem in terms of who one is to represent as a senator and how one gets elected. I don't see an improvement over province-wide elections, as difficult as they are. I think they help create a larger focus in the Senate. I think we are meant to have community representation in the House of Commons and broader provincial interests represented in the Senate.

My own personal belief is that we should keep elections province-wide, to the extent possible, for senators.

The Chair: If we could have quick comments from—

Mr. Gary Goodyear (Cambridge, CPC): A point of clarification, Madam Chair. It was my understanding that unanimous consent was given to hear the answer from the previous question, not unanimous consent to start another round and stay beyond the bells?

The Chair: Are you objecting, then? Then we will suspend.

Mr. Gary Goodyear: I don't want to miss the boat.

The Chair: Okay.

Then I'd like to thank our witnesses for a combined century of wisdom and insight into our deliberations. Thank you.

The meeting is adjourned.

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