A Truly Federal Model of the British Constitution

The fundamental role of the Senate is to ensure legitimate opposition to arbitrary rule. It is to secure, in conjunction with the House of Commons, the conciliation of the wishes and interests of the people in their government.

Sections 18 and 22 of our constitution establish the foundation of the representative and democratic character of the Senate. Section 22 states over and over that senators shall represent the provinces in the Senate. Section 18, confirmed by Act of Parliament, provides both the Senate and the House of Commons with the same powers and privileges as those enjoyed by the British House of Commons in 1867.

The notion that the Senate is modelled on the British House of Lords and that its role is one of "sober second thought" is therefore pure fiction. The Senate is meant to be as legitimately representative as the House of Commons, possessed of the same powers and privileges, to guarantee an executive government responsible to the federation for its conduct.

To understand why this constitutional balance was established between the Senate and the House of Commons, and how this enables the Senate to protect our legitimate provincial jurisdictions, we must re-visit our history.

We must re-visit our history because, in the reference concerning the secession of Quebec, the Supreme Court of Canada explained that the political mechanism or the political structure, which permits the conciliation of the diversity with the unity of Canada through the Senate and the House of Commons, was simply taken for granted by our constitutional law.

Following the popular armed rebellions of 1837, against governments controlled by and for the benefit of the Family Compact in Upper Canada (today Ontario) and the Chateau Clique in Lower Canada (now Quebec), the people were determined to ensure an executive government responsible to the province for its conduct.

In 1840, Upper and Lower Canada were united under one legislature and one government to form the Province of Canada. Almost immediately, the House of Assembly adopted resolutions establishing the constitutional principles to be observed in implementing a responsible system of government under the Union Act.

These principles require the Governor General to ensure that the well-understood wishes and interests of the people shall be the rule of government, and to guarantee this rule of government, they require that his chief advisers, constituting the administration under him, possess the confidence of the representatives of the people.

Because the Union Act entitled both Upper and Lower Canada to an equal number of representatives in the House of Assembly and they each had different concerns and aspirations, the House of Assembly naturally divided into two sections. Each section, equally represented in the Assembly, demanded equal powers and privileges. They each maintained that the principles of Responsible Government entitled them to be represented in the Governor General's Executive Council and Cabinet to guarantee the rule of government according to their own wishes and interests.

So when the Governor General, Lord Elgin, called upon Louis-Hippolyte LaFontaine from Lower Canada to form the government, LaFontaine accepted on condition that Robert Baldwin from Upper Canada was given an equivalent position in his Executive Council and Cabinet.

Lord Elgin accepted this proposition and requested that the two leaders agree upon a Cabinet suitably representative of both sections and agree upon a political program, acceptable to the united House of Assembly.

Because Upper and Lower Canada were equally represented in the Assembly, no political program could gain majority approval if it touched upon matters of custom or culture that were unique to their British or French heritage. The leaders of Upper and Lower Canada therefore had to exclude all these matters of local concern from their common political program.

This political mechanism whereby the Prime Minister had to form a coalition with a Leader of the other section of the Assembly to pursue a common political program excluding all matters of purely local concern was maintained thereafter until the time of Confederation.

The political structure it engendered permitted both sections of the Assembly to confide the authority and the responsibility in a leader to advise the Governor-in-Council of the wishes and interests of their constituents, so he could lawfully sanction the exercise of the executive powers of the State with the consent of the governed.

This system of Responsible Government, not only enabled the Assembly to define the priorities, the policies and the measures their executive government must pursue, it also protected the freedom or the sovereignty of the Upper and Lower Canadians to govern themselves as they wished in those matters of purely local concern.

In effect, it divided the rule of law establishing the federal nature of the government in the Province of Canada. During the Debates on Confederation John A Macdonald said:

> Nominally there was a legislative union in Canada, yet as a matter of fact, since the union of 1841 it was a federal union: in matters affecting Upper Canada solely, members from that section exercised the right to exclusive legislation, while the members from Lower Canada legislated in matters affecting their own section".

This responsible federal system of government established a dynamic, decisive and powerful government with the support of the people. It had ended the “war of races” that had plagued Canada since the conquest of the “Canadiens” by the British in 1759. It had fostered an average economic growth of some 8% per year during its entire existence. It had gained the moral respect of the entire civilised world. And it managed to peacefully and legitimately create what is today the second greatest country on earth.

The fundamental reason for the success of this federal system of government is that both leaders kept each other in check to uphold the legitimate power of their own section to govern themselves as they wished. Essentially, the role of the Governor General was to broker the legitimate constitutional interests of both sections to help the Leaders in their constitutional difficulties.

The intent of Confederation was to perfect and extend this federal system of Responsible Government to unite the provinces because neither Quebec nor the Maritimes would agree to lose their individuality in the union.

It had to be perfected because, though Upper and Lower Canada governed themselves as they wished in local matters, Upper Canada was paying fully three-quarters of the cost of their united government.

It was perfected by re-dividing the Province of Canada into Ontario and Quebec and providing each with a provincial legislature and government so, in the words of George Brown at the time:

> "All local matters are to be banished from the general legislature; local governments are to have control over local affairs, and if our friends in Lower Canada choose to be extravagant, they will have to bear the burden of it themselves".

Why, you might ask, would Quebec have accepted to try the experiment of Confederation only to be fully responsible for the economic consequences of their local laws? I say they accepted that condition then for the same reason they would accept it again today. It was

to protect their sovereignty, that is, the exclusive jurisdiction to govern themselves as they wish in those local matters especially relating to their French cultural heritage.

Quebec accepted this condition then because it had become certain, at the time of Confederation that George Brown would succeed in reforming the composition of the Assembly so that the number of representatives of each section in the Assembly would be proportional to their population. This would have meant an end to the federal system of Responsible Government that was based on the equal number of representatives of Upper and Lower Canada in the Assembly. It meant the system would change to one based on simple majority rule wherein Ontario, possessing the majority of the population, would rule Quebec.

The essential condition without which Confederation would never have occurred is that Ontario, Quebec and the combined Maritime provinces would be equally represented in the Senate "for the purpose of defending [their local] interests against the combinations of majorities in the Assembly," as stated by John A. Macdonald during the debates on Confederation.

Thus, the legitimate representative nature of the Senate and the equal powers and privileges of the Senate with the House of Commons was established by sections 18 and 22. It was assumed or simply taken for granted that constitutional principles would be fully and honestly applied to the letter of the law to renew the responsible federal system of government that succeeded in effectively and harmoniously conciliating the unity with the diversity of Canada at the time of Confederation.

Why is it, you may very well ask, that for 150 years we have been governed by simple majority rule? The reason is that the system of Responsible Government evolved in the Province of Canada was so effective; the Imperial Government could no longer govern the province for its benefit through instructions to the Governor General.

So, when the confederating provinces petitioned the Queen to unite them under the terms of Confederation, in drawing up the BNA Act, the Imperial Government inserted section 55 which permitted the Governor General to disallow laws contrary to their instructions. And to ensure these instructions were observed, in London, before the first parliament of the Dominion of Canada was ever assembled, the Governor General decided that the Senate would not be represented in his council, so he could make a deal with Macdonald.

This deal was that the Governor General would exercise his powers in our internal affairs as it pleased the Prime Minister if, in return, the Prime Minister would help him enforce Her Majesty's Instructions regarding Canada's role in international affairs.

Back in Canada, Macdonald had to give the appearance that the government of Canada was lawfully constituted. He simulated the renewal of the system of Responsible

Government by forming a coalition, not with the provinces in the Senate, but with the Reform party in the House of Commons. In this manner, he hid the fact that the Prime Minister was the sole adviser to the Governor-in-Council, wielding unopposed, all the executive powers of the State.

Through the Governor-in-Council, contrary to section 18 of our constitution, he imposed the rules of debate in the Senate pertaining to the British House of Lords and used every official resource to propagate the notion that its role was one of "sober second thought". When in 1870, he began appointing the representatives of the Provinces to the Senate and some members of the House of Commons began questioning this practice, he buried them in committee.

But to maintain his hold on power over the longer term, the Prime Minister also had to confound our understanding of legitimacy, authority, responsibility and honour, and the role of the Governor General in maintaining a constitutional federal government.

So here we are today, confounded in our values, contesting our federal institutions.

Consider for a moment that if the constitution of Canada were implemented in accordance with constitutional principles so that the provinces, duly represented in the Senate, had a leader in the Governor's Executive Council (now called the Queen's Privy Council):

- To fill a vacancy in the Senate, the Governor-in-Council would turn for advice to the Leader of the Senate, duly possessed of the authority to speak on behalf of the province concerned;

- The leader of the Senate could bring to bear its equal powers and privileges to insist on the equal representation of the provinces in the committee struck to select the Supreme Court Justices. Furthermore, he could uphold sec. 92(14), which establishes the exclusive jurisdiction of the provinces regarding the constitution of the provincial courts, to insist that the judges be appointed in each province upon the advice of the Leader of the Senate duly possessed of the authority to speak on behalf of the province concerned.

- The Leader of the Senate could insist that the Senate participate in drafting the Speech from the Throne outlining the priorities, the policies and the measures the administration will pursue upon the approval of Parliament. For example, the Senate leader might advise the Governor-in-Council that a new federal tax to subsidise public works in certain cities of Canada would not meet with the approval of the provinces in the Senate; that the provinces would rather keep the money at home to manage their own local priorities as they wish. In other words,

the leader of the Senate could insist that the federal spending power be constrained to its legitimate jurisdictions.

– The Senate could even insist on its equal participation in a committee struck to select the next Governor General who could effectively broker the legitimate constitutional interests of both Houses.

My purpose here is to suggest that this responsible federal system of government must ultimately be renewed to ensure the effective and harmonious conciliation of the legitimate constitutional interests of the provinces in the government of our federation.

It is also to suggest that it must be renewed to ensure the legitimacy of the rule of law in Canada, in accordance with section 91 of our constitution, which states:

> "It shall be lawful for the Queen, by and with the advice and consent of the Senate and the House of Commons, to make laws for the peace order and good government of Canada…"

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