Court File No. T-2506-14

FEDERAL COURT

BETWEEN:

ANIZ ALANI

Applicant

and

THE PRIME MINISTER OF CANADA,
THE GOVERNOR GENERAL OF CANADA and
THE QUEEN'S PRIVY COUNCIL FOR CANADA

Respondents

APPLICANT'S BOOK OF AUTHORITIES
VOLUME II of II

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JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN CANADA

BY

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AND

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VOLUME 1

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1:6000 DECLARATIONS AND INJUNCTIONS: AN INTRODUCTION

Originally, declarations and injunctions were private law remedies used respectively to declare the validity or meaning of a provision in a will, trust deed or other legal document, for example, or to restrain a person from committing a breach of contract, a nuisance, or some other unlawful act. However, from the mid-sixties these remedies, and particularly the declaration, have been increasingly used to challenge the validity of the exercise of statutory power by a public authority. This development arose in large part because the courts' jurisdiction to grant declaratory or injunctive relief does not depend upon characterizing the impugned action as judicial or *quasi*-judicial in nature,[408] as it did for *certiorari* and prohibition.[409] Moreover, there is generally no restriction on granting declaratory or injunctive relief on the ground that the administrative action was legislative in nature.[410] Furthermore, for the most part there is no need to establish a public quality in connection with the administrative action, since both an injunction and a declaration may issue in respect of powers, duties or relationships governed by public or private law. And since both are equitable remedies, they are discretionary in nature.[411] Finally, they can be combined in the same proceeding with a claim for damages, unlike the prerogative orders, which are sought by way of motion.

At one time, however, the courts experienced difficulties in melding these two equitable remedies with the prerogative remedies so as to establish an integrated remedial system for judicial review of

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[408] But see *Calgary Power Ltd. v. Copithorne*, [1959] S.C.R. 24, where a plaintiff asked the court to declare that an expropriation order made by a minister was null and void because it was made in breach of the rules of natural justice, but relief was denied on the ground that, since the minister was not under a duty to act judicially when exercising the power to expropriate, the rules of natural justice did not apply to the making of the order.

[409] Of course this is no longer the case: **see generally** topic 1:2210, *ante*.

[410] See topic 1:2220, *ante*.

[411] Whether it is entirely appropriate to regard the declaration as an equitable remedy has been the subject of some controversy: **see** H. Woolf, J. Jowell, and A. Le Sueur, *de Smith's Judicial Review*, 6th ed. (London: Sweet and Maxwell, 2007), c. 18. However, since the general principles regulating the courts' discretion to grant relief in judicial review proceedings apply equally to declaratory relief, the controversy has little practical importance. On the history of the declaration in Quebec, **see *2747-3174 Quebec Inc. v. Québec (Régie des permis d'alcool)***, [1996] 3 S.C.R. 919 at pp. 989-93. **See also** *Campbell Soup Co. Ltd. v. Farm Products Marketing Board* (1976), 10 O.R. (2d) 405 (Ont. H.C.J.), where it is suggested that the equitable principles for refusing relief may be less applicable when the declaration is used as a public law remedy.

administrative action. In the first place, it was said that the courts' jurisdiction to issue the prerogative orders did not overlap with their jurisdiction to issue declarations and injunctions.[412] That is, a litigant who asked the court to declare a decision of an administrative tribunal invalid would be non-suited if the decision were amenable to review on an application for *certiorari*.[413] Second, as private law remedies, declarations and injunctions could only be granted against natural or legal persons, even when they arose in respect of the exercise of powers subject to public law.[414] Third, because of the historical origin of the declaration and injunction as remedies to protect *private* legal rights, a court could grant them only at the instance of a person who alleged that the challenged administrative action either affected some such right, or caused him or her special damage over and above any sustained by the

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[412] It has also been said that, since by definition a declaration only declares what the legal position of the parties is, it is not constitutive of the parties' rights and thus cannot be used to set aside an order that was made within the jurisdiction of the tribunal, which could have been quashed by *certiorari* for error of law on the face of the record: *Punton v. Ministry of Pensions & National Insurance (No. 2),* [1964] 1 W.L.R. 226 (C.A.); **see also** *Canada Post Corp. v. C.U.P.W.* (1989), 38 Admin. L.R. 305 (Ont. H.C.J.). However, with the decline in importance of error of law on the face of the record as a discrete ground of review (**see** topics 1:2100, *ante*; 14:1423, 14:3310, 14:3322, 14:3324, *post*), and the generally more pragmatic approach now taken by the courts to remedial issues, this lack of symmetry between the remedies has not proved to be of much importance in practice. Nowadays, the question that a court is more likely to ask is whether any practical purpose would be served by granting a declaration that the tribunal's order was contrary to law. **And see** *Edmonton Catholic School Board v. Edmonton (City)* (1977), 75 D.L.R. (3d) 443 (Alta. T.D.), for an early example of a non-reductionist approach to the grant of declaration for error of law on the face of the record.

[413] *Hollinger Bus Lines Ltd. v. Labour Relations Board (Ontario),* [1952] O.R. 366 (Ont. C.A.); *B. v. Canada (Department of Manpower & Immigration),* [1975] F.C. 602 (FCTD). However, even in jurisdictions which have not enacted a judicial review statute, these cases are unlikely to be followed today. This limitation on the grant of declaratory relief has been expressly abolished in the judicial review legislation of Ontario, British Columbia and Prince Edward Island. In Manitoba, a declaration or injunction can be combined with prerogative relief if it is ancillary to that relief: Manitoba Court of Queen's Bench Rules, r. 14.05(3) (App. Man. 3). In Saskatchewan, it can be claimed either as an alternative to prerogative relief or collaterally: Saskatchewan Rules of Court, r. 3-56(2). A similar provision is contained in the Alberta Rules of Court: r. 3.15(1), and in the Northwest Territories Rules of Court, r. 599(2) (App. NWT. 4). In New Brunswick, Nova Scotia, and Newfoundland, the question is not directly addressed. And it is inapplicable to the statutory judicial review remedies in the *Federal Courts Act*, R.S.C. 1985, c. F-7 [as am. S.C. 2002, c. 8]: **see** topic 2:4100, *post.*

[414] *Hollinger Bus Lines Ltd. v. Labour Relations Board (Ontario),* [1952] O.R. 366 at pp. 376-78 (Ont. C.A.); *B. v. Canada (Department of Manpower & Immigration),* [1975] F.C. 602 (FCTD) (declaration); *Maclean v. Ontario (Liquor Licence Board)* (1975), 9 O.R. (2d) 9 (Ont. Div. Ct.) (injunction).

public at large.[415]

Today, however, the courts' inherent jurisdiction[416] to grant declarations[417] and injunctions,[418] which has been codified by the provincial *Judicature Acts* or their equivalent,[419] has in most

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[415] This potential limitation on the use of the equitable remedies in public law litigation first surfaced in ***Gouriet v. Union of Post Office Workers,*** [1978] A.C. 435 (H.L.), although in a subsequent case, it was said that when sought on an application for judicial review against a public body, the standing requirement for declaratory relief was not different from that applicable to *certiorari*: **see** *Inland Revenue Commissioners v. National Federation of Self-Employed & Small Businesses Ltd.*, [1982] A.C. 617 (H.L.); *Attorney General v. Blake,* [1998] 1 All E.R. 833 (Eng. C.A.). On the other hand, it is always within the discretion of the Attorney General to seek an injunction or a declaration to protect public rights from unlawful intrusion: **see** topic 4:3510, *post.* However, in the more recent cases on the standing of a person to challenge the legality of administrative action, the form of relief sought is regarded much less significance than it once was, particularly since private plaintiffs seeking declaratory and injunctive relief can be given discretionary standing to represent the public interest in the performance of a public legal duty: ***Finlay v. Canada (Minister of Finance),*** [1986] 2 S.C.R. 607; **and see** topic 4:3520, *post.*

[416] For example, both the Manitoba Court of Appeal in *Forest v. Manitoba (Registrar of Court of Appeal)* (1977), 77 D.L.R. (3d) 445 (Man. C.A.), and the Saskatchewan Court of Appeal in *Bassett v. Canada* (1987), 53 Sask. R. 81 (Sask. C.A.), have held that they have inherent jurisdiction to grant a declaration.

[417] *Operation Dismantle Inc. v. R.,* [1985] 1 S.C.R. 441, *per* Wilson J. at p. 485, citing ***Dyson v. Attorney-General,*** [1911] 1 K.B. 410 (C.A.); ***Kourtessis v. Minister of National Revenue,*** [1993] 2 S.C.R. 53.

[418] E.g. *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 96 [as am. 1994, c. 12, s. 38] in Ontario provides as follows:

> (1) Courts shall administer concurrently all rules of equity and the common law.
>
> (2) Where a rule of equity conflicts with a rule of the common law, the rule of equity prevails.
>
> (3) Only the Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may grant equitable relief, unless otherwise provided.

[419] E.g. in Ontario, the *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 97 [as am. 1994, c. 12, ss. 39], provides:

> The Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may make binding declarations of right, whether or not any consequential relief is or could be claimed.

In addition, the Ontario Rules of Civil Procedure, r. 14.05 (App. Ont. 5) provide that declaratory relief may be sought by way of an application where permitted by statute and where there are no material facts in dispute (**see** r. 14.05(3)(h)); **and see** *London Life Insurance Co. v. Ontario (Human Rights Commn.)* (1985), 50 O.R. (2d) 748 (Ont. H.C.J.). Furthermore, there may be a special provision dealing with labour injunctions (**e.g.** s. 102 of Ontario's *Courts of Justice Act*, R.S.O. 1990, c. C.43) and for obtaining interlocutory or mandatory orders (**e.g.** s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 [as am.

jurisdictions been combined with their jurisdiction to grant prerogative orders, either by legislation[420] or by a Rule of Court.[421] Moreover, the courts have taken their cue from the legislative reform, and have sought to further adapt declarations and injunctions to serve as public law remedies.[422]

1:7000 DECLARATIONS

1:7100 Generally

The breadth of the courts' jurisdiction to grant declarations[423] has been succinctly stated as follows:

1994, c.12, s. 40] and Ontario Rules of Civil Procedure, r. 40), discussed in *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation* (2006), 272 D.L.R. (4th) 727 (Ont. Sup. Ct. J.) (injunction in context of aboriginal treaty rights); *Fraser v. Beach* (2005), 75 O.R. (3d) 383 (Ont. C.A.): jurisdiction of superior court to grant injunction or mandatory order may be limited by statute.

[420] In Ontario, the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, s. 2(1), para. 2 (App. Ont. 3) provides that in connection with an application for judicial review, the court may grant any relief that an applicant would be entitled to in proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power. **See generally** topic 2:2400, *post.* As to the British Columbia *Judicial Review Procedure Act,* **see** topic 2:2400, *post,* particularly *Auton (Guardian ad litem of) v. British Columbia (Minister of Health)* (1999), 12 Admin. L.R. (3d) 261 (BCSC). And as to the Prince Edward Island *Judicial Review Act,* **see** topic 2:3400, *post.* Similarly, the 1992 amendments [S.C. 1990, c. 8, ss. 1-19 and 78(1) [brought into force February 1, 1992] to the *Federal Courts Act*, R.S.C. 1985, c. F-7 [as am. S.C. 2002, c. 8] (App. Fed. 3) eliminated the need to seek a declaration by action as opposed to an originating application: *Groupe des éleveurs de volailles de l'est de l'Ontario v. Canadian Chicken Marketing Agency* (1985), 14 D.L.R. (4th) 151 (FCTD); **see also discussion in** *McKay v. Canada (Minister of Fisheries and Oceans)* (1998), 160 F.T.R. 301 (FCTD). As to the jurisdiction of the Federal Court generally, **see** topic 2:4000, *post.*

[421] See e.g. Alberta Rules of Court, r. 3.15(1); Northwest Territories Rules of Court, r. 599(2) (App. NWT. 4); Saskatchewan Rules of Court, r. 3-56. **And see** topic 1:6000, *ante.* For an example of the new "liberalization" on technical issues of remedial law, **see** *S.G.E.U. v. Saskatchewan* (1997), 155 Sask. R. 161 (Sask. Q.B.), aff'd [1997] S.J. No. 277 (Sask. C.A.) (application for *certiorari* and declaration in respect of regulations treated as request for declaration only: applicants should not be prejudiced by remedial technicalities).

[422] E.g. ***Kourtessis v. Minister of National Revenue,*** [1993] 2 S.C.R. 53. **And see** *Regina (City) v. Regina (City) Policemen's Assn.,* [1982] 1 W.W.R. 759 at p. 763 (Sask. C.A.) (*per* Bayda C.J.S.).

[423] See generally L. Sarna, *The Law of Declaratory Judgments*, 3d ed. (Toronto: Carswell, 2007); I. Zamir, *The Declaratory Judgment*, 3d ed. by Lord Woolf & J. Woolf (London: Sweet & Maxwell, 2001); **and see** H. Woolf, J. Jowell, and A. Le Sueur, *de Smith's Judicial Review,* 6th ed. (London: Sweet and Maxwell, 2007), c. 18.

> A declaratory judgment is a formal statement by the court upon the existence or non-existence of a legal state of affairs. ...The declaration pronounces on what is the legal position.[424]

Similarly, the Supreme Court of Canada has stated that:

> Declaratory relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship, in respect of which a 'real issue' concerning the relative interests of each has been raised and falls to be determined.[425]

Accordingly, the declaration can be employed either as an original remedy to make a declaration of a person's rights under a statute or other instrument, or as a supervisory remedy to determine the validity of some administrative action or decision.[426] And while declarations have no *coercive* effect, as a practical matter they are an effective public law remedy, since bodies invested with public responsibilities will normally comply with the law.[427] Indeed, this is of particular significance when

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[424] See H. Woolf, J. Jowell, and A. Le Sueur, *de Smith's Judicial Review,* 6th ed. (London: Sweet and Maxwell, 2007), c. 18-038.

[425] ***Solosky v. R.,*** [1980] 1 S.C.R. 821 at p. 830, cited in *Cheslatta Carrier Nation v. British Columbia* (1999), 38 C.P.C. (4th) 188 (BCSC), aff'd [2000] 10 W.W.R. 426 (BCCA); *Whitechapel Estates Ltd. v. British Columbia (Ministry of Transportation and Highways)* (1998), 164 D.L.R. (4th) 311 (BCCA); *Elliott v. Canadian Broadcasting Corp.* (1993), 16 O.R. (3d) 677 at p. 697 (Ont. Gen. Div.), aff'd (1995), 25 O.R. (3d) 302 (Ont. C.A.), leave to appeal to SCC ref'd (1996), 26 O.R. (3d) xvi(n).

[426] E.g. *Fortis Benefits Inse Co. v. Nova Scotia (Registrar of Cemetery and Funeral Services)* (2005), 31 Admin. L.R. (4th) 200 (NSSC) (interpretation of statutory provision and determination of *vires* of government action); *Kelso v. R.,* [1981] 1 S.C.R. 199; *Harrison Hot Springs (Village) v. Kamenka* (2004), 243 D.L.R. (4th) 141 (BCCA) (declaration was appropriate remedy when dispute moot, but court nevertheless took jurisdiction); *Morneault v. Canada (Attorney General),* [2000] F.C.J. No. 705 (FCA); *Calgary (City) Police Service v. Alberta (Report of Inquiry into Death of Isaac Mercer)* (1998), 17 Admin. L.R. (3d) 256 (Alta. Q.B.) (portions of inquest report declared null and void).

[427] E.g. *Edgar v. Canada (Attorney General)* (1999), 46 O.R. 294 (Ont. C.A); *Smith v. Canada (Minister of Citizenship and Immigration),* [1998] 3 F.C. 144 (FCTD), citing *LeBar v. Canada* (1988), 90 N.R. 5 (FCA); **see also** *British Columbia (Police Complaints Comm'r) v. Abbotsford (City) Police Dept.* (2000), 19 Admin. L.R. (3d) 134 (BCSC); *Popal v. Canada (Minister of Citizenship and Immigration),* [2000] F.C.J. No. 352 (FCTD); *Sucker Creek Indian Band v. Calliou,* [1999] F.C.J. No. 1715 (FCTD). This is specifically provided for in the various *Crown Proceedings Acts*: **e.g.** *Proceedings Against the Crown Act,* R.S.A. 1980, c. P-18, s. 17(1); R.S.N. 1990, c. P-26, s. 15(1); R.S.N.B. 1973, c. P-18, s. 14(2); R.S.N.S. 1989, c. 360, s. 16(2); R.S.O. 1990, c. P.27, s. 14(1); R.S.S. 1978, c. P-27, s. 17(2); *Crown Proceeding Act,* R.S.B.C. 1996, c. 89, s. 11(2); *Crown Proceedings Act,* R.S.P.E.I. 1988, c. C-32, s. 15; *Crown Liability & Proceedings Act,* R.S.C. 1985, c. C-50, s. 22(19); *Code of Civil*

relief is claimed against the Crown,[428] since at common law neither an injunction nor a prerogative order can be granted against the Crown.[429]

In the result, the declaration can plausibly claim to be *the* administrative law remedy of the late twentieth century. First, unlike the prerogative orders, it is relatively free from historical limitations[430] and statutory limitation periods.[431] Second, it is at home in the realms of public law and private law alike. Third, it is available against the Crown.[432] Fourth, its terms can be moulded to suit the particulars of any given situation, including, presumably, the condition that its operation be suspended or prospective.[433] Fifth, it can be sought alone or together

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Procedure, R.S.Q. 1977, c. C-25, arts. 94.2, 100 (App. Que. 4).

[428] E.g. *St. Anthony (Town) v. Newfoundland and Labrador* (2010), 298 Nfld. & P.E.I.R. 258 (Nfld. & Lab. S.C.) at para. 23; *Chiasson v. Canada (Attorney General)* (2008), 295 D.L.R. (4th) 744 (FC), rev'd on other grounds (2009), 398 N.R. 277 (FCA); *Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307; *Alberta Wapiti Products Cooperative Ltd. v. Canada (Minister of Agriculture and Agri-Food)* (2005), 282 F.T.R. 286 (FC) (government ordered to pay compensation for destruction of livestock), aff'd 2007 FCA 110; *Valley Rubber Resources Inc. v. British Columbia (Minister of Environment, Lands and Parks)* (2001), 90 B.C.L.R. (3d) 165 (BCSC), rev'd on other grounds (2002), 219 D.L.R. (4th) 1 (BCCA); *Roberts v. Northwest Territories (Commissioner)*, [2003] 1 W.W.R. 98 (NWTSC); *Newfoundland Assn. of Provincial Court Judges v. Newfoundland* (2000), 580 A.P.R. 183 (Nfld. C.A.); *Toronto (City) v. 1291547 Ontario Inc.* (2000), 49 O.R. (3d) 709 (Ont. Sup. Ct. J.) (application for declaration appropriate when challenging validity of bylaw); *Carter v. Pasadena (Town)* (2000), 19 Admin. L.R. (3d) 293 (Nfld. S.C.); *Arsenault-Cameron v. Prince Edward Island*, [2000] S.C.J. No. 1 (SCC); *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995. **Compare** *Mount Pearl (City) v. Newfoundland (Minister of Provincial & Municipal Affairs)* (1991), 99 Nfld. & P.E.I.R. 271 (Nfld. S.C.). Each province's *Proceedings Against the Crown Act* or equivalent sets out any limitations in this regard: **see e.g.** *LawPost, Div. of Legal Research Consultants Inc. v. New Brunswick* (2000), 578 A.P.R. 256 (NBCA): provincial *Proceedings Against the Crown Act* had no application to action seeking declaration that provincial legislation unconstitutional.

[429] E.g. *Gajic v. British Columbia (Ministry of Finance and Corporate Relations)* (1996), 19 B.C.L.R. (3d) 169 (BCCA); **see also** P.W. Hogg and P. Monahan, *Liability of the Crown*, 3d ed. (Toronto: Carswell, 2000). **And see** *Pinet v. Penetanguishene Mental Health Centre (Administrator)* (2006), 80 O.R. (3d) 139 (Ont. Sup. Ct. J.).

[430] E.g. *Landreville v. R.* (1973), 41 D.L.R. (3d) 574 (FCTD); **and see** *Montana Band of Indians v. R.*, [1991] 2 F.C. 30 (FCA); *Huron-Wendat Nation Council v. Laveau* (1987), 14 F.T.R. 50 (FCTD); *Driver Salesmen, Plant, Warehouse & Cannery Employees, Local 987 v. Alberta (Industrial Relations Board)* (1967), 68 C.L.L.C. 14,068 (Alta. S.C.).

[431] *Urban Development Institute v. Rocky View (Municipal District No. 44)*, [2003] 2 W.W.R. 140 (Alta. Q.B.) and cases cited therein; *Carter v. Pasadena (Town)* (2000), 19 Admin. L.R. (3d) 293 (Nfld. S.C.) (can be used when *certiorari* statute-barred).

[432] E.g. *O.P.S.E.U. v. Ontario (Attorney General)* (1995), 131 D.L.R. (4th) 572 (Ont. Div. Ct.).

[433] E.g. ***Figueroa v. Canada (Attorney General)***, 2003 SCC 37 (declaration suspended 12 months); *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R.

with a claim for other relief such as damages or an injunction.[434] Indeed, its only significant shortcoming is that courts currently lack jurisdiction to grant *interlocutory* declaratory relief pending the final determination of a matter,[435] even where there is explicit statutory authority to issue

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624 (declaration of invalidity suspended for 6 months); *Hodge v. Canada (Minister of Human Resources Development)* (2002), 214 D.L.R. (4th) 632 (FCA) (declaration of invalidity suspended 12 months, but declaration issued that impugned definition of no force or effect with respect to applicant's rights), rev'd on basis legislation did not violate s. 15 of *Charter* (2004), 244 D.L.R. (4th) 257 (SCC); *Quigley v. Canada (House of Commons)*, [2003] 1 F.C. 132 (FCTD), appeal dismissed as moot 2003 FCA 465; *Walsh v. Bona* (2000), 186 D.L.R. (4th) 50 (NSCA) (declaration of invalidity suspended for 12 months), rev'd on other grounds 2002 SCC 83; *Rice v. New Brunswick*, 2002 SCC 13 (six-month suspension); *Sentes v. Saskatchewan (Minister of Finance)* (1991), 7 Admin. L.R. 140 (Sask. Q.B.) (regulation *ultra vires* its enabling statute); **see also** *M. v. H.* (1999), 171 D.L.R. (4th) 577 (SCC); ***Reference re Language Rights Under s. 23 of Manitoba Act, 1870 & s. 133 of Constitution Act, 1867,*** [1985] 1 S.C.R. 721; *EGALE Canada Inc. v. Canada (Attorney General)* (2003), 228 D.L.R. (4th) 416 (BCCA) (order suspending declaration lifted); *Friends of Democracy v. Northwest Territories (Attorney General)* (1999), 171 D.L.R. (4th) 551 (NWTSC), leave to appeal ref'd on other grounds (1999), 176 D.L.R. (4th) 661 (NWTCA); *Pacific Press Ltd. v. Canada (Minister of Employment & Immigration)*, [1991] 2 F.C. 327 (FCA) (legislation held unconstitutional).

[434] E.g. *Rice v. New Brunswick* (1999), 181 D.L.R. (4th) 643 (NBCA) (damages awarded); *Gardner v. Ontario* (1984), 45 O.R. (2d) 760 (Ont. H.C.J.); *Borowski v. Canada (Minister of Justice),* [1980] 5 W.W.R. 283 (Sask. Q.B.), varied [1981] 1 W.W.R. 1 (Sask. C.A.), aff'd [1981] 2 S.C.R. 575, where its availability to rule on the *vires* of federal legislation by the provincial superior courts was noted. **And see** *Sommers v. Edmonton (City)* (1978), 88 D.L.R. (3d) 204 (Alta. C.A.), where the Alberta Court of Appeal affirmed a lower-court decision holding that a declaration was available notwithstanding that the time-limit for seeking *certiorari* had expired. In contrast, other than in Saskatchewan, damages and a prerogative order may not be sought in the same proceeding, nor may damages be claimed on an application for judicial review. **But see** *Québec (Commission des droits de la personne etc.) v. Communauté urbaine de Montréal*, 2004 SCC 30 (in law of Crown liability, civil liability does not flow from unlawful decision); *White Rock Farm Ltd. v. Canadian Corp. of Agricultural Financial Services,* [2000] 2 W.W.R. 659 (Sask. Q.B.) (trial ordered under *Saskatchewan Farm Security Act* where declaration and damages sought).

[435] *Douglas v. Saskatchewan (Minister of Learning)* (2005), 20 C.P.C. (6th) 19 (Sask. Q.B.) (interim declaration unavailable); *Volansky v. British Columbia (Minister of Transportation)* (2002), 41 Admin. L.R. (3d) 300 (BCSC); *Danners v. Namanishen Contracting Ltd.* (2000), 1 C.C.E.L. (3d) 228 (Sask. Q.B.); **see also** *St. Anthony (Town) v. Newfoundland and Labrador* (2010), 298 Nfld. & P.E.I.R. 258 (Nfld. & Lab. S.C.) at para. 23; *Waldner v. Ponderosa Hutterian Brethren,* [2004] 5 W.W.R. 619 (Alta. C.A.); *Jaballah v. Canada (Minister of Citizenship and Immigration)* (2002), 222 F.T.R. 197 (FCTD); **and see** ***Metropolitan Stores (M.T.S.) Ltd. v. Manitoba Food & Commercial Workers, Local 832,*** [1987] 1 S.C.R. 110, where the court in *obiter* seemed to agree with the statement that an interim declaration of right cannot be granted. **But see** *Loomis v. Ontario (Minister of Agriculture & Food)* (1993), 108 D.L.R. (4th) 330 at p. 333 (Ont. Div. Ct.), where it was suggested that an interim declaration might be granted when there was "some evidence of a deliberate flouting of established law by the governmental authority", foll'd *Summerside Seafood Supreme Inc. v. P.E.I. (Min. of Fisheries, Aquaculture and*

interim relief.[436]

1:7200 When Declarations May Be Awarded

As a public law remedy, declarations may be used to provide an original determination of the plaintiff's legal rights, duties, status, or position. Accordingly, declarations have been granted to decide disputed questions of personal status,[437] to determine whether a public body is in breach of contract,[438] to declare the rights of public office holders and employees,[439] to declare whether a person is a member of an association[440] or has a right to pursue a trade, occupation or other activity, to determine a person's entitlement to statutory compensation[441] or liability to pay a tax, and to declare the extent of the legal powers, immunities or duty of a public authority,[442] especially when disputed by another. As well, of course, a court may declare a decision of a body that does not exercise public powers, such as a trade association, to be invalid.[443]

Environment) (2004), 22 Admin. L.R. (4th) 270 (PEISC), suppl. reasons 2004 PESCTD 76, rev'd on basis interim injunction more appropriate (2006), 271 D.L.R. (4th) 530 (PEICA); **see also** *Terra Vista Ltd. v. Newfoundland* (2000), 577 A.P.R. 319 (Nfld. S.C.); *Saskatoon Square Ltd. v. Canada Mortgage & Housing Corp.* (1995), 32 Admin. L.R. (2d) 63 (Sask. C.A.); and *Ollinger v. Saskatchewan Crop Insurance Corp.*, [1992] 4 W.W.R. 517 (Sask. Q.B.), rev'd without deciding issue [1993] 4 W.W.R. 665 (Sask. C.A.) on the grant of interlocutory relief in the form of a declaration to maintain the *status quo* pending a final determination. **See further** topic 6:3100, *post.*

[436] E.g. *Francis v. Mohawk Council of Akwesasne* (1993), 62 F.T.R. 314 (FCTD) (*Federal Courts Act*, R.S.C. 1985, c. F-7 [as am. S.C. 2002, c. 8] (App. Fed. 3)).

[437] E.g. *McCaw v. United Church of Canada* (1991), 4 O.R. (3d) 481 (Ont. C.A.) (ordained minister).

[438] E.g. *T1T2 Limited Partnership v. Canada* (1995), 23 O.R. (3d) 81 (Ont. Gen. Div.).

[439] E.g. *Dewar v. Ontario* (1996), 137 D.L.R. (4th) 273 (Ont. Div. Ct.), aff'd with variation (1998) 37 O.R. (3d) 170 (Ont. C.A.); *Hewat v. Ontario* (1997), 32 O.R. (3d) 622 (Ont. Div. Ct.), aff'd with variation (1998) 37 O.R. (3d) 161 (Ont. C.A.).

[440] *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165. **See also** *Smith v. International Triathlon Union* (1999), 19 Admin. L.R. (3d) 248 (BCSC).

[441] See discussion in *MacDonald v. Law Society (Manitoba)* (1975), 54 D.L.R. (3d) 372 (Man. Q.B.).

[442] E.g. *Wolfe Island (Township) v. Ontario (Minister of Environment)* (1995), 23 O.R. (3d) 737 (Ont. C.A.) (power of minister to charge tolls for use of ferry); *Canada Life Assurance Co. v. Nova Scotia (Minister of Municipal Affairs)* (1996), 461 A.P.R. 278 (NSTD) (minister not liable to be required to respond to interrogatories).

[443] Compare *Chyz v. Appraisal Institute of Canada* (1985), 44 Sask. R. 165 (Sask. C.A.), where an injunction was granted.

Furthermore, as a remedy to review the legality of administrative action, a declaration may be granted to impugn the validity of delegated legislation,[444] administrative acts, orders or decisions, including reports, recommendations and action taken pursuant to the prerogative, orders or decisions of a judicial nature, policies,[445] and even informal guidelines, handbooks, advice or circulars upon which others may rely but which do not directly affect anyone's rights.[446] Moreover, it has been held that a declaration may be granted at the instance of a witness to the effect that findings of fact about the witness were made in breach of the duty of fairness owed to her, without impugning the validity of the tribunal's decision.[447] And a declaration has also been granted that a series of "non-decisions" or a "course of conduct" with respect to an application for permanent residence status was in contravention of the statute.[448]

And when a constitutional challenge is made to the validity of either the legislation under which an agency operates, or some administrative action taken pursuant to it, on either division-of-powers or *Charter* grounds, a declaration may be the most appropriate remedy.[449]

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[444] E.g. ***Brant Dairy Co. v. Ontario (Milk Commn.)***, [1973] S.C.R. 131; *Canadian Institute of Public Real Estate Companies v. Toronto (City)*, [1979] 2 S.C.R. 2; *O.P.S.E.U. v. Ontario (Attorney General)* (1995), 131 D.L.R. (4th) 572 (Ont. Div. Ct.); *S.G.E.U. v. Saskatchewan* (1997), 155 Sask. R. 161 (Sask. Q.B.), aff'd [1997] S.J. No. 277 (Sask. C.A.). **And see particularly discussion in** *Singh v. Canada (Attorney General)*, [1999] 4 F.C. 583 (FCTD), aff'd [2000] 3 F.C. 185 (FCA).

[445] E.g. *Mohawks of the Bay of Quinte v. Canada (Minister of Indian Affairs and Northern Development)*, 2013 FC 669 at para. 65 (clarification of Special Claims Policy in context of a land claims negotiation); *Jozipovic v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2012 BCCA 174 at paras. 102-5.

[446] E.g. *Morneault v. Canada (Attorney General)* [2000] F.C.J. No. 705 (FCA) (findings of misconduct contained in report of commission of inquiry); *McDonald v. Greater Victoria School District 61* (1997), 47 Admin. L.R. (2d) 175 (BCSC) (school fees policy); *Morgentaler v. New Brunswick (Attorney General)* (1989), 38 Admin. L.R. 280 (NBQB) (policy limiting medicare payments for abortions unauthorized by statute); *Ainsley Financial Corp. v. Ontario (Securities Commn.)* (1994), 121 D.L.R. (4th) 79 (Ont. C.A.) (policies declared invalid as "legislative" in nature).

[447] *Hurd v. Hewitt* (1991), 13 Admin. L.R. (2d) 223 (Ont. Gen. Div.), rev'd on other grounds (1994), 28 Admin. L.R. (2d) 165 (Ont. C.A.).

[448] *Popal v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 352 (FCTD).

[449] See e.g. ***Reference re Language Rights under s. 23 of Manitoba Act, 1870 & s. 133 of Constitution Act, 1867,*** [1985] 1 S.C.R. 721, where the Court suspended the declaration of invalidity to allow the legislature time within which to enact its statutes in French and English. **And see** *Gamble, Re,* [1988] 2 S.C.R. 595 (declaration that prisoner held in breach of constitutional rights eligible for parole); *Canada (Prime Minister) v.*

1:7300 When Declarations May Not Be Granted

Despite the remedial flexibility of the declaration, the courts' jurisdiction to grant it is not unlimited. There are also circumstances in which declaratory relief will not be granted in the exercise of the court's discretion that are now so well-defined that it is not always easy to tell whether the refusal is based on jurisdictional or discretionary grounds.[450]

1:7310 *The Requirement of Justiciability*

Because the scope of declaratory relief lacks clear definition, courts have been concerned to ensure that declarations are sought only in respect of matters that are properly the subject of judicial determination. Thus, as a general principle, the subject matter of a dispute must be justiciable both in the sense that it must be within the competence of the judiciary to determine,[451] and the issue must be one that is appropriate for a court to decide.[452]

For example, in has been said that a court should not grant a declaration where the subject is a matter of morality, politics, the propriety of administrative practices or the wisdom of governmental action.[453] Similarly, where there were no specific facts constituting a

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Khadr, 2010 SCC 3 at para. 46; *Canadian Assn. of the Deaf v. Canada* (2006), 272 D.L.R. (4th) 55 (FC). **See also** ***2747-3174 Quebec Inc. v. Québec (Régie des permis d'alcool),*** [1996] 3 S.C.R. 919 at pp. 992-93, where L'Heureux-Dubé, J. said that, as a common law remedy, declaratory relief is only binding on the parties, while as a constitutional remedy, a declaration that a statutory provision is invalid is good against the world. **See further** K. Roach, *Constitutional Remedies in Canada* (Aurora, Ont.: Canada Law Book, looseleaf), c. 12.

[450] See e.g. *Friesen v. Hammell,* [1999] 5 W.W.R. 345 (BCCA). **See also** *Eli Lilly Inc. v. Novopharm Ltd.* (2008), 70 C.P.R. (4th) 202 (FC) (declarations of invalidity of Regulations may not be sought in course of summary motion to dismiss an application) at para. 26, aff'd 2009 FC 675. **And see generally** topics 1:7330 and 3:0000, *post.*

[451] See further, topic 3:3400, *post.*

[452] Of course, that would include the affected parties being before the court: e.g. *Su v. Canada (Minister of Citizenship and Immigration),* 2012 FC 743 at para. 24 (agency whose conduct to be declared illegal not party to proceeding). **See also** *Orman v. Marnat Inc.,* 2012 ONSC 549 (declaration only binding on governments because of their intervention in the proceedings).

[453] *Dee v. Canada (Minister of Employment & Immigration)* (1987), 17 F.T.R. 304 (FCTD). **See also** *Aleksic v. Canada (Attorney General)* (2002), 215 D.L.R. (4th) 720 (Ont. Div. Ct.) (military bombardment of Yugoslavia); *Brown v. Alberta,* [1999] 3 W.W.R. 730 (Alta. Q.B.), aff'd (1999), 177 D.L.R. (4th) 349 (Alta. C.A.). **And see** ***Black v. Chrétien***

dispute in connection with a *Charter* section 35 assertion of unconstitutionality, a claim for a declaration was struck out.[454] And the Supreme Court of Canada struck out a statement of claim in which the plaintiffs sought a declaration concerning a decision by the federal Cabinet to permit the testing of nuclear weapons in Canada, on the ground that whether testing would have the consequences alleged by the plaintiffs rested on predictions of future events, something not susceptible of proof in a court of law.[455]

Furthermore, while it is usually necessary that a declaration be sought in respect of a question of law,[456] not all questions of law are necessarily justiciable in the courts, particularly where the legislature has provided another forum for their determination.[457] For example, the Supreme Court of Canada refused to declare whether a minister was in breach of a statutory duty to disclose certain information to the Auditor General, where the legislation in question required the Auditor to report any failure by the minister to provide the information to the House of Commons.[458]

1:7320 *No Practical Value*

As a general rule, a declaration will not be granted where it would be of no practical value or not serve a useful purpose:[459] judicial

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(2000), 47 O.R. (3d) 532 (Ont. Sup. C.J.), aff'd (2001), 199 D.L.R. (4th) 228 (Ont. C.A.); *Nova Scotia (Attorney General) v. Bedford Service Commission* (1976), 72 D.L.R. (3d) 639 (NSCA), rev'd on other grounds [1977] 2 S.C.R. 269; *Schreiber v. Canada (Attorney General)*, [2000] 1 F.C. 427 (FCTD).

[454] *Eremineskin Cree Nation v. Canada* (2004), 46 C.P.C. (5th) 223 (Alta. Q.B.).

[455] ***Operation Dismantle Inc. v. R.***, [1985] 1 S.C.R. 441.

[456] But see ***Resolution to Amend the Constitution, Re***, [1981] 1 S.C.R. 753 (the patriation reference), where the Supreme Court of Canada granted a declaration on, *inter alia*, the existence and scope of a constitutional convention.

[457] As to the effect of an alternative remedy on the grant of declaratory relief, **see** topic 1:7330, *post*. **See also** topic 3:3200, *post*, on the courts' exercise of discretion generally to refuse relief on this ground.

[458] *Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*, [1989] 2 S.C.R. 49. **See also** *C.U.P.E. v. Canada (Minister of Health)* (2004), 244 D.L.R. (4th) 175 (FC).

[459] See topic 3:3300, *post*; **and see** *Montana Band of Indians v. R.*, [1991] 2 F.C. 30 (FCA); **see also** *Murphy v. Newhook* (1984), 149 A.P.R. 307 (Nfld. S.C.), where the court was of the view that the result would nevertheless be the same; *C.A.W. v. Nova Scotia (Labour Relations Board)* (1988), 222 A.P.R. 61 (NSTD), where a declaration that an application was not effective since there was no bar to making another application.

resources are not to be used to settle merely academic or hypothetical controversies.[460] And it has been suggested that a dispute will be regarded by the courts as theoretical, and thus not suitable for judicial determination, where any of the following exist:

(1) there is no dispute in existence;[461]

(2) the dispute is divorced from the facts;

(3) the dispute is based on hypothetical facts;[462] or

(4) the dispute has ceased to be of practical significance.[463]

Thus, a declaration of right was refused when a tribunal had already decided the question, and where the decision could not have been changed by the declaration, since the plaintiff did not allege that the tribunal had exceeded its jurisdiction.[464] Similarly, a declaration has been refused on a question of statutory interpretation prior to the establishment of some factual underpinning.[465]

On the other hand, the fact that if granted, it would cause the government at least to rethink its policies and priorities was held to be sufficient to warrant making a declaration.[466] And declarations have been granted with respect to reports of inquiries that do not determine

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Compare *Morneault v. Canada (Attorney General),* [2000] F.C.J. No. 705 (FCA).

[460] See generally topic 3:3000, *post.*

[461] *Lax Kw'alaams Indian Band v Canada (Attorney General),* 2011 SCC 56 at para. 14. **Compare** *K'Omoks First Nation v. Canada (Attorney General),* 2012 FC 1160 at para. 44 (although no longer a dispute, it was desirable to make declaration).

[462] E.g. *Blood Tribe v. Canada (Attorney General),* 2012 ABCA 206 at para. 46; *C.U.P.W. v. Canada (Attorney General)* (1978), 93 D.L.R. (3d) 148 (FCTD), varied on other grounds (1979), 36 N.R. 583 (FCA).

[463] See H. Woolf, J. Jowell, and A. Le Sueur, *de Smith's Judicial Review,* 6th ed. (London: Sweet and Maxwell, 2007), c. 18-055.

[464] *Canada Post Corp. v. C.U.P.W.* (1989), 38 Admin. L.R. 305 (Ont. H.C.J.). **Compare** *Harbourview Acres Ltd. v. Rent Review Commn.* (1983), 57 N.S.R. (2d) 347 at p. 351 (NSCA) (denial of natural justice). However, since a tribunal that renders a decision in breach of the duty of fairness is not thereby *functus,* this latter decision is somewhat anomalous: **see further** topic 12:6224, *post.*

[465] *Thompson v. Chiropractors' Assn. (Saskatchewan)* (1996), 36 Admin. L.R. (2d) 273 (Sask. Q.B.).

[466] *Energy Probe v. Canada (Attorney General)* (1989), 68 O.R. (2d) 449 (Ont. C.A.), leave to appeal to SCC ref'd (1989), 102 N.R. 399(n). **See also** *Dumont v. Canada (Attorney General),* [1990] 1 S.C.R. 279.

individuals' legal rights, but may otherwise affect their reputations.[467] Furthermore, a court has entertained a request for a declaration that certain provisions in a statute were invalid, even before they were proclaimed, on the ground that such an order would be of practical value to those who would be affected by them.[468]

1:7330 *Availability of an Alternative Remedy*

As with the other discretionary remedies, declaratory relief will usually be refused where the legislature has provided an adequate alternative remedy. Thus, a declaration will not normally be granted in connection with an issue that could have been raised on appeal, both where an appeal lies to an independent administrative tribunal or to a court.[469] As well, the availability of criminal proceedings for breach of a statutory duty will generally preclude the grant of a declaration that the defendant had acted unlawfully.[470] And a declaration of right was refused where the plaintiff had instituted a claim for damages against another defendant in respect of the same matter,[471] as it was where the question had been submitted to arbitration pursuant to an agreement of the parties.[472] Indeed, in one case it was held that a political remedy in the House of Commons was sufficient to deprive the court of jurisdiction to grant a declaration on the scope of a minister's statutory duty.[473]

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[467] *Morneault v. Canada (Attorney General)*, [2000] F.C.J. No. 705 (FCA).

[468] *Canadian Indemnity Co. v. British Columbia (Attorney General)* (1974), 56 D.L.R. (3d) 7 (BCSC), aff'd (1976), 63 D.L.R. (3d) 468 (BCCA), aff'd [1977] 2 S.C.R. 504.

[469] E.g. *Dee v. Canada (Minister of Employment & Immigration)* (1987), 17 F.T.R. 304 (FCTD); *Beattie v. Acadia University* (1976), 72 D.L.R. (3d) 718 (NSCA). **See also** *Lockyer-Kash v. British Columbia (Workers' Compensation Board)*, 2013 BCSC 467 at paras. 62-63 (declaration would circumvent WCB and exceed court's role on judicial review); *Public Accountants Council v. Premier Trust Co.*, [1964] 1 O.R. 386 (Ont. H.C.J.); *Municipal Contracting Ltd. v. Nova Scotia (Minister of Finance)* (1992), 309 A.P.R. 174 (NSCA). **See generally** topic 3:2120, *post.*

[470] *R. v. Shore Disposal Ltd.* (1976), 72 D.L.R. (3d) 219 (NSCA); **see also** *Samuel Varco Ltd. v. R.* (1978), 87 D.L.R. (3d) 522 (FCTD). **And see** topic 3:2133, *post.*

[471] *MacDonald v. Law Society (Manitoba)* (1975), 54 D.L.R. (3d) 372 (Man. Q.B.).

[472] *Canada Permanent Trust Co. v. Orvette Investments Ltd.* (1976), 67 D.L.R. (3d) 416 (Ont. C.A.). The proper remedy would be to apply for the statutory or common law remedy to review the arbitrator's award.

[473] *Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*, [1989] 2 S.C.R. 49; **but see** *British Columbia (Legislative Assembly Resolution on Judicial Compensation) (Re)* (1996), 139 D.L.R. (4th) 356 (BCSC), rev'd on other grounds (1998),

Furthermore, a statutory provision to the effect that an administrative agency has exclusive jurisdiction to determine certain issues such as the resolution of differences between a trade union and an employer arising from a collective agreement, may be construed as precluding the grant of an original judicial declaration of the plaintiff's legal rights.[474] Similarly, a court dismissed a claim for a declaration relating to the plaintiff's tax liability on the ground that the statute empowered the minister to decide the issue.[475] And even on questions of constitutional law, where the courts' jurisdiction is constitutionally entrenched, a court may require the plaintiff to exhaust the statutory remedy where it provides an effective alternative.[476]

Moreover, where the legislation creating a new right also provides the means for determining those rights through an independent tribunal, a court will likely infer that its jurisdiction has been excluded by implication.[477] And analogous reasoning has led the Supreme Court of Canada to conclude that it would be inconsistent with the statutory

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160 D.L.R. (4th) 477 (BCCA).

[474] E.g. *Canada Post Corp. v. C.U.P.W.* (1989), 38 Admin. L.R. 305 (Ont. H.C.J.) (Workers' Compensation Appeal Tribunal). On the scope of the exclusive original jurisdiction of labour arbitrators, **see *St. Anne-Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219***, [1986] 1 S.C.R. 704; ***Weber v. Ontario Hydro,*** [1995] 2 S.C.R. 929; *Allen v. Alberta,* 2003 SCC 13*; Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General),* 2004 SCC 39 (human rights tribunal had exclusive jurisdiction over dispute); *Bisaillon v. Concordia University,* 2006 SCC 19 (dispute about pension plan management to be processed through grievance machinery, not class action suit); *Isadore Garon Ltée v. Syndicat du Bois Ouvré de la Région de Québec Inc.,* 2006 SCC 2. **See generally** D.J.M. Brown & D.M. Beatty, *Canadian Labour Arbitration,* 4th ed. (Aurora, Ont.: Canada Law Book, looseleaf), topic 1:4200. **See also** topics 3:2390 and 13:5000, *post.*

[475] *Municipal Contracting Ltd. v. Nova Scotia (Minister of Finance)* (1992), 309 A.P.R. 174 (NSCA); **see also** *Edgar v. Canada (Attorney General)* (1999), 46 O.R. (3d) 294 (Ont. C.A.) (amount of award within the sole discretion of the minister).

[476] ***Weber v. Ontario Hydro,*** [1995] 2 S.C.R. 929. **See also** *Okwuobi v. Lester B. Pearson School Board,* 2005 SCC 16.

[477] The best known authority for this proposition is the English case of ***Barraclough v. Brown***, [1897] A.C. 615 (H.L.). **And see** *G. (C.) v. Catholic Children's Aid Society of Hamilton-Wentworth* (1998), 40 O.R. (3d) 334 (Ont. C.A.); *Bouten v. Mynarski Park School District No. 50* (1982), 21 Alta. L.R. (2d) 20 (Alta. Q.B.); *Mahar v. Rogers Cablesystems Ltd.* (1995), 25 O.R. (3d) 690 (Ont. Gen Div.), add'l reasons (1995), 25 O.R. (3d) 702; *Rollo Bay Holdings Ltd. v. P.E.I. Agricultural Development Corp.* (1994), 28 Admin. L.R. (2d) 79 (PEITD). However, where the issue concerns the impact on common law rights, courts may be more reluctant to defer to a statutory remedy: **e.g.** *Campbell Soup Co. Ltd. v. Farm Products Marketing Board* (1976), 10 O.R. (2d) 405 (Ont. H.C.J.); **but see** *Terrasses Zarolega Inc. v. Quebec (Olympic Installation Board),* [1981] 1 S.C.R. 94 (declaration declined to determine amount of compensation payable under statutory scheme).

provisions for the enforcement of human rights legislation to permit a person to seek damages in the courts for breach of the statutory duty not to discriminate.[478]

Similarly, courts are reluctant to grant declaratory relief where it would, in effect, provide a right of appeal either from a court[479] or a tribunal,[480] where none has been provided by statute. However, much will depend on the view the court takes of the adequacy of the statutory remedies to protect the right in question.[481] For example, in one case a court granted a declaration that discriminatory provisions in a charitable trust were invalid as contrary to public policy, on the ground that the question involved the court's existing jurisdiction over charities, and it was doubtful whether a board of inquiry established under human rights legislation could provide an effective remedy.[482]

Finally, it should be noted that when a claimant has unsuccessfully sought a statutory remedy, a court will normally hold that the doctrine of issue estoppel precludes the claimant from seeking a declaration in respect of any matter that was, or could have been, decided in that other proceeding.[483]

1:8000 INJUNCTIONS

1:8100 Generally

An injunction[484] is an order of the court requiring a person to do or to refrain from doing something. Thus, as a negative order to abstain

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[478] ***Seneca College of App lied Arts & Technology v. Bhadauria***, [1981] 2 S.C.R. 181; ***Canada (Human Rights Commn.) v. Canadian Liberty Net,*** [1998] 1 S.C.R. 626.

[479] ***Kourtessis v. Minister of National Revenue,*** [1993] 2 S.C.R. 53.

[480] *Canada Post Corp. v. C.U.P.W.* (1989), 38 Admin. L.R. 305 (Ont. H.C.J.).

[481] *Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources),* [1989] 2 S.C.R. 49; **and see** *Madadi v. British Columbia College of Teachers,* BCSC 1062 at paras. 18*ff.*; **see also** topic 3:2100, *post.*

[482] *Canada Trust Co. v. Ontario (Human Rights Commn.)* (1990), 74 O.R. (2d) 481 (Ont. C.A.).

[483] *Singh (Ahmar) v. Canada (Minister of Citizenship & Immigration)* (1996), 123 F.T.R. 241 (FCTD) (invalidity of Regulations could have been raised on appeal to the Immigration and Refugee Board against a deportation order). **See also** topic 3:2390, *post.*

[484] See generally R.J. Sharpe, *Injunctions & Specific Performance*, 2d ed. (Aurora, Ont.: Canada Law Book, 1996), c. 1-6, and especially c. 1: "Injunctions to Enforce Public Rights"; and on injunctions as public law remedies in England, **see** H. Woolf, J. Jowell, and A. Le Sueur, *de Smith's Judicial Review,* 6th ed. (London: Sweet and Maxwell, 2007), c. 18-034*ff.*

administrative action must be instituted outside the Act.[444] In Ontario, on the other hand, despite the doubt expressed in one case about the applicability of the Ontario *Judicial Review Procedure Act* to the action of a federally-established therapeutic abortion committee in Ontario,[445] the Act could apply.[446]

If the provincial statute does apply, then the second question is whether that legislation can validly subject federal agencies to more extensive grounds of review than those applicable at common law. And notwithstanding that the Supreme Court of Canada has advanced the broad proposition that a provincial legislature was not competent to *modify* the courts' inherent supervisory jurisdiction as far as federal agencies are concerned,[447] it may have intended only that the review jurisdiction could not be contracted, as opposed to extended. Conversely, Parliament may expressly prescribe the grounds on which provincial superior courts must review decisions taken pursuant to federal statutes, wherever the Federal Court's jurisdiction has been excluded.[448]

2:4400 Grounds of Review

In addition to defining the bodies against which proceedings may be brought under sections 18.1 and 28(1), the *Federal Courts Act* creates a statutory form of summary proceeding to challenge federal administrative action, and sets out the grounds on which it may be brought.[449] Moreover, the grounds listed in this section are the *only*

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[444] See topic 2:3300, *ante*; **and see** *National Farmers Union v. Prince Edward Island (Potato Marketing Council)* (1989), 231 A.P.R. 64 (PEITD); *C.J.A., Local 1388 v. Prince Edward Island (Labour Relations Board)* (1990), 255 A.P.R. 40 (PEITD), although the Appeal Division has left the issue open: (1990), 266 A.P.R. 326 (PEICA).

[445] *Medhurst v. Medhurst* (1984), 4 Admin. L.R. 126 (Ont. H.C.J.). **See also** *Sabados v. Canadian Slovak League* (1982), 133 D.L.R. (3d) 152 (Ont. Div. Ct.), where it was held that a decision of a committee of a body incorporated under a special federal statute was reviewable under the *Judicial Review Procedure Act*, R.S.O. 1980, c. 224; *Williams v. Canada (Attorney General)* (1983), 45 O.R. (2d) 291 (Ont. Div. Ct.).

[446] See topic 2:2411, *ante*.

[447] ***Three Rivers Boatman Ltd. v. Canada (Labour Relations Board)***, [1969] S.C.R. 607. However, this statement should be evaluated in light of the issue in dispute in the case, namely whether the Quebec *Code of Civil Procedure* could *confine* the courts' jurisdiction to the review of provincially-created tribunals. In holding that it could not, the Court was concerned to ensure that the rights of citizens would be protected from unlawful conduct in a province by a federal agency.

[448] E.g. *Extradition Act*, R.S.C. 1985, c. E-23 [as am. By S.C. 1992, c. 13, s. 25.2(7)] (*Federal Courts Act* grounds of review (s. 18.1(4)) to be applied by provincial courts of appeal when reviewing decision of Minister of Justice ordering surrender of fugitive offender on the request of foreign state).

[449] See discussion in ***Canada (Citizenship & Immigration) v. Khosa***, 2009 SCC 12.

grounds on which administrative action may be challenged.[450] Furthermore, it establishes what administrative actions may be the subject of review, and the forms of relief that the court may award.[451]

Section 18.1(4) provides that any of the forms of relief specified in the *Federal Courts Act* may be granted by the Federal Court[452] against a federal board, commission or other tribunal, on the ground that it:

> (a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
>
> (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
>
> (c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;
>
> (d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
>
> (e) acted, or failed to act, by reason of fraud or perjured evidence; or
>
> (f) acted in any other way that was contrary to law.

These grounds of review also apply to administrative action that is reviewable only in the Federal Court of Appeal.[453] And it has been held that the addition of subsection (f) confirms that the Federal Court may consider constitutional and *Charter* arguments on an application for judicial review, even when the tribunal whose decision is being reviewed cannot make constitutional determinations.[454]

However, they do not significantly expand the jurisdiction of the Federal Court over federal administrative action much beyond the scope

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[450] *Radil Bros. Fishing Co. v. Canada (Department of Fisheries and Oceans, Pacific Region)* (2000), 29 Admin. L.R. (3d) 159 (FCTD), aff'd on this ground (2001), 207 D.L.R. (4th) 82 (FCA). **See also** *Canada (Human Rights Commission) v. Warman*, 2012 FC 1162 at para. 43; aff'd 2014 FCA 18, ref'g to *Air Canada Pilots Association v. Kelly*, 2011 FC 120 at paras. 481-489, revd on grounds court had ignored binding authority 2012 FCA 209.

[451] As to the practice and procedure in connection with an application for judicial review in the Federal Court, **see** topics 4:3412; 4:5120; 5:1252; 5:1520; 5:9000, 6:4520; 6:5455; 6:6700; 6:7500, *post.*

[452] *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.1(4) [as am. 2002, c. 8] (App. Fed. 3).

[453] *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 28(2) [as am. S.C. 2002, c. 8]; **and see** topic 2:4120, *ante.*

[454] *Raza v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 F.C. 185 (FCTD); *Gwala v. Canada (Minister of Citizenship and Immigration)*, [1999] 3 F.C. 404 (FCA).

now exercised by other courts over provincial administrative action.[455]

2:4410 *Forms of Relief*

The supervisory jurisdiction of the Federal Court is further defined by section 18.1(3) of the *Federal Courts Act*, which provides that on an application for judicial review, the Federal Court[456] may

> (a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or
>
> (b) declare invalid or unlawful, or quash, set aside, or set aside and refer back for determination in accordance with such instructions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

Again, these provisions also apply to applications for judicial review that must be launched in the Federal Court of Appeal.[457] It should be noted that, unlike the other grounds of review set out in subsection 18.1(4), those contained in paragraphs (c) (error of law) and (d) (erroneous findings of fact) are only available when the administrative action under review is a "decision or order."[458]

Nevertheless, these statutory forms of relief closely track those available at common law. Thus, paragraph (a) is equivalent to the order of *mandamus* or a mandatory injunction, with the significant modification that unreasonable delay is equated with the refusal to discharge a legal duty.[459] Paragraph (b) authorizes forms of relief that are virtually identical to those available through *certiorari*, prohibition,[460] declaration[461] and injunction,[462] and their statutory

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[455] Topics 2:2000, 2:3000, *ante*.

[456] *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.1(3) [as am. S.C. 2002, c. 8].

[457] *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 28(2) [as am. S.C. 2002, c. 8] (App. Fed. 3).

[458] See discussion in *Morneault v. Canada (Attorney General)*, [2000] F.C.J. No. 705 (FCA), **as well as** *Larny Holdings Ltd. v. Canada (Minister of Health)* (2002), 216 D.L.R. (4th) 230 (FCTD).

[459] Topic 1:3000, *ante*; and on injunctions generally, **see** topic 1:8000, *ante*.

[460] Topic 1:2000, *ante*.

[461] Topics 1:6000, 1:7000, *ante*. **And see** *Singh v. Canada (Minister of Citizenship and Immigration)* (2010), 372 F.T.R. 40 (FC) (declaration issued) at para. 38; *Ward v. Samson Cree Nation* (1999), 247 N.R. 254 (FCA) *per* Isaac C.J.: declaration may be sought either through judicial review or by way of action; *Sucker Creek Indian Band v. Calliou*, [1999] F.C.J. No. 1715 (FCTD) (declaration had no coercive effect; contempt of court order unavailable); *Sweet v. Canada*, [1999] F.C.J. No. 1539 (FCA); *Nunavik Inuit v. Canada*

counterparts in provincial judicial review legislation.[463] However, the express provisions enable the court simply to set aside, or set aside and remit for redetermination in accordance with directions.[464] Furthermore, the court may also grant interim relief pending the final disposition of an application for judicial review,[465] including the power to grant relief on consent,[466] a discretion that it exercises by reference to the same considerations as other courts,[467] Moreover, the Federal Court, like most provincial courts, has no jurisdiction to award damages on an application for judicial review.[468]

2:4420 *Reviewable Administrative Action*

Relief may be granted under paragraph (a) of section 18.1(3) in respect of "any act or thing" that a federal agency has unlawfully failed to do or has been unreasonably tardy in doing. As well, the "act or thing"

(Minister of Canadian Heritage) (1998), 164 D.L.R. (4th) 463 (FCTD); *Smith v. Canada (Minister of Citizenship and Immigration),* [1998] 3 F.C. 144 (FCTD). **Compare** *Price v. Canada (Attorney General)* (2004), 247 F.T.R. 15 (FC) (termination of tenure as military judge not result of "order"; action necessary); *Perera v. Canada (Canadian Human Rights Commission)* (1989), 89 C.L.L.C. 17,016 (FCA); *Panchoo v. Canada (Minister of Citizenship and Immigration),* [2000] 3 F.C. 18 (FCA); *Moktari v. Canada (Minister of Citizenship and Immigration),* [2000] 2 F.C. 341 (FCA).

[462] Topics 1:6000, 1:8000, *ante.*

[463] Topics 2:2000, 2:3000, *ante.*

[464] Topic 5:2200, *post.*

[465] *Federal Courts Act,* R.S.C. 1985, c. F-7, s. 18.2 [as am. S.C. 2002, c. 8]. **See e.g.** *Borisova v. Canada (Minister of Citizenship and Immigration),* [2003] 4 F.C. 408 (FCC) (Minister restrained from rejecting applications for permanent residence under new legislation); *Capital Vision Inc. v. Canada (Minister of National Revenue)* (2000), 191 F.T.R. 183 (extension of time to produce documents granted, pursuant to power to make interim orders). However, the Federal Court of Appeal is the proper forum in which to seek such relief if the tribunal is reviewable in that court: *Evangelical Fellowship of Canada v. Canadian Musical Reproduction Rights Agency,* [1999] F.C.J. No. 1068 (FCA); *Inspiration Television Canada Inc. v. Canada,* [1992] 3 F.C. 350 (FCTD).

[466] *Canada (Attorney General) v. Goulet,* 2012 FCA 62 at para. 12.

[467] E.g. *Strizhko v. Canada (Minister of Citizenship and Immigration)* (1998), 150 F.T.R. 244 (FCTD): s. 18.2 cannot be used as vehicle to bypass judicial review. **And see generally** topic 6:2000, *post.*

[468] E.g. *Powderface v. Baptiste* (1996), 118 F.T.R. 258 (FCTD). **See also** *Liddar v. Canada (Minister of National Revenue)* (2007), 371 N.R. 65 (FCA) (Federal Court lacked authority to order minister to repay interest and penalties); *Oak Island International Group Ltd. v. Canada (Attorney General)* (2003), 30 C.P.C. (5th) 355 (NSSC) (action in tort could proceed in provincial superior court prior to conclusion of judicial review proceedings in federal court; allegations not merely facade to mask judicial review claim); *Radil Bros. Fishing Co. v. Canada (Department of Fisheries and Oceans, Pacific Region)* (2000), 29 Admin. L.R. (3d) 159 (FCTD), aff'd on this point (2001), 207 D.L.R. (4th) 82 (FCA).

must qualify as a "matter" under section 18.1(1).[469]

The interpretation of the words "decision, order, act or proceeding," which define the subject matter of the Court's jurisdiction to grant the forms of relief contained in paragraph (b), has been less straightforward, in part as a result of the original version of section 28(1). That section conferred on the Federal Court of Appeal exclusive jurisdiction to review and set aside "a decision or order....required by law to be made on a judicial or *quasi*-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal." As indicated,[470] the precise scope of nearly every word in this clause was much litigated, including the phrase "decision or order," which was interpreted quite narrowly by the Court.[471] Of course, other administrative action that did not qualify as a "decision or order," including a non-final or non-dispositive order of a tribunal whose final decision was reviewable under section 28(1),was reviewable in the Trial Division (now Federal Court) under section 18(1).[472]

The subsequent enactment of Sections 18.1(3)(b) and 28(2), however, has expanded the jurisdiction of the Federal Courts considerably. Specifically, reviewable administrative action now includes not only "a decision or order,"[473] but also an "act or proceeding" of a federal board, commission or other tribunal. And with some exceptions,[474] the words "decision, order, act or proceeding" have been

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[469] *Telus Communications Co. v. Canada (Attorney General),*2014 FC 1 at paras. 28*ff.* (issuance of spectrum licences is policy but comes within the concept of "matter"); *CEP v. Canada (Minister of Canadian Heritage and Official Languages)*, 2013 FC 34 at para. 28 (letter acknowledging request not a "matter" within section 18.1(1)). **See also** *May v CBC/Radio Canada*, 2011 FCA 130 at para. 10.

[470] Topic 2:4110, *ante.*

[471] Indeed, initially the Court restricted the term to "final" decisions or orders, or to those that the tribunal was expressly charged by its enabling legislation to make: **e.g.** *Nenn v. R.*, [1981] 1 S.C.R. 631.

[472] *Minister of National Revenue v. Schnurer Estate* (1997), 108 F.T.R. 339 (FCA).

[473] E.g. *Meeches v. Meeches*, 2013 FC 196 at para. 117 referring to *Krause v Canada*, [1999] 2 F.C. 476 at para. 24 (recommendation a "decision" of the Election Appeal Committee and a "matter" in respect of which relief is available by way of subsections 18.1 and 18.3).

[474] E.g. ***Air Canada v. Toronto Port Authority***, 2011 FCA 347 (Port Authority's bulletins not judicially reviewable, since affected no rights or interests of Air Canada); ***Halifax (Regional Municipality) v. Canada (Public Works and Gov't Services)***, 2009 FC 670 (report of advisory panel to Minister of Public Works not judicially reviewable), aff'd on this point (2010), 321 D.L.R. (4th) 638 (FCA), rev'd on other grounds 2012 SCC 29; *Toronto Coalition to Stop the War v. Canada (Minister of Public Safety and Emergency Preparedness)* (2010), 17 Admin. L.R. (5th) 1 (FC) (letter in question not subject to judicial review: "advance indications of a future ministerial position are not subject to judicial review") at para. 144; *Francoeur v. Canada (Treasury Board)* (2010), 373 F.T.R.

held to encompass a wider range of administrative action than was

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29 (FC) (courtesy letter not a decision; however, merits considered) at para. 13; *Canada (Attorney General) v. Beyak* (2011), 28 Admin. L.R. (5th) 1 (FC) (non-binding recommendations not judicially reviewable); *Cassiar Watch v. Canada (Minister of Fisheries and Oceans)* (2010), 362 F.T.R. 82 (FC) (letter of advice, a non-binding opinion with no legal effect, not amenable to judicial review); *Gomez v. Canada (Minister of Public Safety and Emergency Preparedness)* (2010), 372 F.T.R. 168 (FC) (non-decision of Minister not judicially reviewable) at paras. 25-37; *Sandiford v. Canada (Attorney General),* 2009 FC 862 (courtesy response to letter by applicant long after decision rendered not subject to judicial review) at para. 25; *Democracy Watch v. Canada (Conflict of Interest and Ethics Commissioner)* (2009), 86 Admin.L.R. (4th) 149 (FCA) (letter from Conflict of Interest and Ethics Commissioner not judicially reviewable); *Leighton v. Canada (Minister of Transport)* (2006), 57 Admin. L.R. (4th) 120 (FC) ("pending decision" not reviewable); *Butterfield v. Canada (Attorney General)* (2006), 297 F.T.R. 34 (FC) (courtesy letter), aff'd 2007 FCA 290; *Mymryk v. Canada (Attorney General)* (2007), 308 F.T.R. 5 (FC) (Federal Court did not have jurisdiction to grant restoration of day parole and other remedies which should have been sought from Parole Board); *Pieters v. Canada (Attorney General)* (2007), 65 Admin. L.R. (4th) 92 (FC) (report and recommendations of Public Service Integrity Office not judicially reviewable); *Canada (Royal Canadian Mounted Police) v. Canada (Attorney General)* (2007), 65 Admin. L.R. (4th) 111 (FC) (initiation of criminal investigation by R.C.M.P. not subject to judicial review); *Cinemas Guzzo Inc. v. Canada (Attorney General)* (2005), 277 F.T.R. 39 (FC) (decision to discontinue inquiry was "administrative" and so not susceptible to judicial review), aff'd 2006 FCA 160; *Nourhaghighi v. Canada (Security Intelligence Review Committee)* (2005), 26 Admin. L.R. (4th) 192 (FC) (alleged tortious conduct by Registry officials could not be challenged by judicial review); *Nunavut Tunngavik Inc. v. Canada (Attorney General)* (2004), 10 Admin. L.R. (4th) 310 (FC) (refusal to increase pay for board members not reviewable, since did not flow from any statutory power); *Patterson v. Canada (Correctional Service)* (2004), 18 Admin. L.R. (4th) 57 (FC) (policy or practice not "order" than can be judicially reviewed); *Price v. Canada (Attorney General)* (2004), 247 F.T.R. 15 (FC) (termination of tenure as military judge not result of "order"; action necessary); *P.I.P.S. v. Canada (Customs and Revenue Agency)* (2004), 251 F.T.R. 56 (FC) ("staffing recourse" program not reviewable); *Copello v. Canada (Minister of Foreign Affairs),* 2001 FCT 1350 (diplomatic note requesting diplomat to leave Canada), aff'd (2003), 3 Admin. L.R. (4th) 214 (FCA); *Centre for Research-action on Race Relations v. Canada (Canadian Radio-Television and Telecommunications Commission)* (2000), 266 N.R. 344 (FCA) (letter from C.R.T.C. not "decision or order"); *Bouchard v. Canada (Minister of National Defence)* (1999), 187 D.L.R. (4th) 314 (FCA) (letter of refusal of reinstatement); **see also** *Alberta v. Canadian Wheat Board* (1997), 2 Admin. L.R. (3d) 187 (FCTD), aff'd (1998), 234 N.R. 74 (FCA) (Canadian Wheat Board program not reviewable); *Mennes v. Canada (Attorney General)* (1998), 9 Admin. L.R. (3d) 119 (FCTD), aff'd (1999), 247 N.R. 295 (FCA) (Chief Justice of Federal Court in issuing Direction); *Apotex Inc. v. Canada (Minister of National Health and Welfare)* (1998), 153 F.T.R. 216 (FCTD) ("course of conduct" not judicially reviewable), aff'd (2000), 181 D.L.R. (4th) 404 (FCA). **Compare** *Griffin v.* Canada (1997), 128 F.T.R. 175 (FCTD) (refusal of recommendation for interview concerning appointment to board reviewable); *Tomlinson v. Canada (Attorney General)* (1996), 108 F.T.R. 263 (FCTD) (refusal to issue firearms licence reviewable as a "decision" that affected the legal right of the applicant to be in possession of a gun collection). **And see discussion** in *Toronto (City) v. Toronto Port Authority* (2010), 370 F.T.R. 226 (FC) at paras. 38-41; *C.B. Powell Ltd. v. Canada (Border Services Agency),* 2010 FCA 61, rev'g 2009 FC 528. As well, the existence of a statutory right of appeal from a decision of a federal agency to the Federal Court, or to certain other bodies, precludes an application for judicial review (s. 18.5: **see** topic 3:2120, *post*).

previously reviewable in the Federal Court of Appeal.[475] The principal significance of characterizing administrative action as a "decision or order" for the purpose of subsection 18.1(4) is that only a decision or order is reviewable for error of law (paragraph (c)) or an erroneous finding of fact (paragraph (d)). However, it may be possible to obtain review, in effect, on these grounds in the case of administrative action that is not a "decision or order," by relying on another paragraph in the section.[476]

At the same time, in order to avoid a multiplicity of proceedings and frustration of the statutory purposes underlying the administrative

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[475] E.g. *Boogaard v. Canada (Attorney General)*, 2014 FC 1113 (RCMP Commissioner's refusal to recommend promotion to rank of commissioned officer reviewable); *Mikail v. Canada (Attorney General)* (2011), 338 D.L.R. (4th) 364 (FC) (S.I.R.C report tantamount to "adjudicative recommendation", and so subject to judicial review) at paras. 47*ff; Khadr v. Canada (Prime Minister)* (2010), 321 D.L.R. (4th) 413 (FC) ("decisions not to take a certain course of action that are evidenced by public statements are justiciable") at para. 39, abated 2011 FCA 92; *Hiltz v. Canada (Human Resources Development)* (2009), 350 F.T.R. 19 (FC) (letters subject to judicial review) at para. 17; *Okemow-Clark v. Lucky Man Cree Nation* (2010), 399 N.R. 311 (FCA) (board decision to remove names from membership list was final, and so subject to judicial review); *Tsawout First Nation v. Canada (Minister of Indian Affairs and Northern Development)* (2008), 79 Admin. L.R. (4th) 226 (FC) (letter from minister's delegate subject to judicial review); *Canadian Assn. of the Deaf v. Canada* (2006), 298 F.T.R. 90 (FC); *Canadian Museum of Civilization Corp. v. P.S.A.C., Local 70396* (2006), 294 F.T.R. 163 (FC) (commission's refusal to withdraw complaint can be judicially reviewable); *Philipps v. Bibliothécaire et Archiviste du Canada* (2006), 63 Admin. L.R. (4th) 233 (FC) (letter was not merely "courtesy letter"; judicial review available since was "fresh exercise of discretion"); *Shea v. Canada (Attorney General)* (2006), 296 F.T.R. 81 (FC); *Gilchrist v. Canada (Treasury Board)* (2005), 281 F.T.R. 135 (FC) (deviation from grievance process judicially reviewable); *Tremblay v. Canada* (2004), 244 D.L.R. (4th) 422 (FCA) (mandatory retirement must be challenged through judicial review, not action); *Bennett Environmental Inc. v. Canada (Minister of the Environment)* (2004), 18 Admin. L.R. (4th) 108 (FC) (Minister's decision manifested by news releases and letter; decision judicially reviewable), appeal allowed in part on another point (2005), 29 Admin. L.R. (4th) 256 (FCA); *Falls Management Co. v. Canada (Minister of Health)* (2005), 32 Admin. L.R. (4th) 306 (FC), rev'd on other grounds (2006), 41 Admin. L.R. (4th) 63 (FCA); *MPL Communications Inc. v. Canada (Attorney General)* (2005), 33 Admin. L.R. (4th) 192 (FC); *Persons wishing to use pseudonyms of Employee no. 1 v. Canada* (2004), 266 F.T.R. 77 (FC) (C.S.I.S. decision should be challenged through judicial review application, not action); *Van Vlymen v. Canada (Solicitor General)*, [2005] 1 F.C.R. 617 (FC) (failure/delay in making decision is reviewable); *Eiba v. Canada (Attorney General)*, [2004] 3 F.C.R. 416 (FC) (deeming application abandoned can be subject to judicial review); *F. Hoffmann-La Roche AG v. Canada (Commissioner of Patents)*, [2004] 2 F.C.R. 405 (FC) (judicial review available for automatic forfeiture of application), aff'd (2005), 344 N.R. 202 (FCA); ***Krause v. Canada*** (1999), 236 N.R. 317 (FCA). **And see discussion in** *Manuge v. Canada* (2009), 384 N.R. 313 (FCA) at paras. 43*ff*, rev'd 2010 SCC 67; *Sweet v. Canada*, [1999] F.C.J. No. 1539 (FCA). **Compare** *Britton v. Canada (Royal Canadian Mounted Police)*, 2012 FC 1325 at para. 26 (voluntary resignation is not a decision of the RCMP).

[476] *Morneault v. Canada (Attorney General)*, [2000] F.C.J. No. 705 (FCA) (findings of fact contained in report of commission of inquiry could be challenged for no evidence under paragraph (b) (breach of duty of fairness)).

scheme, the Court will not normally exercise its jurisdiction to grant relief in respect of a decision that is not dispositive of the party's rights if an adequate alternative remedy is available later.[477] Thus, relief has been refused in respect of both an interlocutory decision of the Registrar of Trademarks granting an extension of time and declaring that a trade mark application had not been abandoned,[478] and a ruling on the admissibility of evidence made in the course of a proceeding by the Immigration and Refugee Board.[479] As well, where a decision has been reconsidered on the merits by a tribunal, an application for judicial review of the initial decision alone will likely be dismissed as moot.[480]

However, immediate relief may be granted in exceptional circumstances, including, for example, where the Superintendent of Bankruptcy ordered the seizure of records and delivered them to the applicant's guardian pending completion of the administrative proceedings,[481] where the jurisdiction of a tribunal was in question,[482] where a jurisdictional challenge was made on constitutional grounds to the statutory authority of the Superintendent,[483] and where a ruling was made by a Deputy Tax Court judge that would prevent the applicant from making an argument when the appeal was heard in the Tax Court, thereby removing an adequate alternative statutory remedy to judicial review.[484]

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[477] *Showtime Networks Inc. v. WIC Premium Television Ltd.* (2000), 5 C.P.R. (4th) 297 (FCTD); *Szczecka v. Canada (Minister of Employment & Immigration)* (1993), 116 D.L.R. (4th) 333 (FCA). **See also** *MiningWatch Canada v. Canada (Minister of Fisheries and Oceans),* [2008] 3 F.C.R. 84 (FC) (only final rulings should be judicially reviewable), rev'd on other grounds 2008 FCA 209, rev'd on other grounds [2010] 1 S.C.R. 6; *Zündel v. Canada (Human Rights Commission),* [2000] 4 F.C. 255 (FCA); *Ipsco Inc. v. Sollac, Aciers d'Usinor* (1999), 246 N.R. 197 (FCA); *Canada (Information Commissioner) v. Canada (Minister of the Environment),* [2000] F.C.J. No. 480 (FCA); *Cannon v. Canada (Assistant Commissioner, RCMP),* [1998] 2 F.C. 104 (FCTD). **And see** topic 3:2310, *post.*

[478] *Novopharm Ltd. v. Aktiebolaget Astra,* [1996] 2 F.C. 839 (FCTD).

[479] *Szczecka v. Canada (Minister of Employment & Immigration)* (1993), 116 D.L.R. (4th) 333 (FCA).

[480] *Vidéotron Telecom Ltée v. C.E.P.* (2005), 345 N.R. 130 (FCA), aprv'd *Veillette v. International Assn. of Machinists and Aerospace Workers* (2011), 417 N.R. 95 (FCA).

[481] *Groupe G. Tremblay Syndics Inc. v. Canada (Superintendent of Bankruptcy),* [1997] 2 F.C. 719 (FCTD).

[482] See *Con-Way Central Express Inc. v. Canada (Minister of Labour)* (1997), 153 F.T.R. 161 (FCTD). **See also** *C.T.E.A. v. Bell Canada,* 2002 FCT 776 (decision affected final rights of parties).

[483] *Pfeiffer v. Canada (Superintendent of Bankruptcy),* [1996] 3 F.C. 584 (FCTD).

[484] *Minister of National Revenue v. Schnurer Estate* (1997), 108 F.T.R. 339 (FCA).

CHAPTER 4

PARTIES TO A JUDICIAL REVIEW PROCEEDING

4:1000 INTRODUCTION

An applicant and a respondent are generally essential to a proceeding to review the legality of administrative action. However, if relief is sought by way of an action, the parties are properly designated as plaintiff and defendant. In addition, it is not uncommon in judicial review proceedings for others to seek to intervene in order to inform the court of a point of view or position that may not be adequately represented by the principal parties.[1]

4:1100 Applicants

The law of *locus standi* or standing, as it is now usually called, defines who may apply for relief from allegedly unlawful administrative action.[2] These rules and principles reflect the dual purposes of judicial review: to protect individuals from unlawful governmental interference with their rights, and to protect the public's interest in ensuring that government is conducted in accordance with law.

Access to the courts will normally be afforded as of right to those who allege that they have sustained some legal wrong or a discrete injury as a result of the impugned administrative action,[3] as it will be when an Attorney General seeks to protect public rights.[4] In addition, it is within the discretion of the courts to permit a private individual who has suffered no personal harm to challenge the validity of administrative action when no one else is likely to do so.[5]

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1 Topic 4:5000, *post.*

2 See generally topic 4:3000, *post.*

3 Topic 4:3000, *post.*

4 Topic 4:3510, *post.*

5 Topic 4:3520, *post.*

departmental administrative action should be sought against the Crown,[49] the Attorney General[50] or where appropriate, the officials in question.[51] Furthermore, neither the Senate nor its standing committees are suable entities.[52] Thus, to challenge committee actions, the individual members of a committee should be named as respondents.[53]

4:3000 STANDING TO SEEK JUDICIAL REVIEW

4:3100 Overview

At one time, the rules governing a person's eligibility to seek judicial review depended in part on the remedy being sought. In particular, standing requirements varied between the prerogative orders on the one hand, and the equitable "private law" remedies of the declaration and injunction on the other. Thus, even when used in a public law context to review the legality of administrative action, declarations and injunctions were only available to persons who could establish that the action in question infringed either their statutory or common law rights, or inflicted some "special damage"on them over and

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Scotia (Attorney General) (2010), 8 Admin. L.R. (5th) 290 (NSSC) (Nova Scotia Civil Procedure Rules have statutory effect) at paras. 11*ff.*

[49] See e.g. *Jos. Zuliani Ltd. v. Windsor (City)* (1973), 2 O.R. (2d) 598 (Ont. H.C.J.). **And see generally** P.W. Hogg and P. Monahan, *Liability of the Crown*, 3d ed. (Toronto, Carswell: 2000).

[50] *Mabrouk v. Canada (Public Service Commission)*, 2014 FC 166 at para. 5 (Court applied Rule 303(2) to amend the named Respondent in the style of cause to "Canada (Attorney General")); *Kelly v. Canada (Attorney General)* (1997), 4 Admin. L.R. (3d) 144 (FCTD); *B v. Canada (Department of Manpower & Immigration)*, [1975] F.C. 602 (FCTD); *Crown Trust Co. v. Ontario* (1988), 64 O.R. (2d) 774 (Ont. H.C.J.); *Belczowski v. R.* (1991), 42 F.T.R. 98 (FCTD), aff'd (1992), 132 N.R. 183 (FCA), aff'd [1993] 2 S.C.R. 438; *Carrier-Sekani Tribal Council v. Canada (Minister of Environment)* (1992), 5 Admin. L.R. (2d) 38 (FCA), leave to appeal to SCC ref'd (1993), 9 Admin. L.R. (2d) 98(n). **See also** *British Columbia Assn. of Optometrists v. Clearbrook Optical Ltd.* (2000), 187 D.L.R. (4th) 525 (BCCA). **Compare** *Canadian Broadcasting Corp. v. Nova Scotia (Attorney General)* (2010), 8 Admin. L.R. (5th) 290 (NSSC) (provincial court or chief judge, not Attorney General, should have been named where index of search warrant records sought) at paras. 43-45.

[51] E.g. *Azubuike v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2014 FC 34 at para. 11; *Canada (Commissioner of Official Languages) v. Canada (Department of Justice)* (2001), 194 F.T.R. 181 (FCTD); *MacLean v. Ontario (Liquor Licence Board)* (1975), 61 D.L.R. (3d) 237 (Ont. Div. Ct.).

[52] *Southam Inc. v. Canada (Attorney General)*, [1989] 3 F.C. 147 (FCTD), rev'd on other grounds [1990] 3 F.C. 465 (FCA).

[53] *Southam Inc. v. Canada (Attorney General)*, [1989] 3 F.C. 147 (FCTD), rev'd on other grounds [1990] 3 F.C. 465 (FCA).

above that suffered by the public, or a section of the public at large.[54]

By way of contrast, being public law remedies, the prerogative orders were never oriented exclusively to the protection of private rights. But that did not mean that the standing rules were uniform among the various prerogative orders themselves. For example, since *certiorari* and prohibition were designed to ensure that inferior courts and tribunals did not usurp a jurisdiction they did not possess, they issued at the instance of "persons aggrieved," a category that was not confined to those whose private legal rights had been infringed. Indeed, it was sometimes said that a court in its discretion could issue them at the instance of anyone, whether or not the person was adversely affected by the decision or proceeding in question.[55] On the other hand, as a mandatory order, *mandamus* was often said to be limited to the person to whom a legal duty was owed.[56] And *habeas corpus* issued only at the instance of a person who alleged unlawful imprisonment, although when the person's confinement precluded the institution of proceedings, a third party could apply for the writ.[57]

In the contemporary law of standing, however, many of the technical rules have been smoothed away both by the legislature in those jurisdictions where statutory reforms have been enacted and by the courts.[58] In the result, those who have sustained harm from allegedly

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[54] T.A. Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986) at pp.121-35 and 147-57; H. Woolf, J. Jowell, and A. Le Sueur, *de Smith's Judicial Review,* 6th ed. (London: Sweet and Maxwell, 2007), c. 2. **And see generally** the Ontario Law Reform Commission, *Report on the Law of Standing* (Toronto: Ministry of the Attorney General, 1989).

[55] T.A. Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986) at pp. 103-09; H. Woolf, J. Jowell, and A. Le Sueur, *de Smith's Judicial Review,* 6th ed. (London: Sweet and Maxwell, 2007), c. 2, where it is also pointed out that there were differences between prohibition and *certiorari.* **And see** *Rothmans of Pall Mall Can. Ltd. v. Minister of National Revenue,* [1976] 2 F.C. 500 (FCA), where it was noted that *certiorari* and prohibition could be granted to a stranger, whereas declaratory or injunctive relief would not be.

[56] T.A. Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986) at pp. 113-18. **And see discussion** in *Distribution Canada Inc. v. Minister of National Revenue* (1990), 46 Admin. L.R. 34 (FCTD), aff'd (1993), 10 Admin. L.R (2d) 44 (FCA), leave to appeal to SCC ref'd (1993), 12 Admin. L.R. (2d) 280(n). In England, the standing requirements for mandatory orders may still be stricter than for other forms of relief: **see** H. Woolf, J. Jowell, and A. Le Sueur, *de Smith's Judicial Review,* 6th ed. (London: Sweet and Maxwell, 2007), c. 15-040*ff.*

[57] R.J. Sharpe, *The Law of Habeas Corpus,* 2d ed. (New York: Oxford University Press, 1989) at pp. 221-24.

[58] And this seems to be true, even though only the *Federal Courts Act,* R.S.C. 1985, c. F-7, as am. S.C. 2002, c.8 (App. Fed. 3) and Prince Edward Island's *Judicial Review Act,*

unlawful administrative action will be afforded standing as of right,[59] without much regard for the particular remedy or form of relief being sought. As one Alberta court has noted:[60]

> Because there is no reason to believe that it was the intention of the legislature, in adopting the [Alberta] rules of judicial review, to reduce the availability of the prerogative orders (which would occur if the narrower rules of standing relating to declaration and injunction were to apply to all remedies), it should follow that the broader rules of standing relating to certain of the prerogative orders are to apply to all the remedies which are now subsumed under the single judicial review procedure.

As well, the decision of the Supreme Court of Canada in *Finlay v. Minister of Finance of Canada*[61] is an important landmark in the modern law of standing. There, the court held that a claimant for an injunction or a declaration who has not suffered "special damage"[62] or who is unable to demonstrate a sufficient personal interest to qualify as a person whose legal rights have been infringed, may nonetheless be granted standing in the court's discretion as a "public interest applicant."[63] Prior

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R.S.P.E.I. 1988, c. J-3 (App. PEI. 1) mention the standing of the applicant: **see also** topic 4:3410, *post.*

[59] Indeed, the Supreme Court of Canada held that a corporation had standing to challenge a law as being invalid under the *Charter*, even though the *Charter* did not apply to the corporation: ***Canadian Egg Marketing Agency v. Richardson***, [1998] 3 S.C.R. 157.

[60] *Reese v. Alberta* (1992), 87 D.L.R. (4th) 1 at p. 15 (Alta. Q.B.).

[61] ***Finlay v. Canada (Minister of Finance)***, [1986] 2 S.C.R. 607. For further commentary on this decision, **see** J.M. Evans, "Developments in Administrative Law: The 1986-87 Term" (1988) 10 *Supreme Court L.R.* 1 at pp. 11-33; W.A. Bogart, "Understanding Standing, Chapter IV: *Minister of Finance of Canada v. Finlay*" (1988) 10 *Supreme Court L.R.* 377. The decision also eliminated any differences in the standing requirements for declarations and injunctions: **see e.g.** *Airport Taxicab (Malton) Assn. v. Canada (Minister of Transport)*, [1985] 2 F.C. 392 (FCTD).

[62] On the meaning of "special damage," a more restrictive concept than "person aggrieved," **see** R.J. Sharpe, *Injunctions & Specific Performance*, 2d ed. (Aurora, Ont.: Canada Law Book, looseleaf), topics 3.610-3.6840. There are no differences in the standing requirements for declarations and injunctions: ***Finlay v. Canada (Minister of Finance)***, [1986] 2 S.C.R. 607 at pp. 634-35.

[63] The Court thereby implicitly overruled *Smith v. Ontario (Attorney General)*, [1924] S.C.R. 331, which required an individual who could not qualify as a "person aggrieved" nevertheless to show that he was "exceptionally prejudiced" in order to be granted standing. As to the factors to be considered by courts in the exercise of their discretion to grant "public interest" standing, **see** topic 4:3520, *post.*

to *Finlay*, the Court had held that it was within the courts' discretion to grant "public interest" standing to private individuals to challenge the validity of legislation on constitutional grounds, when there was no reasonable prospect that a better plaintiff would emerge.[64] And in extending the principles set out in those cases to challenges to administrative action on non-constitutional grounds,[65] the court recognized, as it had elsewhere, that regardless of the kind of governmental unlawfulness alleged, the rule of law requires the courts ultimately to ensure that government is conducted in accordance with law.[66]

Moreover, the Supreme Court of Canada has held that a party may be granted standing under its residual discretion. The Court, it said, is always free to hear *Charter* arguments from parties who would not normally have standing, if the question involved is one of public importance.[67]

4:3200 Function of a Standing Requirement

Like some of the discretionary bars to the grant of relief in judicial review proceedings,[68] the overall function of a standing requirement[69] is

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[64] See ***Thorson v. Canada (Attorney General) (No. 2)***, [1975] 1 S.C.R. 138; ***MacNeil v. Nova Scotia (Board of Censors)***, [1976] 2 S.C.R. 265; ***Canada (Minister of Justice) v. Borowski***, [1981] 2 S.C.R. 575.

[65] This is not to say that the ground of review on which the applicant relies is irrelevant to the issue of standing. For instance, it will be very rare for a court to entertain a judicial review proceeding based on an allegation of a breach of the duty of fairness that is instituted by a person other than the person whose right to fairness was denied: **e.g.** *Okanagan Helicopters Ltd. v. Canadian Helicopter Pilots' Assn.*, [1986] 2 F.C. 56 (FCA); *U.S.W.A. v. American Barrick Resources Corp.* (1991), 48 Admin. L.R. 115 (Ont. Div. Ct.).

[66] E.g. *Burke v. Winnipeg (City)* (1982), 18 Man. R. (2d) 134 (Man. Q.B.), where the court anticipated the application of the relaxed standing rules in constitutional cases to challenges to administrative action on non-constitutional grounds.

[67] ***Canadian Egg Marketing Agency v. Richardson***, [1998] 3 S.C.R. 157. **Compare** *R. v. Inco* (2001), 54 O.R. (3d) 495 (Ont. C.A.) (no public interest at issue).

[68] See generally Chapter 3, *ante*. **And see e.g.** *Apotex Inc. v. Canada (Minister of National Health and Welfare)* (1998), 82 C.P.R. (3d) 65 (FCTD) (lack of ripeness), aff'd (2000), 181 D.L.R. (4th) 404 (FCA). Indeed, standing can be viewed as a discretionary bar, because, even though a court has no discretion to refuse standing to an applicant who has established a qualifying personal interest in the matter, others may be refused relief on standing grounds within the discretion of the court.

[69] The literature on the functions of a standing requirement is immense: particularly useful are the Ontario Law Reform Commission, *Report on the Law of Standing* (Toronto: Ministry of the Attorney General, 1989), especially at 45-51 and 56-60; and P.P. Craig, *Administrative Law*, 6th ed. (London: Sweet and Maxwell, 2008).

to ration the limited public resources devoted to the administration of justice and regulatory and benefit programmes.[70] However, the standing requirement focuses principally on the suitability of the applicant to invoke the court's judicial review jurisdiction, and not, for example, on the "ripeness" of the issue or whether it is inherently appropriate for determination by adjudication, or whether the applicant should first have exhausted other remedies. Also, standing may be in issue in relation to appropriate respondents or intervenors.[71]

In some circumstances, there may be an overlap between the concerns of standing and other discretionary bars. For instance, the courts have normally declined to grant injunctions at the instance of private individuals to restrain others from committing an offence. This posture may be explained either on the ground that criminal proceedings are an adequate alternative remedy, or because the plaintiff has sustained no injury.[72] Similarly, relief may be refused on the basis of the applicant's lack of standing even though it could have been challenged by a person who had sustained an injury from the alleged unlawful action, because at the instance of the third party it is merely an abstract question of law.[73]

4:3300 When Standing is Decided

A challenge to the standing of a respondent can be made either as a preliminary motion to strike or quash, or at the time that the case is heard on its merits.[74] And since the Supreme Court of Canada has

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[70] It may also ensure that a person who is directly affected by administrative action can, by deciding not to litigate the matter, put closure to it. Thus, those who may be peripherally affected should not always be able to force the litigation of an issue that those more immediately affected do not wish to pursue. **See** P.P. Craig, *Administrative Law*, 6th ed. (London: Sweet and Maxwell, 2008).

[71] E.g. *Baharloo v. University of British Columbia*, 2014 BCSC 272 (University has standing to respond to judicial review of decision of a university Senate Committee).

[72] E.g. *R. v. Shore Disposal Ltd.* (1976), 72 D.L.R. (3d) 219 (NSCA); ***Gouriet v. Union of Post Office Workers***, [1978] A.C. 435 (H.L.).

[73] E.g. ***Canadian Council of Churches v. R.***, [1992] 1 S.C.R. 236.

[74] Compare topic 4:4500, *post.* **See also** *Metropolitan Toronto Police Services Board v. Young (Coroner)* (1997), 98 O.A.C. 188 (Ont. Div. Ct.), where one of the issues in the judicial review application was the decision made by the coroner as to standing at the coroner's inquest. **And see** *Kendrick v. Nelson (City)* (1997), 31 B.C.L.R. (3d) 134 (BCSC) (question of standing inextricable from merits). **But see** *Court v. Alberta (Environmental Appeal Board)* (2003), 2 Admin. L.R. (4th) 71 (Alta. Q.B.) (standing issue should have been determined before hearing).

rejected the argument that normally the issue of standing should not be dealt with as a preliminary issue on a motion to strike,[75] the decision as to which is appropriate will depend upon such factors as cost and ripeness, and particularly the adequacy of the record,[76] as well as an assessment of the strategically most favourable time to make the challenge.[77] However, to the extent that the grant of standing depends upon an analysis of the statutory scheme or the legal defects in the administrative action under review, a court may conclude that standing cannot be decided satisfactorily *other than* in the broader context of the litigation.[78] For example, in one case a preliminary motion by the defendant was dismissed on the ground that "at this point in the proceeding it is not obvious that the plaintiff has no interest."[79] As well, if a decision on standing is postponed until after the argument on the merits of the application is made, a court in its discretion will be able to render judgment on the merits, even if it concludes that the applicant has no standing.[80]

4:3400 The General Rule: a Personal Interest

4:3410 *Statutory Provisions*

4:3411 *Specific Legislation*

Although a specific statutory right of appearance before a tribunal will usually be interpreted as providing a right to apply for judicial review,[81] the statute may explicitly define who has standing to institute

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[75] ***Finlay v. Canada (Minister of Finance)***, [1986] 2 S.C.R. 607 at p. 617; **and see** *P.E.I.N.U. v. Prince Edward Island (Lieutenant Governor in Council)* (1995), 30 Admin. L.R. (2d) 145 (PEITD).

[76] *USW v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 496 at para. 8 (record adequate to determine standing preliminarily).

[77] *Lamont (County No. 30) v. St. Michael and Area Landowners Protection Society* (1998), 64 Alta. L.R. (3d) 35 (Alta. C.A.) (challenge is subject to a fair opportunity to respond).

[78] Compare topic 4:3200, *ante*.

[79] *Hoechst Canada Inc. v. Genpharm Inc.* (1991), 35 C.P.R. (3d) 280 at p. 288 (FCTD).

[80] *Professional Institute of the Public Service of Canada v. R.*, [1990] 2 S.C.R. 367.

[81] E.g. *Canada Broadcasting League v. Canada (Radio-television & Telecommunications Commn.) (No. 2)* (1980), 101 D.L.R. (3d) 669 (FCA) (every member of the public given standing at CRTC hearing by *Broadcasting Act*, R.S.C. 1970, c. B-11). **Compare** *North Sydney (Town) Chief of Police v. Nova Scotia (Advisory Council on the*

certain kinds of proceedings in a court.[82] For example, where a statute provided for standing to "any person who considers himself aggrieved" but limited it to those whose grievance was reasonable, standing was granted to an incorporated public interest group formed to oppose development in a park.[83] On the other hand, a statutory provision authorizing a court to avoid a contract with a municipal corporation for conflict of interest at the instance of the municipality did not enable an

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Status of Women) (1992), 15 Admin. L.R. (2d) 218 (NSTD), where the statutory authorization for a "member of the public" to appear before the tribunal was held not to include an incorporated body.

[82] E.g. Ontario's *Environmental Bill of Rights,* S.O. 1993, c. 28, ss. 84(1) ("any person resident on Ontario"), and 103 (special damage rule modified to allow individuals to sue for public nuisance, even though the damage that they suffered was no different from that suffered by others). **See also e.g.** *Smed v. Alberta (Worker's Compensation Board),* 2013 ABQB 120 at para. 54 ("direct interest" pursuant to Alta. WCB legislation); *Emerman v. Assn. of Professional Engineers and Geoscientists of B.C.* (2008), 298 D.L.R. (4th) 272 (BCSC) ("person aggrieved" not fellow engineer); *Assn. of Registered Nurses of Newfoundland and Labrador v. Sparkes* (2008), 281 Nfld. & P.E.I.R. 171 (Nfld. & Lab. S.C.) (complainant had no standing to have nurse's registration revoked); *Richard Niebuhr Enterprises Ltd. v. Vancouver (City) Board of Variance* (2006), 277 D.L.R. (4th) 371 (BCSC) (statutory appeal; "person aggrieved" in development permit decision does not include neighbours), aff'd (2007), 287 D.L.R. (4th) 563 (BCCA), reconsideration allowed 2007 BCCA 593; *Corp. of the Canadian Civil Liberties Assn. v. Ontario (Civilian Commission on Police Services)* (2006), 86 O.R. (3d) 798 (Ont. C.A.) ("directly affected" *per Police Services Act*; eyewitness held to have no standing); *Allen v. College of Dental Surgeons of British Columbia* (2007), 46 C.C.L.T. (3d) 122 (BCCA) ("person aggrieved" under *Dentists Act*); *Real Estate Council of Alberta v. Henderson* (2007), 286 D.L.R. (4th) 110 (Alta. C.A.) ("directly affected"; Executive Director could seek judicial review of hearing panel, subject to discretionary considerations); *Samson Cree Nation v. Canada (Registrar of Indian and Northern Affairs)* (2005), 379 A.R. 83 (Alta. Q.B.) (Indian Band had standing to protest addition of name to Band List); *Berg v. British Columbia (Police Complaint Commissioner)* (2006), 268 D.L.R. (4th) 467 (BCCA) (no right for complainant under *Police Act* to appeal merits of decision), leave to appeal to SCC ref'd [2006] S.C.C.A. No. 300; *Englander v. TELUS Communications Inc.*, [2005] 2 F.C.R. 572 (FCA) (standing to challenge decision under *PIPEDA*: complainant need not have personal interest at stake); *Fairmount Developments Inc. v. Nova Scotia (Minister of Environment and Labour)* (2004), 713 A.P.R. 41 (NSSC) (pragmatic and functional analysis used to determine whether applicant was "aggrieved person" under *Environment Act*); *British Columbia (Liquor and Licensing Branch, General Manager) v. British Columbia (Liquor Appeal Board)* (2002), 35 C.B.R. (4th) 5 (BCSC) (person "whose licensed establishment is directly referred to in the order or decision"); *Brighton v. Nova Scotia (Minister of Agriculture and Fisheries)* (2002), 206 N.S.R. (2d) 95 (NSSC) (statutory appeal: "person aggrieved"), foll'd *Specter v. Nova Scotia (Minister of Fisheries and Aquaculture)* (2011), 307 N.S.R. (2d) 142 (NSSC); *Nordale Community Club v. Prince Albert (City),* [2000] 7 W.W.R. 525 (Sask. Q.B.) ("sufficient interest"); *Royal Commission on the Northern Environment, Re* (1983), 144 D.L.R. (3d) 416 (Ont. Div. Ct.). A statutory right of appeal may also define who may exercise it: **e.g.** *Friends of the Athabasca Environmental Assn. v. Alberta (Public Health Advisory & Appeal Board)* (1996), 34 Admin. L.R. (2d) 167 (Alta. C.A.) ("directly affected").

[83] *Friends of McNichol Park v. Burlington (City)* (1996), 31 O.R. (3d) 405 (Ont. Div. Ct.).

elector to seek this remedy.[84] And where a complaint before a human rights tribunal has been withdrawn, a human rights commissioner did not have standing to compel the tribunal to proceed to hear the complaint.[85] Likewise, where an individual had a settlement reached on his behalf by his union, he could no longer be considered a person aggrieved for purposes of Ombudsman-like legislation.[86] Finally, in the absence of legislation to the contrary, a decision-maker has no standing to seek judicial review of its own decision.[87]

4:3412 *Judicial Review Legislation*

Statutes of more general application may also define who is entitled to make an application for judicial review. For example, section 18.1(1) of the *Federal Courts Act*[88] provides that an application for judicial review may be made by the Attorney General of Canada "or anyone directly affected by the matter in respect of which the relief is sought."[89]

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[84] *Sims v. Sault Ste. Marie (City)* (1997), 34 O.R. (3d) 232 (Ont. Gen. Div.). However, the plaintiffs were held to have standing to seek the statutory motion to quash the relevant bylaws.

[85] *British Columbia (Human Rights Commission) v. British Columbia (Human Rights Tribunal)* (2001), 9 C.C.E.L. (3d) 150 (BCSC).

[86] *Newfoundland and Labrador Office of the Citizens' Rep.) v. Nfld. and Lab. Housing Corp.* (2009), 98 Admin. L.R. (4th) 296 (Nfld. & Lab. S.C.).

[87] *Watson v. Catney* (2007), 84 O.R. (3d) 374 (Ont. C.A.). **See also** *Bahcheli v. Alberta Securities Commission* (2007), 409 A.R. 388 (Alta. C.A) ("person or company directly affected"; tribunal held not to be able to appeal own decision).

[88] *Federal Courts Act*, R.S.C. 1985, c. F-7, as am. S.C. 2002, c. 8 (App. Fed. 3).

[89] E.g. *Teva Canada Ltd. v Canada (Minister of Health)*, 2012 FCA 106 at paras. 48-56; *Toronto Coalition to Stop the War v. Canada (Minister of Public Safety and Emergency Preparedness)* (2010), 17 Admin. L.R. (5th) 1 (FC); *Fond du Lac Denesuline First Nation v. Canada (Attorney General)* (2010), 377 F.T.R. 50 (FC) (applicants had no standing to challenge uranium mine licence renewal) at paras. 164-80, aff'd 2012 FCA 73; *Canadian Generic Pharmaceutical Assn. v. Canada (Minister of Health)* (2011), 378 F.T.R. 314 (FC) (association of generic drug manufacturers had no standing to challenge decision to list drug), aff'd 2011 FC 465, add'l reasons 2011 FC 1345; aff'd 2011 FCA 357; *Douze v. Canada (Minister of Citizenship and Immigration)* (2010), 382 F.T.R. 81 (FC) (sponsor wife of applicant could not seek judicial review); *Island Timberlands LP v. Canada (Minister of Foreign Affairs)*, 2009 FC 258 (applicant had no status to challenge minister's decision, since only commercial interests affected) at para. 18, aff'd 2009 FCA 353; *League for Human Rights of B'Nai Brith Canada v. Canada* (2008) FC 732, rev'g (2008), 79 Admin. L.R. (4th) 161 (FC) (B'Nai Brith granted standing); *Biro v. Canada (Minister of Citizenship and Immigration)* (2006), 293 F.T.R. 297 (FC) (counsel for applicant); *Pason Systems Corp. v. Canada (Commissioner of Patents)* (2006), 295 F.T.R. 1 (FC); *Moresby Explorers Ltd. v. Canada (Attorney General)* (2006), 350 N.R. 101 (FCA) (licence-holder had standing to challenge policy); *Ontario Harness Horse Assn. v. Canada (Pari-Mutuel Agency)* (2005), 281

And although this definition was enacted after *Finlay*[90] was decided, it has not been construed as preserving the pre-*Finlay* standing requirements. Rather, the phrase has been interpreted as allowing a court discretion to grant standing "when it is convinced that the particular circumstances of the case justify status being granted."[91]

Since the *Judicial Review Procedure Acts* in Ontario[92] and in British Columbia[93] are silent on the standing requirement for an applicant for judicial review, the courts in those jurisdictions continue to determine the standing of an applicant according to common law. And while it is unlikely that the requirements will be significantly affected by the form of relief sought, a court may show more reluctance to make an order mandating action to be taken in the performance of a public legal duty at the instance of a person who is not affected in a material

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F.T.R. 120 (FC) (Ontario Harness Horse Assn. did not have standing before Canadian Pari-Mutuel Agency); *Nunavut Territory (Attorney General) v. Canada (Attorney General)* (2005), 23 Admin. L.R. (4th) 288 (FC) (Attorney General did not have standing); *Dicaire v. Aéroports de Montréal* (2004), 267 F.T.R. 155 (FC) (insufficient interest); *Kwicksutaineuk/Ah-kwa-mish Tribes v. Canada (Minister of Fisheries and Oceans)* (2003), 227 F.T.R. 96 (FCTD) (Chief failed to show Tribe directly affected by issue of licence by Minister), aff'd 2003 FCA 484; *Canada (Attorney General) v. Canada (Information Commissioner)* (2002), 18 C.P.R. (4th) 110 (FCTD) (federal Attorney General has standing to bring application as of right); *P.S.A.C. v. Canada (Treasury Board)* (2001), 205 F.T.R. 270 (FCTD) (union not directly affected by dispute); *Northwest Territories v. P.S.A.C.* (2001), 27 Admin. L.R. (3d) 259 (FCA) (government of Northwest Territories has standing to challenge provisions of *Canadian Human Rights Act*).

[90] ***Finlay v. Canada (Minister of Finance)***, [1986] 2 S.C.R. 607.

[91] *Friends of the Island Inc. v. Canada (Minister of Public Works)*, [1993] 2 F.C. 229 at p. 283 (FCTD), rev'd in part (1995), 131 D.L.R. (4th) 285; **see also** *Strickland v. Canada (Attorney General)*, 2013 FC 475 at para. 61 (since provincial courts usual forum for *Divorce Act* proceedings standing denied to challenge guidelines in Federal Court), aff'd 2014 FCA 33; *McGahey v. Joyceville Penitentiary* (2002), 223 F.T.R. 206 (FCTD) (family member has standing to challenge refusal as visitor to inmate); *Canadian Jewish Congress v. Chosen People Ministries, Inc.* (2002), 19 C.P.R. (4th) 186 (FCTD); *Canada (Attorney General) v. Canada (Information Commissioner)* (2002), 18 C.P.R. (4th) 110 (FCTD); *Sierra Club of Canada v. Canada (Minister of Finance)* (1998), 13 Admin. L.R. (3d) 280 (FCTD); *Alberta v. Canada (Canadian Wheat Board)* (1998), 234 N.R. 74 (FCA); *Henry Global Immigration Services v. Canada (Citizenship and Immigration)* (1998), 158 F.T.R. 110 (FCTD); **and compare** the narrow interpretation of the words "directly affected" in a statutory right of appeal in Alberta to an appellate tribunal: *Kostuch v. Alberta (Director, Air & Water Approvals Division, Environmental Protection)* (1996), 35 Admin. L.R. (2d) 160 (Alta. Q.B.); *Court v. Alberta (Environmental Appeal Board)* (2003), 2 Admin. L.R. (4th) 71 (Alta. Q.B.). **And see** A. Desjardins, "Review of Administrative Action in the Federal Court of Canada: The New Style in a Pluralist Setting" in *Administrative Law: Principles, Practice & Pluralism* (Special Lectures of the Law Society of Upper Canada) (Scarborough, Ont.: Carswell, 1992) 405 at pp. 428-29.

[92] *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 (App. Ont. 3).

[93] *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 (App. BC. 4).

way by the failure to perform.[94]

By way of contrast, Prince Edward Island's *Judicial Review Act* provides that an application for judicial review may be dismissed on the ground that "the applicant is not a person who is, or would be, adversely affected by the exercise of, or failure to exercise, the authority conferred on the tribunal."[95] However, if this section is interpreted in the same broad and liberal manner as section 18.1(1) of the *Federal Courts Act*, it will still permit a court to grant standing to a public interest litigant in its discretion, even though the person is not "adversely affected" by the administrative action in question.[96]

As well, the applicable Rules of Practice may also define standing. For example, Rule 3-56(1) of the Saskatchewan Rules of Court provides that an application for judicial review may be made "by any person having such interest as the court considers sufficient in the matter to which the application relates."[97]

4:3420 *The Common Law Test*

At common law a person will have standing to seek a remedy in proceedings for judicial review if he or she is an "aggrieved person,"[98] an

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[94] Compare H. Woolf, J. Jowell, and A. Le Sueur, *de Smith's Judicial Review,* 6th ed. (London: Sweet and Maxwell, 2007), c. 2; **but see *Finlay v. Canada (Minister of Finance)***, [1986] 2 S.C.R. 607 at pp. 634-35, where Le Dain J. denied that there were any differences in the standing requirements for declarations and injunctions.

[95] *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3, ss. 5 and 5(b) (App. PEI. 1).

[96] But see *Concerned Citizens Committee of Borden & Carleton Siding v. Prince Edward Island (Minister of Environmental Resources)* (1994), 24 Admin. L.R. (2d) 149 (PEITD).

[97] Saskatchewan Rules of Court, r. 3-56(1). **See also** *Alberta (Attorney General) v. U.F.C.W., Local No. 401,* [2011] 1 W.W.R. 128 (Alta. Q.B.) ("affected by the proceedings"), rev'd on basis application for standing out of time 2011 ABCA 93; *Smyth v. Edmonton (City) Police Service* (2005), 385 A.R. 100 (Alta. Q.B.), concerning the application of Alberta's Rule 753.1 ("affected").

[98] E.g. *R. v. Stewart* (2005), 78 O.R. (3d) 744 (Ont. Sup. Ct. J.) (rights of group of lawyers who objected to courtroom search not affected; no status to bring applications); *R. v. Vancouver (City) Zoning Board of Appeal* (1966), 60 D.L.R. (2d) 331 (BCCA); **see also** *Ghuman v. Canada (Minister of Transport)* (1983), 2 Admin. L.R. 1 (FCTD). **Compare** *Friends of the Oldman River Society v. Assn. of Professional Engineers, Geologists and Geophysicists of Alberta* (2001), 199 D.L.R. (4th) 85 (Alta. C.A.) (complainant not adversely affected), foll'd *Davidoff v. Law Society of Alberta,* 2014 ABQB 370 (complainant had no standing to institute judicial review); *Mitten v. College of Alberta Psychologists,* 2008 ABQB 748, var'd 2010 ABCA 159; *M.H. v. College of Physicians and Surgeons of Alberta* (2006), 49 Admin. L.R. (4th) 171 (Alta. Q.B.).

4:3500 Public Interest Applicants

4:3510 *The Attorney General*

When public rights are involved, the Attorney General is entitled to seek judicial review of administrative action as the representative of the public interest.[253] As the Supreme Court of Canada has stated:

> ...the Attorney General asserts a general competence, by virtue of his office...imposing a duty to 'see that the administration of public affairs is in accordance with the law'...to require the Courts, at his behest, to inquire into any allegation of legal frailty of any decision of federal administrative boards, even though the parties to the decisions are satisfied with them or have no desire to attack them. ... I am content, in these circumstances, to proceed here on the assumption that the Attorney General of Canada may freely apply to quash under s. 18 of the *Federal Court Act*.[254]

Of course, when challenging federal administrative action, a provincial Attorney General must establish that the action affects the public in that province.[255] As well, Attorneys-General may permit "relator" proceedings to be brought in their names by a member of the public. However, the Attorney General's discretion as to whether or not to institute proceedings[256] or to authorize relator proceedings by others[257]

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[253] See generally J.L.J. Edwards, *The Law Officers of the Crown: A Study of the Offices of Attorney-General & Solicitor-General of England With an Account of the Office of the Director of Public Prosecutions of England* (London: Sweet & Maxwell, 1964), c. 14. **See also** *Sawridge Band v. Canada,* [2004] 3 F.C.R. 274 (FCA) (Crown has interest in ensuring that laws obeyed; standing to seek mandatory injunction granted); *Northwest Territories v. P.S.A.C.* (2001), 27 Admin. L.R. (3d) 259 (FCA) (government of Northwest Territories has standing to challenge provisions of *Canadian Human Rights Act).*

[254] ***P.P.G. Industries Canada Ltd. v. Canada (Attorney General),*** [1976] 2 S.C.R. 739 at p. 742.

[255] *Nunavut Territory (Attorney General) v. Canada (Attorney General)* (2005), 23 Admin. L.R. (4th) 288 (FC) (provincial Attorney General had only indirect interest; standing not granted); *Nova Scotia (Attorney General) v. Ultramar Canada Inc.*, [1995] 3 F.C. 713 (FCTD).

[256] *Cowan v. Canadian Broadcasting Corp.* (1966), 56 D.L.R. (2d) 578 (Ont. C.A.); *Alberta v. Beaver (County)* (1984), 31 Alta. L.R. (2d) 174 (Alta. C.A.); *Gaboriault v. Tecksol Inc.* (1992), 8 Admin. L.R. (2d) 113 (FCA), leave to appeal to SCC ref'd (1993), 149 N.R. 238(n); *Canada (Attorney General) v. Board of Referees,* [1982] 1 F.C. 148 (FCTD). And as to the courts' reluctance to interfere with the discretion of the Attorney General with respect to the initiation of criminal proceedings, **see** *Campbell v. Ontario (Attorney*

is virtually unreviewable.[258] Thus, prior to the more recent decisions of the Supreme Court of Canada[259] granting public interest standing to private individuals, a refusal by an Attorney General to seek relief or to authorize a relator proceeding could virtually immunize administrative action from review where there was no individual who could show a personal interest that had been injured by the administrative action in question.[260]

However, while Attorneys-General always have standing to vindicate public rights, any claim for relief is nevertheless subject to the discretionary bars, including delay and the availability of alternative remedies.[261]

Other public bodies, such as municipalities, do not share this role as representative of the public interest, although such bodies may institute proceedings if they qualify for standing as "public interest litigants."[262] They may also challenge conduct that threatens their corporate interests, such as their ownership of property or contractual relations, or where they have explicit statutory authority to sue in order to vindicate public rights. As well, a municipality may have an interest of its own in the constitutional validity of electoral boundaries.[263]

General) (1987), 58 O.R. (2d) 209 (Ont. H.C.J.), aff'd (1987), 60 O.R. (2d) 617 (Ont. C.A.), leave to appeal to SCC ref'd (1987), 60 O.R. (2d) 618(n).

[257] *Grant v. St. Lawrence Seaway Authority,* [1960] O.R. 298 (Ont. C.A.); **see also** *Rosenberg v. Grand River Conservation Authority* (1975), 12 O.R. (2d) 496 (Ont. C.A.); *Ontario (Attorney General) v. Yeotes* (1980), 28 O.R. (2d) 577 (Ont. H.C.J.), rev'd on other grounds (1981), 31 O.R. (2d) 589 (Ont. C.A.), leave to appeal to SCC ref'd (1981), 37 N.R. 356.

[258] *Cowan v. Canadian Broadcasting Corp.* (1966), 56 D.L.R. (2d) 578 (Ont. C.A.).

[259] See topic 4:3100, *ante*; topic 4:3520, *post.*

[260] Compare *Energy Probe v. Canada (Atomic Energy Control Board),* [1984] 2 F.C. 138 (FCTD), when the court held that there was a discretion to grant standing to public interest applicants who could not qualify as persons aggrieved, aff'd with modification (1985), 11 Admin. L.R. 287 (FCA), leave to appeal to SCC ref'd (1985), 15 D.L.R. (4th) 48(n) without comment on the standing issue.

[261] E.g. *Nova Scotia (Attorney General) v. Beaver* (1985), 18 D.L.R. (4th) 286 (NSCA) (refusal of injunction to enforce criminal law). **See also** topic 3:3200, *ante.*

[262] Compare *Kitimat (District) v. Alcan Inc.* (2005), 250 D.L.R. (4th) 144 (BCSC) (municipal district was refused standing: argument that it was third-party beneficiary to impugned contract, and so entitled to standing, rejected), aff'd 2006 BCCA 75; *Equal Opportunities Commn. v. Secretary of State for Employment,* [1994] 1 All E.R. 910 (H.L.).

[263] *Charlottetown (City) v. Prince Edward Island* (1998), 167 D.L.R. (4th) 268 (PEICA).

4:3520 *Private Plaintiffs as Public Interest Applicants Generally*

An applicant for judicial review who cannot establish standing on the basis of a personal interest may, in the discretion of the court, be granted standing to pursue a remedy as a public interest applicant, regardless of whether the claim is based on the Constitution or on the principles of administrative law, or whether the remedy sought is a prerogative order, a statutory equivalent, an injunction or a declaration.[264] In that regard, the Supreme Court of Canada has established an analytical framework to assist the courts in the exercise of their discretion to grant standing to a private person who cannot qualify for standing under the general common law test.[265]

First, a court must determine that the applicant has a "genuine interest" in the matter; second, the issue must be "justiciable"; third, there must be a serious issue to be tried; and fourth, the court must be satisfied that there is no other reasonable and effective manner for the issue to be resolved. It is only where these conditions are met that a court will afford the applicant standing.[266] Nevertheless, even if standing is refused, the court retains a further discretion to make a decision on

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[264] ***Finlay v. Canada (Minister of Finance)***, [1986] 2 S.C.R. 607; **see also** *H.E.U. v. Northern Health Authority* (2003), 2 Admin. L.R. (4th) 99 (BCSC); *Remmers v. Lipinski* (2001), 203 D.L.R. (4th) 367 (Alta. C.A.); *Sierra Club of Canada v. Canada (Minister of Finance)* (1998), 13 Admin. L.R. (3d) 280 (FCTD); *French Estate v. Ontario (Attorney General)* (1998), 38 O.R. (3d) 347 (Ont. C.A.); *Kendrick v. Nelson (City)* (1997), 31 B.C.L.R. (3d) 134 (BCSC); *Scott v. British Columbia (Attorney General)*, [1986] 5 W.W.R. 207 (BCSC); **and see** *Burke v. Winnipeg (City)* (1982), 18 Man. R. (2d) 134 (Man. Q.B.), where the courts anticipated the application of these cases to applications for judicial review. **See further** J. Ross, "Standing in *Charter* Declaratory Actions" (1995) 33 *Osgoode Hall L.J.* 151. For an important post-*Finlay* decision, **see *Canadian Council of Churches v. R.***, [1992] 1 S.C.R. 236, although this judgment has been criticized for adopting too narrow an approach to standing: S. McIntyre, "Above & Beyond Equality Rights: *Canadian Council of Churches v. The Queen*" (1992) 12 *Windsor Y.B. Access Just.* 293; J. Ross, "*Canadian Council of Churches v. The Queen:* Public Interest Standing Takes a Back Seat" (1992) 3 *Constitutional Forum* 100.

[265] ***Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society***, 2012 SCC 45 at paras. 18-51. **See also** discussion in *Odhavji Estate v. Woodhouse*, 2003 SCC 69, where the court recognized two types of public interest litigants: "litigants who have no direct pecuniary or other material interest in the proceedings (e.g. a non-profit organization); and litigants who do have a pecuniary interest, but whose interest is modest in comparison to the cost of the proceedings", cited in *MacDonald v. University of British Columbia* (2004), 45 C.P.C. (5th) 251 (BCSC).

[266] E.g. *LeBlanc v. Moncton (City)*, 2013 NBQB 236 (public interest standing denied); *Poulis v. R.* (1991), 6 Admin. L.R. (2d) 101 (FCTD) (if any one of the criteria were not met, standing would be refused).

the merits if the merits have been fully argued.[267]

However, a public interest group that otherwise qualifies may still be denied standing if it has been incorporated solely to insulate its members from an award of costs.[268] Furthermore, not only is the grant of public interest standing discretionary,[269] but as well when it is granted, the form of relief available may be limited.[270]

4:3530 *The Requirement of "a Genuine Interest"*

The requirement that an applicant for standing have a "genuine interest" is less stringent than the requirement that an individual be a "person aggrieved" or have a "personal interest" in the matter. In a negative sense, this requirement screens out so-called "busybodies"[271] who persist notwithstanding the cost of litigation and the potential risk of being responsible for costs if an application is dismissed.[272] However, on the positive side, the test may "screen in" those whose "interest" takes the form of an ideological commitment to the subject matter of the litigation, for example, the welfare of refugees,[273] civil liberties,[274] or the

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[267] *Professional Institute of the Public Service of Canada v. R.*, [1990] 2 S.C.R. 367, in which Sopinka J. noted that the case differed from ***Canada (Minister of Justice) v. Borowski***, [1981] 2 S.C.R. 575, where they had granted standing but declined to deal with the merits, because the legislation in that case no longer existed. **See also** *Schaeffer v. Wood* (2011), 107 O.R. (3d) 721 (Ont. C.A.) at para. 41; *Nunavut Territory (Attorney General) v. Canada (Attorney General)* (2005), 23 Admin. L.R. (4th) 288 (FC); *H.E.U. v. Northern Health Authority* (2003), 2 Admin. L.R. (4th) 99 (BCSC) (discretion exercised to grant standing).

[268] *R. v. Secretary of State for the Environment, Ex p. Kirkstall Valley Campaign Ltd.*, [1996] 3 All E.R. 304 at pp. 342-43 (Q.B.D.).

[269] *Denys v. Saskatchewan (Minister of the Environment & Public Safety)* (1993), 107 Sask. R. 295 (Sask. Q.B.) (issue moot).

[270] E.g. *Federation of Metropolitan Toronto Tenants' Assns. v. York (City)* (1988), 51 D.L.R. (4th) 731 (Ont. Div. Ct.), where declaratory but not injunctive relief was available; **but see *Finlay v. Canada (Minister of Finance)***, [1986] 2 S.C.R. 607 at pp. 634-35, where LeDain J. was of the view that the standing requirements for these remedies were identical.

[271] *R. v. Paddington Valuation Officer, Ex p. Peachy Property Corp. Ltd.*, [1966] 1 Q.B. 380 at p. 401 (C.A.). **See also** *CanWest MediaWorks Inc. v. Canada (Minister of Health)* (2008), 78 Admin. L.R. (4th) 1 (FCA) (interest was commercial, transitory and speculative; standing denied).

[272] See topic 5:2500, *post*.

[273] ***Canadian Council of Churches v. R.***, [1992] 1 S.C.R. 236.

[274] *Corp. of the Civil Liberties Assn. v. Canada (Attorney General)* (1990), 74 O.R. (2d) 609 (Ont. H.C.J.), rev'd (1998), 161 D.L.R. (4th) 225 (Ont. C.A.).

protection of the environment.[275]

In other words, the "genuine interest" requirement serves to identify individuals and groups who are likely to have something of value to contribute to the judicial decision-making process as a result of their personal experience, or the fact that they, along with others, may be affected by the decision, or out of their record of active concern and expertise. Of course, a person who satisfies the "genuine interest" test may nevertheless be denied standing on the ground that one of the other requirements is not met.[276]

4:3531 *"Genuine Interest" and Individuals*

The interest of the applicant in some of the cases where "public interest" standing was granted would seem to have been so obvious as to qualify for "personal interest" standing. For example, a mother whose two children were placed on the child abuse register was found to have a "genuine interest" in the validity of the administrative practice pertaining to it.[277] Similarly, in the leading case on public interest standing in administrative law, the Supreme Court of Canada held that a welfare recipient had a genuine interest in challenging the eligibility for federal transfer payments of reduced provincial welfare benefits.[278] As well, a lawyer serving low-income clients was held to have a genuine interest in challenging the constitutionality of a provincial statute imposing a tax on legal services.[279] Other examples of those granted public interest standing as persons with a genuine interest include a company whose business was affected by a decision of the

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[275] E.g. *Environmental Resource Centre v. Canada (Minister of the Environment)*, 2001 FCT 1423. **But see** *Concerned Citizens Committee of Borden & Carleton Siding v. Prince Edward Island (Minister of Environmental Resources)* (1994), 24 Admin. L.R. (2d) 149 (PEITD), where an environmental group in opposition to a project was held not to have a "genuine interest" to warrant standing.

[276] E.g. ***Canadian Council of Churches v. R.***, [1992] 1 S.C.R. 236.

[277] *S. (H.S.) v. Manitoba (Director of Child & Family Services)*, [1987] 5 W.W.R. 309 (Man. Q.B.).

[278] ***Finlay v. Canada (Minister of Finance)***, [1986] 2 S.C.R. 607. The respondent was denied "personal interest" standing because he was unable to establish a causal nexus between the federal transfer payments and the loss that he had sustained through the reduced level of provincial benefits.

[279] *Christie v. British Columbia (Attorney General)* (2005), 250 D.L.R. (4th) 728 (BCSC), var'd on basis entire statute *ultra vires* 2005 BCCA 631, rev'd on basis statute not *ultra vires* 2007 SCC 21.

Government,[280] and a person who was subject to threats by Revenue Canada in relation to political contributions,[281] as well as a taxpayer who sought to challenge a Revenue Canada policy on behalf of himself and other taxpayers,[282] individuals who had a family member's death investigated by the Special Investigations Unit,[283] and an abortion-provider who wished to challenge the constitutionality of certain abortion legislation and Regulations.[284] Conversely, one individual was held not to have a genuine interest where the minister's approval in question did not have "some direct impact on her."[285] Another individual was denied public interest standing to challenge the bestowal of the Order of Canada on Dr. Morgantaler.[286] Neither did two university professors have a sufficient interest in a university resolution respecting reorganization to qualify for public interest standing, especially when the body they purported to represent had not chosen to intervene.[287]

Nevertheless, a person may have a genuine interest, even if it is not different in kind from the interest of others, since an interest that is shared with others may still be "genuine" for the purpose of granting

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[280] *Public Mobile Inc. v. Canada (Attorney General)* (2011), 333 D.L.R. (4th) 463 (FCA); *Associated Respiratory Services Inc. v. British Columbia (Purchasing Commn.)* (1992), 7 Admin. L.R. (2d) 104 (BCSC), rev'd on other grounds (1994), 108 D.L.R. (4th) 577 (BCCA), leave to appeal to SCC ref'd (1995), 29 Admin. L.R. (2d) 87(n); **and see *Canadian Egg Marketing Agency v. Richardson*** (1996), 38 Admin. L.R. (2d) 49 (NWTCA), rev'd on other grounds [1998] 3 S.C.R. 157 (challenge to marketing legislation); **see also** *Federation of Metropolitan Toronto Tenants' Assns. v. York (City)* (1988), 51 D.L.R. (4th) 731 (Ont. Div. Ct.), where there was no dispute over a tenants' organization's standing to bring an application.

[281] *Longley v. Minister of National Revenue,* [1992] 4 W.W.R. 213 (BCCA).

[282] *Harris v. Canada,* [1999] 2 F.C. 392 (FCTD), aff'd [2000] F.C.J. No. 729 (FCA).

[283] *Schaeffer v. Wood* (2011), 107 O.R. (3d) 721 (Ont. C.A.).

[284] *Morgentaler v. New Brunswick* (2009), 306 D.L.R. (4th) 679 (NBCA).

[285] *Shiell v. Amok Ltd.* (1987), 58 Sask. R. 141 at p. 147 (Sask. Q.B.). **See also** *Talbot v. Northwest Territories (Commissioner)* (1997), 5 Admin. L.R. (3d) 102 (NWTSC); *Shiell v. Atomic Energy Control Board* (1995), 33 Admin. L.R. (2d) 122 (FCTD). **And see discussion** in *Marchand v. Ontario* (2006), 81 O.R. (3d) 172 (Ont. Sup. Ct. J.) (individual had standing to challenge only some aspects of adoption legislation).

[286] *Chauvin v. Canada* (2009), 35 F.T.R. 200 (FC).

[287] *Kulchyski v. Trent University* (2001), 204 D.L.R. (4th) 364 (Ont. C.A.). **See also** *Camara v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 1309 (public interest standing denied where issue moot and applicant's presence in Canada would last only while judicial review outstanding); *Lukács v. Doering* (2011), 340 D.L.R. (4th) 533 (Man. Q.B.) (university professor did not have public interest standing to challenge *process* of university's accommodation of disabled student) at para. 41.

public interest standing,[288] which distinguishes it from the "special interest" test for private interest standing.

4:3532 *"Genuine Interest" and Public Interest Groups*

Courts have often been reluctant to recognize the standing of corporations as representing the personal interests of those affected by administrative action.[289] However, groups claiming to represent either the public interest or a particular professional or economic interest have readily been held to have a genuine interest in a matter for the purpose of public interest standing.[290] That is so, in part, due to reasons of cost and convenience. Specifically, a single proceeding instituted by a representative applicant with the expertise and resources to present a well-prepared and argued case is likely to be more efficient than a number of separate challenges made by individuals, as and when they become "persons aggrieved," and in circumstances that may be much less conducive to a carefully considered and comprehensive disposition of the issues.[291]

Thus, the Saskatoon Criminal Defence Lawyers' Association was found to have a genuine interest in challenging the reduction in the number of judges in the Saskatoon courts,[292] as was an association of francophone lawyers respecting enforcement of the *Official Languages Act*,[293] an association of justices of the peace challenging the constitutionality of the scheme providing for remuneration of its members,[294] a federation of law societies to challenge legislation

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[288] *Reese v. Alberta* (1992), 87 D.L.R. (4th) 1 (Alta. Q.B.). **See also** *MacDonald v. University of British Columbia* (2004), 45 C.P.C. (5th) 251 (BCSC) and cases cited therein.

[289] E.g. topic 4:3443, *ante*.

[290] Indeed, an English court has said that the principles of public interest standing are particularly useful for enabling courts to permit the participation of public interest groups in litigation to which they may make a valuable contribution: *R. v. Inspectorate of Pollution, Ex p. Greenpeace Ltd.*, [1994] 4 All E.R. 329 at pp. 350-52 (Q.B.D.).

[291] E.g. *Unishare Investments Ltd. v. R.* (1994), 18 O.R. (3d) 603 (Ont. Gen. Div.), where a corporation which supplied street vendors was granted standing to attack a bylaw on the ground that it was directly affected and, in any event, the individual street vendors were not likely to have the resources to mount a challenge.

[292] *Criminal Defence Lawyers Assn. (Saskatoon) v. Saskatchewan*, [1984] 3 W.W.R. 707 (Sask. Q.B.).

[293] *Canada (Commissioner of Official Languages) v. Canada (Department of Justice)* (2001), 194 F.T.R. 181 (FCTD).

[294] *Nova Scotia Presiding Justices of the Peace Assn. v. Nova Scotia*, 2013 NSSC 40.

potentially affecting solicitor-client disclosure,[295] the Certified General Accountants Assn. of Canada to challenge certain matters affecting the profession,[296] an alliance of business groups to counter a challenge to the introduction of the H.S.T. in British Columbia,[297] the Canadian Federation of Students to challenge a Research Council's refusal to proceed with a complaint against a university,[298] a council representing psychiatric patients,[299] and a trade union in respect of the privatization of a Crown corporation that employed its members,[300] a trade union representing members who were affected by decisions of officers of Human Resources and Skills Development,[301] and another trade union in respect of a Cabinet decision to grant unpaid leave to a group of public employees.[302] So too were employees of the CBC who sought to have the Corporation carry out its restructuring in accordance with its constitutive legislation,[303] and a municipality with respect to the proposed location of a hospital.[304] And a group of property owners was granted standing to challenge the issuance of development permits to a developer.[305] Furthermore, two doctors employed by a corporation which performed abortions were given standing to challenge the *vires* of a regulation restricting payment for abortions to the level of payment for

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[295] *Federation of Law Societies of Canada v. Canada (Attorney General)* (2002), 207 D.L.R. (4th) 740 (Ont. Sup. Ct. J.).

[296] *Certified General Accountants Assn. of Canada v. Canadian Public Accountability Bd.* (2008), 77 Admin. L.R. (4th) 262 (Ont. Div. Ct.).

[297] *Allan v. British Columbia (Chief Electoral Officer)* (2010), 322 D.L.R. (4th) 219 (BCSC).

[298] *Canadian Federation of Students v. Natural Sciences and Engineering Research Council of Canada* (2008), 329 F.T.R. 31 (FC).

[299] *Thompson v. Ontario (Attorney General)* (2011), 106 O.R. (3d) 176 (Ont. Sup. Ct. J.) (however, standing granted on terms).

[300] *Bury v. Saskatchewan Government Insurance,* [1991] 4 W.W.R. 1 (Sask. C.A.).

[301] *Construction and Specialized Workers' Union, Local 1611 v. Canada (Minister of Citizenship and Immigration),* 2012 FC 1353.

[302] *P.E.I.N.U. v. Prince Edward Island (Lieutenant Governor in Council)* (1995), 393 A.P.R. 345 (PEITD).

[303] *C.U.P.E. v. Canadian Broadcasting Corp.* (1991), 50 Admin. L.R. 237 (FCTD).

[304] *Fogo (Town) v. Newfoundland* (2000), 23 Admin. L.R. (3d) 138 (Nfld. S.C.).

[305] *Mountain Ash Court Property Owners Assn. v. Dartmouth (City)* (1994), 376 A.P.R. 74 (NSCA).

those performed in public hospitals.[306] In another case, the Western Canada Wilderness Association, which was made up of "concerned citizens," was said to have a genuine interest in the authorization of a wolf-kill program,[307] as was Amnesty International to challenge Canadian Forces' transfer of individuals to Afghan authorities.[308] Similarly, the Canadian Parks and Wilderness Society was granted standing in relation to a challenge to an environmental assessment.[309] In another context, the "demonstrated interests" of the Sierra Club and other environmental groups in forests and wildlife issues gave them a genuine interest in the subject-matter of the litigation.[310] Similarly, a citizens' group has been permitted to ensure that lawful process was followed respecting the lease of heritage property,[311] to challenge a decision to cut down trees in a community park,[312] to challenge the construction of a road,[313] and community groups have participated at coroners' inquests.[314]

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[306] *Lexogest Inc. v. Manitoba (Attorney-General)* (1993), 101 D.L.R. (4th) 523 (Man. C.A.) where, however, it was held that neither the corporation nor the doctors could raise *Charter* issues, on the ground that they would be dealt with more effectively by a patient. **See also** *Morgentaler v. Prince Edward Island (Minister of Health & Social Services)* (1994), 365 A.P.R. 181 (PEITD).

[307] *Western Canada Wilderness Committee v. British Columbia (Minister of Environment & Parks)* (1988), 31 Admin. L.R. 302 (BCSC); **compare** the pre-*Finlay* decision *Sea Shepherd Conservation Society v. British Columbia* (1984), 11 Admin. L.R. 190 (BCSC).

[308] *Amnesty International Canada v. Canada (Canadian Forces)* (2007), 287 D.L.R. (4th) 35 (FC). **See also** *Amnesty International Canada v. Canada (Armed Forces)* (2008), 292 D.L.R. (4th) 127 (FC), aff'd 2008 FCA 401.

[309] *Sunshine Village Corp. v. Superintendent of Banff National Park* (1996), 202 N.R. 132 (FCA). **See also** *Environmental Resource Centre v. Canada (Minister of the Environment),* 2001 FCT 1423*; Citizens' Mining Council of Newfoundland and Labrador Inc. v. Canada (Minister of the Environment)* (1999), 29 C.E.L.R. (N.S.) 117 (FCTD).

[310] *Reese v. Alberta* (1992), 87 D.L.R. (4th) 1 (Alta. Q.B.), apl'd *Pembina Institute for Appropriate Development v. Alberta (Utilities Commission)* (2011), 27 Admin. L.R. (5th) 10 (Alta. C.A.) at para. 20. **See also** *Sierra Club of Canada v. Canada (Minister of Finance)* (1998), 13 Admin. L.R. (3d) 280 (FCTD).

[311] *Greater Victoria Concerned Citizens Assn. v. British Columbia (Provincial Capital Commn.)* (1990), 46 Admin. L.R. 74 (BCSC).

[312] *Friends of Point Pleasant Park v. Canada (Attorney General),* [2000] F.C.J. No. 1355 (FCTD).

[313] *South March Highlands--Carp River Conservation Inc. v. Ottawa (City)* (2010), 17 Admin. L.R. (5th) 231 (Ont. Div. Ct.).

[314] E.g. *People First of Ontario v. Regional Coroner of Niagara* (1992), 6 O.R. (3d) 289 (Ont. C.A.); *Black Action Defence Committee v. Coroner* (1992), 11 O.R. (3d) 641 (Ont. Div. Ct.). **See also** *Pham (Re)* (2004), 45 C.P.C. (5th) 111 (Alta. Prov. Ct.) (media given

Indeed, even where the "real and continuing interest" is that of the individual members, an organization may still be afforded standing.[315] And in a different context, public interest standing was conferred to permit a challenge to the propriety of a tax ruling made in favour of another by a person who was a member of a public interest group concerned with issues of social justice, including fair taxation.[316] As well, in those circumstances where there is no immediate impact on the public interest applicant, the courts will sometimes consider a group's past record in applying the "genuine interest" criterion. For example, the Canadian Council of Churches was said to have a "genuine interest" in the problems of refugees and immigrants, based on its past record of having demonstrated a "real and continuing" interest.[317] Similarly, the Elizabeth Fry Society was granted standing to challenge the imposition of conditions for legal aid recipients,[318] as was B'Nai Brith in challenging

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"interested party" standing at fatality inquiry), rev'd on basis decision to grant standing not reasonable 2004 ABQB 505, rev'd on basis provincial court decision reasonable and should not have been disturbed (2005), 14 C.P.C. (6th) 326 (Alta. C.A.). **But see** *Allalouf v. Allalouf Inquest (Coroner of)* (1999), 122 O.A.C. 115 (Ont. Div. Ct.) (advocacy group had no "unique perspective"), foll'd *C.U.P.E., Local 2316 v. Evans* (2010), 22 Admin. L.R. (5th) 341 (Ont. Div. Ct.).

[315] E.g. *Coalition of Citizens for a Charter Challenge v. Metropolitan Authority* (1993), 103 D.L.R. (4th) 409 (NSTD), rev'd on the ground that it was premature (1993), 108 D.L.R. (4th) 145 (NSCA), leave to appeal to SCC ref'd (1994), 108 D.L.R. (4th) vii(n). **Compare** *Preserve Mapleton Inc. v. Ontario (Director, Ministry of the Environment)*, 2012 ONSC 2115 (Ont. Div. Ct.) (public interest standing denied where, *inter alia*, the individual members would be able to bring application).

[316] *Harris v. Canada,* [2000] F.C.J. No. 729 (FCA).

[317] ***Canadian Council of Churches v. R.,*** [1992] 1 S.C.R. 236 at p. 254. However, in this case standing was denied as there were others more directly involved who could bring the matter before the courts, although the Court also said that the Council would be permitted to intervene in any proceedings brought by rejected claimants for refugee status. As to intervenors, **see generally** topic 4:5000, *post.* **See also** *Ontario Harness Horse Assn. v. Canada (Pari-Mutuel Agency)* (2005), 281 F.T.R. 120 (FC) (standing refused on all branches of test); *Energy Probe v. Canada (Atomic Energy Control Board)* (1985), 11 Admin. L.R. 287 (FCA), leave to appeal to SCC ref'd (1985), 15 D.L.R. (4th) 48(n), a pre-*Finlay* case where Energy Probe was accorded standing because of a long-standing interest in energy-related matters. **And see** *Canadian Abortion Rights Action League Inc. v. Nova Scotia (Attorney General)* (1990), 43 Admin. L.R. 134 (NSCA), leave to appeal to SCC ref'd (1990), 100 N.S.R. (2d) 90(n), where CARAL was held to have a genuine interest in the issue of abortion, but was nevertheless denied standing because others were in a superior position to challenge the legislation. Finally, **see** *Vriend v. Alberta,* [1998] 1 S.C.R. 493, where several groups representing same-sex interests were granted standing because of their "direct interest" in the issue of exclusion of sexual orientation from all forms of discrimination.

[318] *Elizabeth Fry Society of Saskatchewan Inc. v. Saskatchewan (Legal Aid Commn.),* [1989] 2 W.W.R. 168 (Sask. C.A.).

an order-in-council declining to revoke an individual's Canadian citizenship for suppressing wartime activities.[319]

4:3540 *The Requirement of "a Justiciable Issue"*

The requirement that a judicial review proceeding present a "justiciable issue" is one of general application in public law, and has two aspects to it.[320] The first is that the issue should be presented in a form which is readily susceptible to resolution by adjudication. Specifically, it must be amenable to the adversary process, be sufficiently grounded in basic facts, and not involve a hypothetical question.[321] The second is that the issue must be appropriate for determination by the courts, rather than by Parliament or by a provincial legislature.[322] For example, where the issue in question was an alleged breach of statute, or whether a bylaw was *ultra vires* a body's statutory authority,[323] it was readily held to be justiciable.[324] Conversely, where the attack was on consultations leading to a policy opinion, it was held not to raise a justiciable issue.[325]

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[319] *League for Human Rights of B'Nai Brith Canada v. Canada*, 2009 FC 647 at para. 14, aff'd (2010), 409 N.R. 298 (FCA).

[320] See also topics 3:3400, *ante*; 15:2120, *post.*

[321] *Thompson v. Ontario (Attorney General)* (2011), 106 O.R. (3d) 176 (Ont. Sup. Ct. J.) (sufficient adjudicative facts available); *Ratepayers of Calgary (City) v. Canada,* [2000] 4 W.W.R. 274 (Alta. Q.B.) (matter not justiciable), aff'd (2001), 286 A.R. 128 (Alta. C.A.); *Criminal Defence Lawyers Assn. (Saskatoon) v. Saskatchewan*, [1984] 3 W.W.R. 707 (Sask. Q.B.); *Energy Probe v. Canada (Attorney General)* (1989), 37 Admin. L.R. 1 (Ont. C.A.), leave to appeal to SCC ref'd (1989), 102 N.R. 399(n); **compare** *S. (H.S.) v. Manitoba (Director of Child & Family Services),* [1987] 5 W.W.R. 309 (Man. Q.B.); **see also** ***Canadian Council of Churches v. R.***, [1992] 1 S.C.R. 236; *Victoria Waterfront Enhancement Society v. Victoria (City)* (1980), 117 D.L.R. (3d) 77 (BCSC), rev'd on other grounds (1981), 131 D.L.R. (3d) 509 (BCCA).

[322] *Schaeffer v. Wood* (2011), 107 O.R. (3d) 721 (Ont. C.A.) at paras. 42-3; *Pim v. Ontario (Minister of the Environment)* (1978), 23 O.R. (2d) 45 (Ont. Div. Ct.) (standing refused on the ground that Cabinet was under no obligation to enact regulations). **And see** *Canadian Assn. of the Deaf v. Canada* (2006), 272 D.L.R. (4th) 55 (FC); *Fogo (Town) v. Newfoundland* (2000), 23 Admin. L.R. (3d) 138 (Nfld. S.C.).

[323] *Urban Development Institute v. Rocky View (Municipal District No. 44),* [2003] 2 W.W.R. 140 (Alta. Q.B.).

[324] *Greater Victoria Concerned Citizens Assn. v. British Columbia (Provincial Capital Commn.)* (1990), 46 Admin. L.R. 74 (BCSC).

[325] *USW v. British Columbia (Ministry of Energy and Mines),* 2014 BCSC 1403 at paras. 35*ff.*

4:3550 *The Requirement of "a Serious Issue"*

Because of the limits to judicial and other public resources, where private rights are not at stake, courts have required that the issue in dispute not only be justiciable, but also be "serious." This concept has two aspects to it as well. First, the judicial review proceeding must have some prospect of succeeding on the merits, a requirement that is normally readily met,[326] and it must not be premature.[327] Second, the issue must also be "serious" in the sense that it must be of some public importance.[328]

Thus, when granting public interest standing to an environmental group, the Ontario Court of Appeal noted that standing should be granted where there are "serious individuals ... presenting concerns that are of fundamental significance to all citizens."[329] For example, the fact that a plaintiff's statement of claim alleged maladministration and lack of good faith, rather than a mere misinterpretation of a statutory provision, was regarded as a reason for granting public interest standing to a taxpayer who was challenging the propriety of a ruling in favour of

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[326] E.g. *Thompson v. Ontario (Attorney General)* (2011), 106 O.R. (3d) 176 (Ont. Sup. Ct. J.); *Timberwolf Log Trading Ltd. v. British Columbia (Comm'r apptd Pursuant to s. 142.11 Forest Act)* (2011), 331 D.L.R. (4th) 405 (BCCA); *Amnesty International Canada v. Canada (Canadian Forces)* (2007), 287 D.L.R. (4th) 35 (FC) ("fairly arguable case"); *Urban Development Institute v. Rocky View (Municipal District No. 44)*, [2003] 2 W.W.R. 140 (Alta. Q.B.); *Sierra Club of Canada v. Canada (Minister of Finance)* (1998), 13 Admin. L.R. (3d) 280 (FCTD); ***Canadian Council of Churches v. R.***, [1992] 1 S.C.R.. **Compare** *Kwicksutaineuk/Ah-kwa-mish Tribes v. Canada (Minister of Fisheries and Oceans)* (2003), 227 F.T.R. 96 (FCTD) (reasonable cause of action not established), aff'd 2003 FCA 484.

[327] *Sierra Club of Canada v. Canada (Minister of Finance)* (1998), 13 Admin. L.R. (3d) 280 (FCTD); *Coalition of Citizens for a Charter Challenge v. Metropolitan Authority* (1993), 108 D.L.R. (4th) 145 (NSCA), leave to appeal to SCC ref'd (1994), 108 D.L.R. (4th) vii(n).

[328] *Friends of Point Pleasant Park v. Canada (Attorney General)*, [2000] F.C.J. No. 1355 (FCTD).

[329] *Energy Probe v. Canada (Attorney General)* (1989), 37 Admin. L.R. 1 at p. 25 (Ont. C.A.), leave to appeal to SCC ref'd (1989), 102 N.R. 399(n); **see also** *League for Human Rights of B'Nai Brith Canada v. Canada*, 2009 FC 647, aff'd (2010), 409 N.R. 298 (FCA); *League for Human Rights of B'Nai Brith Canada v. Canada* 2008 FC 732, rev'g (2008), 79 Admin. L.R. (4th) 161 (FC) (League raised serious issue in challenge to Cabinet refusal to revoke individual's citizenship); *Marchand v. Ontario* (2006), 81 O.R. (3d) 172 (Ont. Sup. Ct. J.); *Urban Development Institute v. Rocky View (Municipal District No. 44)*, [2003] 2 W.W.R. 140 (Alta. Q.B.); *Corp. of the Canadian Civil Liberties Assn. v. Canada (Attorney General)* (1990), 74 O.R. (2d) 609 (Ont. H.C.J.), where it was held that the issue must be one of general public importance, rev'd (1998), 161 D.L.R. (4th) 225 (Ont. C.A.).

another taxpayer.[330] Conversely, due to a lack of seriousness, standing was refused to government officers who merely disagreed with the simplified procedure for dealing with Convention refugee claims established by the Canada Immigration and Employment Commission.[331]

4:3560 *The Requirement of "No Other Route"*

This requirement relates to the unavailability of effective alternative remedies and to a lack of other potential applicants who could qualify under the general rule rather than pursuant to the public interest exception. Underlying the first aspect of this requirement are issues of conservation of limited resources and a desire to maintain the respective roles of tribunals and courts. The second aspect attempts to contain judicial power to its proper domain, namely the adjudication of the legal rights of disputing parties. Furthermore, since public interest litigants often ask courts to rule on a question in the abstract, deferring any adjudication until there is someone who has been adversely affected tends to ensure that the issue is determined in the context of specific facts.[332] Accordingly, public interest standing will not normally be granted if it is realistic to expect that the issue in dispute will be determined in another forum or in a different proceeding, at the instance of a person who would have standing.[333]

For example, the existence of effective and practicable alternative opportunities for litigating the issues has led to the denial of public interest standing to an organization seeking to challenge the procedural

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[330] *Harris v. Canada,* [2000] F.C.J. No. 729 (FCA); **see also** *Distribution Canada Inc. v. Minister of National Revenue,* [1993] 2 F.C. 26 (FCA).

[331] *Poulis v. R.* (1991), 6 Admin. L.R. (2d) 101 (FCTD).

[332] Compare ***Canadian Council of Churches v. R.,*** [1992] 1 S.C.R. 236, where although not expressly mentioned in the reasons for judgment, this seems to have been a concern, in that whether the statutory provisions in question were procedurally unfair was likely to depend on the facts of particular cases.

[333] ***Finlay v. Canada (Minister of Finance),*** [1986] 2 S.C.R. 607 at p. 634. **See also** *Dolan v. Ontario (Civilian Commission on Police Services)* (2011), 277 O.A.C. 109 (Ont. Div. Ct.) (grievance procedure); *Marchand v. Ontario* (2006), 81 O.R. (3d) 172 (Ont. Sup. Ct. J.)*; 1085459 Ontario Ltd. v. Prince Edward County* (2005), 77 O.R. (3d) 114 (Ont. Sup. Ct. J.) (party should have challenged bylaw instead); *Zeyha v. Canada (Attorney General)* (2004), 246 D.L.R. (4th) 631 (Sask. C.A.) (issue could be raised in divorce proceedings or child support proceedings); *S.G.E.U. v. Saskatchewan,* [1999] 7 W.W.R. 318 (Sask. C.A.).

fairness of amendments to the *Immigration Act*,[334] on the ground that it was practicable for these issues to be raised by individual refugee claimants who had been refused entry into Canada.[335] Similarly, public interest groups have been refused standing because there were others who were "directly affected" who could launch an application for judicial review.[336]

Conversely, where there was no practical possibility that the issue of legality would be raised in other proceedings, public interest standing has been granted. These instances include cases where a lack of knowledge of the impugned conduct made an individual challenge unlikely, and where the chilling effect of the conduct in question was likely to deter those who were directly affected from instituting litigation against the government.[337] Similarly, in conferring standing on a taxpayer who sought to challenge a favourable ruling by Revenue Canada for another taxpayer, the Federal Court of Appeal has noted that, since the Attorney General had refused to consent to legal

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[334] *Immigration Act, 1976*, S.C. 1976-77, c. 52.

[335] ***Canadian Council of Churches v. R.***, [1992] 1 S.C.R. 236. **Compare** *Canadian Council for Refugees v. Canada,* [2008] 3 F.C.R. 606 (FC) (no refugee from within Canada could bring claim; public interest standing granted). However, on appeal the court expressed the view that the applications judge had erred in concluding that a refugee would have had to bring a challenge from outside Canada, and that public interest standing probably should not have been granted on this basis: 2008 FCA 229 at paras. 99*ff*.

[336] *E.g. Nunavut Territory (Attorney General) v. Canada (Attorney General)* (2005), 23 Admin. L.R. (4th) 288 (FC); *Hendricks v. Canada (Attorney General)* (2004), 238 D.L.R. (4th) 577 (Que. C.A.) (Catholic Civil Rights League denied intervenor standing to appeal right of two men to marry, since organization could be heard in reference to Supreme Court of Canada); *Alberta v. Canada (Canadian Wheat Board)* (1998), 234 N.R. 74 (FCA); *Kennett Estate v. Manitoba (Attorney General),* [1999] 1 W.W.R. 639 (Man. C.A.); *Rural Dignity of Canada v. Canada Post Corp.* (1991), 7 Admin. L.R. (2d) 242 (FCA), leave to appeal to SCC ref'd (1992), 7 Admin. L.R. (2d) 242(n). **Compare *Canadian Egg Marketing Agency v. Richardson*** (1996), 38 Admin. L.R. (2d) 49 (NWTCA), rev'd on other grounds [1998] 3 S.C.R. 157.

[337] *Canadian Assn. of the Deaf v. Canada* (2006), 298 F.T.R. 90 (FC); *Friends of the Island Inc. v. Canada (Minister of Public Works)* (1993), 102 D.L.R. (4th) 696 (FCTD), rev'd in part (1995), 106 F.T.R. 320(n) (FCA); **see also** *Sierra Club of Canada v. Canada (Minister of Finance)* (1998), 13 Admin. L.R. (3d) 280 (FCTD); *Human Rights Institute of Canada v. Canada (Minister of Public Works and Government Services),* [2000] 1 F.C. 475 (FCTD); *Vriend v. Alberta,* [1998] 1 S.C.R. 493 (delay in waiting for other challenges wasteful and unfair). **Compare** *Friends of the Oldman River Society v. Assn. of Professional Engineers, Geologists and Geophysicists of Alberta* (2001), 199 D.L.R. (4th) 85 (Alta. C.A.) (complainant not adversely affected), foll'd *M.H. v. College of Physicians and Surgeons of Alberta* (2006), 49 Admin. L.R. (4th) 171 (Alta. Q.B.); *Corp. of the Canadian Civil Liberties Assn. v. Canada (Attorney General)* (1990), 74 O.R. (2d) 609 (Ont. H.C.J.), rev'd (1998), 161 D.L.R. (4th) 225 (Ont. C.A.).

proceedings, and the taxpayer in receipt of the ruling was unlikely to institute them, there was no "better plaintiff" to raise the issue.[338]

As well, public interest standing has been granted where there was no other reasonable alternative to bring forward the issue of: the legality of Canadian Forces' transfer of prisoners to Afghan authorities,[339] the legality of refusal of entry to Canada of a controversial speaker,[340] the constitutionality of certain provisions of the Ontario *Mental Health Act*,[341] the legality of a power plant,[342] the legality of Regulations promulgated under the *Canada-U.S. Safe Third Country Act*,[343] the constitutionality of abortion legislation and Regulations,[344] a reduction in the number of judges;[345] the imposition of a tax on legal services;[346] the payment of a settlement in a defamation action against a provincial member of the legislative assembly;[347] an interprovincial pension dispute;[348] where those in the better position were of limited means and therefore unlikely to challenge the government action;[349] and where to

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[338] *Harris v. Canada,* [2000] F.C.J. No. 729 (FCA).

[339] *Amnesty International Canada v. Canada (Canadian Forces)* (2007), 287 D.L.R. (4th) 35 (FC).

[340] *Toronto Coalition to Stop the War v. Canada (Minister of Public Safety and Emergency Preparedness)* (2010), 17 Admin. L.R. (5th) 1 (FC) at paras. 81-4.

[341] *Thompson v. Ontario (Attorney General)* (2011), 106 O.R. (3d) 176 (Ont. Sup. Ct. J.) at para. 62.

[342] *Pembina Institute for Appropriate Development v. Alberta (Utilities Commission)* (2011), 27 Admin. L.R. (5th) 10 (Alta. C.A.).

[343] *Canadian Council for Refugees v. Canada,* [2008] 3 F.C.R. 606 (FC), although on appeal the court expressed the view that the applications judge had erred in concluding that a refugee would have had to bring a challenge from outside Canada, and that public interest standing probably should not have been granted on this basis: 2008 FCA 229 at paras. 99*ff.*

[344] *Morgentaler v. New Brunswick* (2009), 306 D.L.R. (4th) 679 (NBCA).

[345] *Criminal Defence Lawyers Assn. (Saskatoon) v. Saskatchewan,* [1984] 3 W.W.R. 707 (Sask. Q.B.); **and see** *C.U.P.E. v. Canadian Broadcasting Corp.* (1991), 50 Admin. L.R. 237 (FCTD).

[346] *Christie v. British Columbia (Attorney General)* (2005), 250 D.L.R. (4th) 728 (BCSC), var'd on basis entire statute *ultra vires* 2005 BCCA 631, rev'd on basis statute not *ultra vires* 2007 SCC 21.

[347] *Carter v. Alberta* (2001), 33 Admin. L.R. (3d) 149 (Alta. Q.B.), aff'd [2003] 2 W.W.R. 419 (Alta. C.A.), leave to appeal to SCC ref'd [2004] 1 W.W.R. 585 (SCC).

[348] *Régie des rentes du Québec v. Pension Commission of Ontario* (2000), 189 D.L.R. (4th) 304 (Ont. Div. Ct.).

[349] *Unishare Investments Ltd. v. R.* (1994), 18 O.R. (3d) 603 (Ont. Gen. Div.); **see also** *MiningWatch Canada v. Canada (Minister of Fisheries and Oceans),* [2008] 3 F.C.R. 84

defer giving standing until a "better" case arose would give rise to the possibility that the respondent could manipulate the situation to produce a more favourable result.[350]

The need to defer the grant of public interest standing until a "better" plaintiff appears is, however, subject to some practical limitations. As the Ontario Court of Appeal noted in a case brought by an environmental protection group, it should not be necessary to wait until a nuclear accident has occurred before the legality of the operation of nuclear power generating stations can be litigated.[351] Furthermore, the fact that others might share the applicant's concern but not have brought an action would not be a bar to standing.[352]

4:4000 RESPONDENTS

4:4100 Generally

The Rules of Practice require that all parties necessary for the adjudication of a matter be parties to the proceeding.[353] In addition to

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(FC) (coalition of 20 groups sought review; standing granted), rev'd on other grounds [2009] 2 F.C.R. 21 (FCA), rev'd on other grounds 2010 SCC 2; *Conseil du Patronat du Québec v. Québec (Attorney General),* [1991] 3 S.C.R. 685; *P.E.I.N.U. v. Prince Edward Island (Lieutenant Governor in Council)* (1995), 30 Admin. L.R. (2d) 145 (PEITD).

[350] *S. (H.S.) v. Manitoba (Director of Child & Family Services),* [1987] 5 W.W.R. 309 (Man. Q.B.).

[351] *Energy Probe v. Canada (Attorney General)* (1989), 37 Admin. L.R. 1 (Ont. C.A.), leave to appeal to SCC ref'd (1989), 102 N.R. 399(n).

[352] *Lavoie v. Canada (Minister of the Environment),* [2000] F.C.J. No. 1238 (FCTD), appeal dismissed as moot (2002), 43 Admin. L.R. (3d) 209 (FCA).

[353] E.g. Ontario Rules of Civil Procedure, r. 5.03(1) provides:

> 5.03(1) Every person whose presence is necessary to enable the court to adjudicate effectively and completely on the issues in a proceeding shall be joined as a party to the proceeding.

See also *Yestal v. New Westminster (City),* 2012 BCSC 925 (owners of strata lot and common area were proper parties to application by strata unit owner for building permit); *Adams Lake Indian Band v. British Columbia (Lieutenant Governor in Council)* (2011), 21 B.C.L.R. (5th) 286 (BCCA) (business's rights potentially affected, so party-respondent status granted) at paras. 19, 36; *University of Prince Edward Island v. Nilsson* (2009), 282 Nfld. & P.E.I.R. 334 (PEISC) (union added as party-respondent in human rights complaint); *Stark v. Vancouver School District No. 39* (2007), 62 Admin. L.R. (4th) 79 (BCSC) (although board had not been served or named in petition, had standing as party to apply for dismissal); *Kitimat (District) v. British Columbia (Minister of Energy and Mines)* (2006), 34 C.P.C. (6th) 26 (BCCA) (Rules 10 and 15 of former B.C. Supreme Court

that no substantial prejudice or hardship would result from the delay.[81]

5:1252 *The Federal Courts Act*

Section 18.1(2) of the *Federal Courts Act*[82] applies to both the Federal Court and the Federal Court of Appeal. It requires applicants to bring proceedings within 30 days from the time the decision or order[83]

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[81] E.g. *Zenner v. Prince Edward Island College of Optometrists* (2004), 15 Admin. L.R. (4th) 241 (PEICA) (continuing intention to seek judicial review of 1996 decision; little prejudice), rev'd in part on other grounds (2005), 260 D.L.R. (4th) 577 (SCC); *Summerside Seafood Supreme Inc. v. P.E.I. (Min. of Fisheries, Aquaculture and Environment)* (2004), 22 Admin. L.R. (4th) 270 (PEISC) (extension granted), suppl. reasons 2004 PESCTD 76, rev'd on other grounds (2006), 271 D.L.R. (4th) 430 (PEICA). **See also** *Reiten v. Prince Edward Island (Human Rights Commission)* (1997), 475 A.P.R. 327 (PEISC); *McKenna's Furniture Store v. Prince Edward Island (Fire Marshal)* (1997), 474 A.P.R. 212 (PEISC) (relief not granted); *Prince Edward Island Regional Administrative School Unit No. 3 v. Prince Edward Island Teachers Federation* (1983), 130 A.P.R. 228 (PEICA) (proof of a continuing intention to apply for judicial review relevant). **And see** topic 5:1500, *post.*

[82] *Federal Courts Act,* R.S.C. 1985, c. F-7, s. 18.1(2) [as am. S.C. 2002, c.8].

[83] *Federal Courts Act,* R.S.C. 1985, c. F-7, s. 18.1(2) [as am. S.C. 2002, c.8]. Since the section does not specify that the decision or order be "final," when an application attacking an evidentiary ruling was made within 30 days of a final decision but longer than 30 days from the earlier ruling, it was held to be untimely: *Canada (Attorney General) v. Purcell* (1994), 86 F.T.R. 232 (FCTD). **See also** *Exeter v. Canada (Attorney General)* (2011), 423 N.R. 262 (FCA); *Maple Leaf Foods Inc. v. Consorzio Del Prosciutto Di Parma* (2010), 407 N.R. 199 (FCA); *Basil v. Lower Nicola Indian Band* (2009), 96 Admin. L.R. (4th) 17 (FC) (challenge to one aspect of claim time-barred) at para. 142; *Ontario Assn. of Architects v. Assn. Of Architectural Technologists of Ontario,* [2003] 1 F.C.331 (FCA); *Muckenheim v. Canada (Employment Insurance Commission)* (2008), 382 N.R. 97 (FCA); *Bozzer v. Canada (Minister of National Revenue)* (2007), 67 Admin. L.R. (4th) 71 (FC); *Cousins v. Canada (Attorney General)* (2007), 58 C.C.E.L. (3d) 225 (FC); *Canada (Attorney General) v. Trust Business Systems* (2007), 361 N.R. 53 (FCA); *Coffey v. Canada (Minister of Justice)* (2005), 273 F.T.R. 92 (FC) (not clear whether Authority to Proceed under *Extradition Act* subject to 30-day time-limit); *Bordage v. Archambault Institution* (2000), 204 F.T.R. 133 (FCTD) (no motion made to extend time); *Lewis v. Canada (Minister of Citizenship and Immigration)* (2001), 206 F.T.R. 313 (FCTD) (extension of time to file affidavit of service, application for judicial review and record); *Durant v. Canada (Minister of Fisheries and Oceans),* 2002 FCT 327 (no "decision or order"); *McKeown v. Royal Bank of Canada* (2001), 7 C.C.E.L. (3d) 305 (FCTD) (no explanation for delay, so application dismissed); *687764 Alberta Ltd. v. Canada (Minister of Health)* (2000), 261 N.R. 102 (FCA), aff'g [1999] F.C.J. No. 545 (FCTD); *Cartier v. Canada (Attorney General)* (2000), 255 N.R. 392 (FCA) (extension of time allowed); *Khaper v. Canada* (2001), 178 F.T.R. 68 (FCTD), aff'd 2001 FCA 52; *Provost v. Canada (Minister of Labour)* (2000), 258 N.R. 229 (FCA); *Forster v. Canada (Correctional Service)* (1999), 247 N.R. 300 (FCA) (reason for delay insufficient); *Fan v. Canada (Minister of Citizenship and Immigration)* (1998), 152 F.T.R. 301 (FCTD) (application out of time); ***Krause v. Canada*** (1999), 236 N.R. 317 (FCA) (application not out of time); *Bullock v. Canada* (1997), 221 N.R. 345 (FCA); *British Columbia Hydro and Power Authority v. Canada (Attorney General)* (1997), 137 F.T.R. 265 (FCTD) (extension of time to file affidavits); ***Grewal v. Canada (Minister of Employment & Immigration)***, [1985] 2 F.C. 263 (FCA). **Compare** *2005 Robert Julien Family Delaware*

was first communicated by the tribunal to the Deputy Attorney General of Canada or any affected party, "or within any further time as a judge of the Federal Court may fix or allow before or after the end of those 30 days." In addition, Rule 8 of the Federal Courts Rules, 1998[84] provides that a judge may extend or reduce those time-limits.[85]

There are two important points to note about these provisions. First, the Federal Court of Appeal has held that since the term "decision" "cannot refer to every interlocutory decision a tribunal makes...[time] does not begin to run until the final decision in the proceedings has been rendered."[86] Accordingly, any objection to proceedings followed during the hearing may be heard at the time the final decision is challenged, it appears.

Second, s. 18.1(2) does not apply to all administrative action that may be the subject of judicial review before the Federal Court, but only to "decisions or orders." Thus, it does not apply to regulations, or to a "course of conduct" by a federal agency that falls short of a "decision or order."[87]

Dynasty Trust v. Canada (Minister of National Revenue) (2008), 381 N.R. 325 (FCA) (since application was attack on ongoing failure to perform statutory duty, 30-day limitation period not applicable).

[84] See generally topic 5:1520, *post.*

[85] E.g. *May v. CBC/Radio Canada* (2011), 420 N.R. 23 (FCA) (order for expedited hearing refused) *Canada (Canadian Wheat Board) v. Canada (Attorney General)* (2007), 68 Admin. L.R. (4th) 22 (FC) (order for expedited hearing refused), aff'd 2008 FCA 76; *Liu v. Canada (Minister of Citizenship and Immigration)* (2007), 362 N.R. 81 (FCA) (court had no jurisdiction under Rule 8 to extend time set out in other Acts such as *Citizenship Act*); *Gordon v. Canada (Minister of National Defence)* (2004), 22 Admin. L.R. (4th) 25 (FC) (abridgement refused).

[86] *Zündel v. Citron*, [2000] F.C.J. No. 678 (FCA) at para. 17. **See also** *MiningWatch Canada v. Canada (Minister of Fisheries and Oceans),* [2008] 3 F.C.R. 84 (FC) at para. 148, rev'd on other grounds [2009] 2 F.C.R. 21 (FCA), rev'd on other grounds [2010] 1 S.C.R. 6.

[87] *Telus Communications Co. v. Canada (Attorney General),*2014 FC 1 at paras 28*ff.* (the issuance of spectrum licences is policy but comes within the concept of "matter"); *Popal v. Canada (Minister of Citizenship and Immigration),* [2000] F.C.J. No. 352 (FCTD). **See also** *Sandiford v. Canada (Attorney General),* 2009 FC 862 (challenge to courtesy response to letter by applicant long after decision rendered was out of time); *Great Lakes United v. Canada (Minister of the Environment),* 2009 FC 408; *Olah v. Canada (Attorney General)* (2006), 301 F.T.R. 274 (FC).

Stephen Harper vows not to name any senators before reforms made

'We're just not going to make the appointments,' Harper says as 22 seats sit vacant

By Laura Payton, CBC News Posted: Jul 24, 2015 4:28 PM ET Last Updated: Jul 24, 2015 10:39 PM ET

Prime Minister Stephen Harper says he refuses to name any senators until the Senate is reformed, adding he hopes it will put pressure on the provinces to figure out a plan to update the institution.

Twenty-two of the Senate's 105 seats are currently vacant.

"Canadians are not divided on their opposition to the status quo — that is to an unelected, unaccountable Senate," Harper said Friday.

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- **Stephen Harper's Senate class of 2009**
- **Senate reform can't be done by Ottawa alone**

"The government is not going to take any actions going forward that would do anything to further entrench that unelected, unaccountable Senate."

But while Harper said his intention is to "formalize" the moratorium on new appointments, he later said that it's not possible under the Constitution.

"We'll entrench it simply in this way, which is we're just not going to make the appointments."

"I can't formalize a non-appointment. That would be a constitutional change. But under the Constitution of the day, the prime minister has the authority to appoint or not appoint," Harper said.

Harper said the benefit is that costs are down $6 million with 22 seats now unfilled: about one fifth of the 105-seat chamber. He said the provinces have so far been "resistant" to reform.

The policy will remain in place as long as the government can pass its legislation, the prime minister said.

"It will force the provinces over time — who as you know have been resistant to any reforms, in most cases — to either come up with a plan of comprehensive reform or to conclude that the only way to deal with the status quo is abolition."

Last year, the Supreme Court of Canada ruled that Senate reform would require consent from seven provinces representing half the population. Abolishing the Senate would call for the consent of all provinces, the top court said.

It's been roughly 2½ years since Harper last appointed a senator, and the question of whether he can choose not to fill the vacant seats is already being challenged in court.

Vancouver lawyer Aniz Alani launched a court challenge arguing Harper has a constitutional obligation to fill vacant seats since the provinces are under-represented. In May, a Federal Court justice threw out the government's application to dismiss the case.

- **Senate reform can't be done by Ottawa alone**

- **Prime Minister Stephen Harper sued by B.C. lawyer for not filling senate seats**

"If he takes the position that it's up to him to make the appointments and he simply refuses to do so, I don't see any other way of enforcing the Constitution other than to get a declaration from the courts that it's a duty he has," Alani told CBC's Rosemary Barton on *Power & Politics* after Harper's announcement.

32 will have to retire by 2020

Of the 22 existing vacancies, 15 belong to Ontario and Quebec. The two provinces combined are allotted 48 seats, something that has long frustrated westerners, with British Columbia and Alberta getting only six seats each.

The Conservatives have 47 Senate seats, more than half of those that are filled. The Liberals have 29, with seven senators sitting as independents.

Another 32 senators will have to retire at age 75 between now and 2020.

Assuming a large number of senators don't quit the Senate or retire early, it would be years before any province was left without representation, and even longer before the Senate was left without enough members to pass legislation.

Harper has long struggled with the Senate on a number of fronts: as a Reform Party MP, he argued against having an unelected Senate. As prime minister in 2008, faced with the possibility of being unseated by a Liberal-NDP coalition, he named 18 new senators, including three whose expenses have since been investigated by the RCMP (two face criminal charges resulting from those probes).

Over the next three years, he named 39 more. But since the Senate scandal broke, Harper has avoided naming anyone new to fill the growing number of vacancies.

'Trying to distract'

The New Democrats also want to see the Senate abolished, while the Liberals have proposed creating a non-partisan process for advising the prime minister on appointments.

Liberal Leader Justin Trudeau, who last winter released the Liberals' Senate caucus, said Friday that Harper "has made this promise before.

"He broke that promise 59 times," Trudeau said. "Mr. Harper is trying to distract people from his inability to deal with the economy, and we don't believe him."

NDP Leader Tom Mulcair said even though his party has no representation in the Senate, he would not make any appointments while negotiating with provinces to abolish the chamber.

Harper said he doesn't think Canadians will notice if the Senate fades away.

"The number of vacancies will continue to rise and other than some voices in the Senate and some people who want to be appointed to the Senate, no one will complain."

Saskatchewan Premier Brad Wall, who appeared with the prime minister on Friday and favours abolition,

said he fully supports the prime minister's move.

"It will be up to premiers ... to respond to this now," he said.

The premier's office in P.E.I. released their own statement Friday, reiterating their opposition to abolition.

"The Senate contributes regional balance and voice in our national institutions," Wade MacLauchlan's office said.

Carissima Mathen, an associate law professor at the University of Ottawa, said she thinks the prime minister's move could do damage to federal-provincial relations.

"There's a very essential constitutional principle that you can't do by indirect means what the Constitution prohibits you from doing by direct means," Mathen said Friday on *Power & Politics.* "The Supreme Court has said that the prime minister does not have the unilateral authority to reshape the Senate even in ways that he might in good faith think are really warranted and legitimate."

With files from The Canadian Press

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CANADIAN CONSTITUTIONAL CONVENTIONS

The Marriage of Law and Politics

ANDREW HEARD

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Conten

> The validity of conventions cannot be the subject of proceedings in a court of law. Reparation for breaches of such rules will not be effected by any legal sanction. There are no cases which contradict these propositions.[32]

A number of authors have argued that not only have conventions not been enforced in the courts but neither should they be. For example, Rodney Brazier and St J. Robilliard object to the notion that conventions should be treated as legal rules because of the informal origins of constitutional conventions:

> To say that a convention can become a rule of law would be to challenge the proposition that Parliament makes laws which are recognised as such by virtue of the act of law-making, whereas conventions, on the other hand, evolve in a manner which is not necessarily appreciated by those participating in their development and which in any case has not been perceived by them as law-making.[33]

Eugene Forsey has also taken great exception to the possibility that courts could declare what the terms of a conventions are:

> The courts have not, nor should they have, the right to decide what the conventions of the Constitution are. If they attempt to do so, the decision has no force at all, legal or other. It is not desirable or even safe, to have the courts making such decisions. On the contrary, it is most dangerous. Acceptance of the Supreme Court's decisions on conventions would mean a Quiet Revolution in our system of government. It would blur the distinction between convention and law. It could lead to the supersession of the law set out in the Constitution by judicially determined 'convention'. It could provide a means of circumventing the explicit provision for constitutional amendment set out in the Constitution Act, 1982. It could subvert parliamentary government.[34]

All arguments that have been rallied against the justiciability of constitutional conventions, however, can be seriously challenged. Munro is mistaken in his assertion that the validity of conventions has not been dealt with in the courts; forthcoming chapters will demonstrate the manner in which conventions have been treated in a variety of relevant cases around the Commonwealth. The legislative formalism inherent in Brazier's and Robilliard's normative argument against justiciable conventions is curious, given the law-making role of the courts in refining both statutory and common law. Forsey's impassioned attack seems to bolt the proverbial door too late. Conventions have been discussed and defined in a number of cases over the years without the ensuing demise of parliamentary government. Forsey appears to ignore the judicial interpretation of our formal Constitution that has effected substantial constitutional change

since very soon after Confederation, thereby side-stepping the previous amending procedures; indeed, judicial interpretation is a fundamental avenue of constitutional evolution. Furthermore, one must point out in just as strong terms that the development of constitutional conventions, regardless of their treatment in the courts, has also brought fundamental alterations to the constitution without recourse to the formal amending procedures. The very basis of parliamentary government Forsey wishes to uphold is founded on conventional rules that arose outside the existing formal amending procedures.

No author has seriously contended that a formal legal remedy, such as a prerogative writ, will be granted by the courts purely on the grounds that a convention has been broken. There is no evidence that in judicial proceedings conventions have been treated in exactly the same way as statute or common law.[35] Nevertheless Jennings,[36] Russell,[37] Allan,[38] and Marshall[39] have clearly shown that various Commonwealth courts have on occasion referred to conventions for guidance and defined their terms in the course of interpreting statutes and extending particular common-law principles.

The Supreme Court of Canada's handling of the reference questions on the amendment of the Constitution illustrates both aspects of the treatment of conventions given by the judiciary: the Court was prepared to discuss in detail the conventions, but not to consider them as court-enforceable rules. On the one hand the majority said:

> The conventional rules of the Constitution present one striking peculiarity. In contradistinction to the laws of the Constitution, they are not enforced by the courts. . . . [T]he legal system from which they are distinct does not contemplate formal sanctions for their breach.[40]

On the other hand they also argued that they would be following judicial practice in discussing the existence and content of a convention:

> We are asked to recognize if it exists. Courts have done this very thing many times in England and the Commonwealth to provide aid for and background to constitutional statutory construction. . . . In so recognizing conventional rules, the Courts have described them, sometimes commented upon them and given them such precision as is derived from the written form of judgment.[41]

The explicit discussion of particular conventional rules in both the Patriation and Quebec Veto reference cases appears to have settled the issue in Canada about the justiciability of constitutional conventions in Canada. In these two cases the Supreme Court was asked to decide whether a convention existed and, if so, what its terms were. Marshall, however, denies that the Court's answering of these reference questions

implied that conventions were dealt with as legal rules, claiming that it dealt with them as questions of fact rather than of law:

> The Canadian courts only felt able to declare the existence of the convention because under widely drawn provincial and federal statutes providing for the furnishing of advisory opinions, they were specifically authorized to give such opinions on questions either of law or of fact. The power to recognize the conventions derived therefore from statute. Where such statutes exist the law will treat the existence of a convention simply as a question of fact—though not a simple question of fact . . .[42]

There is legislation to permit reference questions in all federal and provincial jurisdictions in Canada. Although there are slight variations in the phrasing of the various acts, they essentially provide that the governor-in-council may refer *any* matter to the appeal court of that jurisdiction for an opinion. The Supreme Court of Canada intimated that the courts could place their own restrictions on what matters they would hear: 'The scope of the authority in each case is wide enough to saddle the respective Courts with the determination of questions which may not be justiciable and there is no doubt that those Courts, and this Court on appeal, have a discretion to refuse to answer such questions.'[43] However, the Supreme Court also held that the questions relating to constitutional conventions in the Patriation case should be answered. The majority did not reach this position because they would be answering questions of fact, as Marshall suggested. Rather the majority opinion stated that the question about the existence and terms of the convention dealing with amendments to the constitution

> . . . is not confined to an issue of pure legality but it has to do with a fundamental issue of constitutionality and legitimacy. Given the broad statutory basis upon which the Governments of Manitoba, Newfoundland and Quebec are empowered to put questions to their respective courts of Appeal, they are in our view entitled to an answer to a question of this type.[44]

Thus Canadian courts have been enjoined to answer reference questions raising matters of 'constitutionality and legitimacy'.

The justiciability of conventions should not be denigrated simply because they can be most clearly litigated in reference questions. As Gerald Rubin concluded after a review of the treatment of reference cases in subsequent litigation: 'Theoretically in law, reference opinions are "advisory only"—no doubt about that. But in practice they are treated with the respect due to judgements.'[45] In some ways the status of reference opinions is moving towards that of the 'opinions' of the Judicial Commit-

tee of the Privy Council, which are now conventionally taken to be legal decisions of a court of law.[46]

Furthermore, the judicial consideration of conventions is not restricted to reference questions. In two cases decided before the Patriation reference, the Supreme Court relied heavily on the conventional relationship between a legislature and its government: in *Arseneau v. The Queen*[47] this relationship was relied upon to allow prosecution, under a charge of bribing a member of the legislature, of a person who had corruptly paid money to a minister; in *Blaikie* (No. 2, 1981),[48] it was used to explain an earlier decision to extend the bilingualism required under s.133 of the 1867 Constitution Act to cover regulations enacted by the government of Quebec. Constitutional conventions are clearly rules with which Canadian constitutional lawyers must become more familiar.

The dichotomy between law and convention may not be as distinct as many constitutional theorists would have us believe. The later chapters of this book dealing with the operation of particular conventions will include discussions of the use made of conventions in a number of court decisions that involve a good deal of litigation outside the context of reference legislation.

THE GENESIS OF CONVENTIONAL RULES

There is general agreement that conventions may arise in at least two ways: through some practice acquiring a strong obligatory character over time, or through the explicit agreement of the relevant actors. When conventions arise from practice, however, it is often difficult to ascertain when or if a usage has become sufficiently accepted as binding that it constitutes a convention. Some writers have downplayed the importance of distinguishing between obligatory conventions and non-binding usages. As Peter Hogg has written:

> The distinction between convention and usage, although insisted upon by some constitutional lawyers, is not ordinarily useful, because conventions are as unenforceable as usages. The most that can be said is that there is a stronger moral obligation to follow a convention than a usage, and that departure from convention may be criticized more severely than departure from usage.[49]

In one of the most recent treatments of conventions, Colin Munro has argued that usages and conventions belong to the same continuum.[50] Nevertheless political actors and observers must concern themselves with the distinction between them, however ambiguous it may be, precisely because greater moral obligation occurs in convention than usage. When constitutional dilemmas emerge, it is the degree of obligation to follow, or

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minister.[4] Another representational consideration that a prime minister must take into account when forming the Cabinet is the number of francophone ministers.[5] There have always been a considerable number of francophone members of the Cabinet; for instance, between 1867 and 1965, 28 per cent of all Cabinet positions were held by francophones, which is close to the francophone portion of the population.[6] While religious representation used to be a consideration, modern prime ministers are no longer obliged to balance Catholics and Protestants.[7]

Another major constraint faced in the composition of the federal Cabinet is an apparent obligation to include as few senators as possible. Since the turn of the century there have never been more than three senators in the Cabinet—usually only one. During almost five years of Diefenbaker's term as Prime Minister, there was no senator in the Cabinet. The general practice in this century has been to restrict senatorial ministers to positions without portfolio; usually the sole representative in the Cabinet from the Senate only functions formally as the Leader of the Government in the Senate. The move to bar senators from holding portfolios is of long duration, with the Liberals missing by one vote the passage of a bill in 1871 that would have legally established such a rule. It may not be clear if this practice can be viewed as an established convention today. Dawson does refer to it as a rule that 'has suffered some major infractions',[8] but these infractions have amounted to 12 instances since 1925—six since 1979. Incidents that go contrary to a rule, however, may signify that other more important rules have taken precedence, rather than that the rule does not exist at all. For example, the five senators holding portfolios in the Clark and Trudeau governments between 1979 and 1984 did so only in the context of insufficient elected MPs from important regions of the country. The earlier instances mostly involved temporary or short-lived situations while newly appointed ministers waited for a by-election to run in. A general rule against senators' holding portfolios might have to give way in particular circumstances to the requisites of linguistic or provincial representation, or to the requirement that a minister must hold a seat in either House of parliament. Its breach would not bring with it very serious consequences, since questions could still be addressed to the Prime Minister, an acting minister, or another minister in the Commons who has charge of duties in the same policy area as the senator.

RESPONSIBLE GOVERNMENT

The principle of responsible government figures prominently in the rules relating to the formation and operation of the Cabinet, since the government must be held continually accountable to the elected representatives in the legislature. This principle involves two general aspects: the responsibility of individual ministers for their departments and their own per-

> practice control the operations of the elected branch of the Legislature on a day to day basis, allocates time, gives priority to its own measures, and in most cases decides whether or not the legislative power is to be delegated and, if so, whether it is to hold it itself or to have it entrusted to some other body. Legislative powers so delegated by the Legislature to a constitutional body which is part of itself must be viewed as an extension of the legislative power of the Legislature and the enactments of the Government under such delegation must clearly be considered as the enactments of the Legislature for the purposes of s.133 of the B.N.A. Act.[11]

In this case, as in *Arseneau*, the conventions were used as an interpretative means to extend a rule of positive law.

INDIVIDUAL RESPONSIBILITY

Two particular meanings are generally attributed to the responsibility of individual ministers: first, questions concerning a department may be directed in the legislature to the minister; second, the minister carries a culpability for wrongful actions and will have to correct the wrong and/or, depending on the circumstances, suffer the penalty of loss of office. In what might be called the classic theory, ministers were responsible in both these senses for the activities of their officials as well as for their own actions. As Herbert Morrison once told the British House of Commons, a minister 'is responsible for every stamp stuck on an envelope'.[12] However, post-war political practice has seen great changes in the rules of individual responsibility, and the classic view no longer holds.

Informational Answerability

The most widely accepted aspect of ministerial responsibility is the doctrine that members of the legislature may direct questions to ministers concerning their administrative responsibilities. Indeed, this is one of the characteristic features of the Westminster model of parliamentary government adopted by Canada.

The practical operation of ministerial answerability, in this informational sense, illustrates the interaction between the conventions of the constitution and the 'laws and customs' of parliament enforced by the presiding officers in the legislature. The Standing Orders of the Canadian House of Commons provide the formal framework within which ministerial answerability may occur in the national legislature. An Oral Question Period is provided for, during which time members of the House may pose questions of any minister present without giving notice of the issue to be raised. In addition, provision is made for written questions to be submitted to ministers on matters that require some research; answers to these questions are usually merely inserted into *Hansard* without an oral response.

...al activities, and the collective responsibility of the Cabinet as a whole. ... individual ministers and the government collectively must answer to ... legislature for their actions and resign if the legislature loses confi... in their performance.

Although responsible government has taken shape through conven... the courts have several times relied on their combined effect in ...ing points of law. Two cases from the Supreme Court of Canada ...strate the use the judiciary can make of conventions. The Supreme ...rt did not actually mention conventions in either case, yet their use is ...dent. In the 1979 *Arseneau* decision, the Court allowed a prosecution ...nst someone who had paid monies to a minister, under a charge of ...ruptly paying a member of a legislature. The reasons that Mr Justice ...chie gave in his unanimous opinion are worth quoting at length:

> In the absence of evidence to the contrary, I am prepared to proceed on the basis that it was as a member of the Legislature that Van Horne was appointed to be Minister of Tourism. This would be in accord with the generally accepted practice in this country whereby ministers are accountable to the elected representatives of the people in Parliament or the Legislature as the case may be, and it is in his capacity as a member of the Legislature that a Cabinet Minister participates in the process of securing legislative authority for the implementation of the policies which he proposed. In the final analysis, it is as a member and not as a minister that he approves the expenditures which he may have recommended as a minister. In view of the above, I am unable to accept that Van Horne's capacity as a member of the Legislature can be so severed from the functions he performs as a Minister of Tourism as to make it an offence under s.108 to corruptly pay money to him as a member of the Legislature and no offence to corruptly pay money to the same man in his capacity as minister.[9]

Thus the Court used the conventional relationship between the Cabinet and the legislature to extend the circumstances in which a criminal charge could be laid.

In *Blaikie* (No.2),[10] the Court relied on the relationship between the Quebec legislature and the provincial executive council (the cabinet) to extend s.133 of the 1867 Constitution Act to executive regulations. In reaching this conclusion, the Court mentioned that the Lieutenant Governor would appoint to the Executive Council only persons who, 'according to constitutional principles of a customary nature referred to in the preamble of the B.N.A. act as well as in some statutory provisions . . . , must be or become members of the Legislature and are expected, individually and collectively, to enjoy the confidence of the elected branch.' Thus:

> The Government of the province is not a body of the Legislature's own creation. It has a constitutional status and is not subordinate to the Legislature in the same sense as other provincial agencies established by the Legislature. Indeed, it is the Government which, through its majority, does in

NSTD—Nova Scotia Supreme Court, Trial Division

NZLR—*New Zealand Law Reports*

OR—*Ontario Reports*

PEIR—*Prince Edward Island Reports*

PEISC—Prince Edward Island Supreme Court

QAC—*Quebec Appeal Cases*

QB—Queen's Bench

QLR—*Quebec Law Reports*

Que.SC—Quebec Superior Court

RSBC—*Revised Statutes of British Columbia*

RSC—*Revised Statutes of Canada*

SC—*Statutes of Canada*

SCC—Supreme Court of Canada

SCR—*Supreme Court Reports*

SN—*Statutes of Newfoundland*

SNS—*Statutes of Nova Scotia*

SO—*Statutes of Ontario*

SQ—*Statutes of Quebec*

UCQBR—*Upper Canada Queen's Bench Reports*

WWR—*Western Weekly Reports*

YR—*Yukon Reports*

YTCA—Yukon Territorial Court of Appeal

1. THE ROLE AND NATURE OF CONVENTIONS

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[2]Peter H. Russell, 'The Supreme Court and Federal Provincial Relations: The Political Use of Legal Resources', *Canadian Public Policy*, vol. 11, no. 2, June 1985, pp. 161ff.

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[5]Eugene A. Forsey, 'The Courts and the Conventions of the Constitution', *UNB Law Journal* 33 (1984), p. 11.

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Macmillan, 1924, p.
[8]Hogg, op. cit.
[9]Henri Brun and Gu
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Press, 1950.
[11]Frank MacKinnor
[12]John T. Saywell, *Th*
[13]Eugene Forsey, *Fr*
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[15]Marc Gold, 'The
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[16]Dicey, op. cit.
[17]Sir Ivor Jennings
Press, 1959.
[18]O. Hood Phillips,
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[22]Dicey, op. cit., p.
[23]Jennings, op. cit.
[24]Dicey, op. cit., p.
[25]Phillips, *Constitu*
[26]Forsey, 'The Cou
[27]Jennings, op. cit.
[28]Illustrations of th
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[29]Wade, op. cit., pp
[30]J.R. Mallory, *The*
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[32]Munro, 'Laws an

[1]A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* (8th ed.), London: Macmillan, 1924, p. 30.
[2]Hogg, op. cit.
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[13]Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability*, Oxford: Oxford University Press, 1984.
[14]L.J.M. Cooray, *Conventions, the Australian Constitution and the Future*, Sydney: Legal Books, 1979. Cooray drew attention in this work to the importance of distinguishing between 'constitutional' conventions, which affect the basic operation of constitutional structures and processes, and what he called 'governmental' conventions, which regulate the internal workings of government departments.
[15]O. Hood Phillips, 'Constitutional Conventions: Dicey's Predecessors', *Modern Law Review* 29 (1966), p. 137.
[16]Dicey, op. cit., p. 417.
[17]Jennings, op. cit., p. 81.
[18]Dicey, op. cit., p. 23.
[19]Phillips, *Constitutional Law*; Munro, op. cit.; Marshall and Moodie, op. cit.
[20]Forsey, 'The Courts and the Conventions', p. 13.
[21]Jennings, op. cit., ch. 3.
[22]Illustrations of this can be found in Canada in the Ontario Cabinet Management Board Act, which presupposes the conventional creation of the Cabinet; also, the British Columbia Attorney General Act, RSBC 1979, c. 23, s. 2(e), grants the Attorney General such powers as belong to the Attorney General or Solicitor General of England 'by law or usage'.
[23]Wade, op. cit., pp. cxxxvi to cxlvi.
[24]J.R. Mallory, *The Structure of Canadian Government* (rev. ed.), Toronto: Gage, 1984, p. 442.
[25]*Madzimbamuto v. Lardner-Burke*, [1969] 1 AC 645; and, *Adegbenro v. Akintola*, [1963] AC 614.
[26]Munro, 'Laws and Conventions Distinguished', p. 228.

[33]Rodney Brazier and St J. Robilliard, 'Constitutional Conventions: The Canadian Supreme Court's Views Reviewed', *Public Law* 28 (1982) at p. 33.
[34]Forsey, 'The Courts and the Conventions', p. 42.
[35]This situation may well change in Canada, with redress being made, outside of reference legislation, for a declaratory judgement by a court concerning the terms or obligation of a party to respect a particular conventional rule. See, for instance, the unsuccessful application made by the Yukon Territory's administration to have a declaration made that the Meech Lake Accord contravened a convention the Territorial administration believed existed concerning the admission of new provinces to Confederation. *Penikett et al. v. The Queen et al.* [1987], 2 YR 262 (YSC); [1988], 2 WWR 481 (YTCA).
[36]Jennings, op. cit., pp. 122-7.
[37]Peter H. Russell, 'The Supreme Court Decision: Bold Statescraft Based on Questionable Jurisprudence', Russell et al., op. cit., pp. 20-4.
[38]Allan, op. cit, pp. 312-19.
[39]Marshall, op. cit., pp. 13-15.
[40]*Reference re Amendment of the Constitution of Canada* (1981), 125 DLR (3d) 1 at pp. 84-5.
[41]Ibid., at pp. 88-9.
[42]Marshall, op. cit., pp. 16-17.
[43]*Reference re Amendment of the Constitution of Canada* (1981), 125 DLR (3d) 1 at p. 16.
[44]Ibid., at p. 88.
[45]Gerald Rubin, 'The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law', in W.R. Lederman, ed., *The Courts and the Canadian Constitution*, Toronto: McClelland and Stewart, 1964. See also Hogg, op. cit., pp. 180-1; Barry L. Strayer, *The Canadian Constitution and the Courts* (2nd ed.), Toronto: Butterworths, 1983, p. 292.
[46]*British Coal Corp. v. The King*, [1935] AC 500 at pp. 510-11.
[47](1979) 2 SCR 136 at p. 149.
[48]*A.G. Quebec v. Blaikie et al.* (No. 2), [1981] 1 SCR 312 at pp. 319-20.
[49]Hogg, op. cit., p. 10.
[50]Munro, *Studies in Constitutional Law*, pp. 59-60.
[51]Marshall, op. cit., p. 8.
[52]'A constitutional convention is worked out under the form of an understanding. A usage, practice, or a way of doing things becomes the object of an agreement. A convention is necessarily bilateral or multilateral; it implies several parties. It is a kind of contract. It is a way of doing things that happens to be sanctioned by agreement rather than by time, as in customary law; the determinative element of a convention is the agreement by virtue of which those in power consider themselves bound.' Brun and Tremblay, op. cit., p. 47.
[53]'This agreement . . . can be written, oral or tacit.' Ibid., 47.
[54]Gold, op. cit.
[55]Phillips, *Constitutional Law*, p. 77.
[56]Marshall, op. cit., pp. 10-12.
[57]Geoffrey Marshall, 'What Are Constitutional Conventions?', *Parliamentary Affairs* 38 (1985), p. 39.
[58]Hogg, op. cit., p. 16.
[59]Jennings, op. cit., p. 136.
[60]Ibid., p. 136.
[61]Forsey, 'The Courts and the Conventions', p. 34.
[62]Marshall, op. cit., p. 9.

2. CONVENTIONS OF THE GOVERNORS' POWERS

[1]Article I of the 1947 Letters Patent states: 'We do hereby constitute, order, and declare that there shall be a Governor General. . . .'
[2]Despite this broad wording, it must be noted that additional Letters Patent were issued by

[104]Marshall, op. cit., p. 174.
[105]Keith, *Letters*, pp. 126-32.
[106]The Judicial Committee of the Privy Council eventually ruled on the original dismissal of the prime minster by the Oni of Ife, and found it was quite constitutional. *Adegbenro v. Akintola*, [1963] AC 614. For a fuller account of the political crisis itself, see S.A. de Smith, *The New Commonwealth and its Constitutions*, London: Stevens & Sons, 1964, pp. 87-90.
[107]Reprinted in the Toronto *Globe and Mail*, 29 July 1986, p. A6.
[108]Keith, *Letters*, p. 130; Marshall, op. cit., p. 174.
[109]Franck, op. cit., p. 1096.
[110]*Proposals on the Constitution: 1971-1978*, Ottawa: Canadian Intergovernmental Conference Secretariat, 1978, p. 140.
[111]David Butler, 'Politics and the Constitution: Twenty Questions Left by Remembrance Day', in H.R. Penniman, ed., *Australia at the Polls: The National Election of 1975*, Washington: American Enterprise Institute for Public Policy Research, 1977, p. 328; Marshall, op. cit., p. 174; D.P. O'Connell, 'Canada, Australia, Constitutional Reform and the Crown', *Parliamentarian* 60 (1979), (1), pp. 9-10.
[112]See the accounts of this episode in *The Times*, London, 14, 15, and 25 September 1974.
[113]For a detailed account of both incidents, see Saywell, op. cit., ch. IX.
[114][1919] AC 935.
[115]Cheffins and Johnson, op. cit., p. 74.
[116]*Reference re Legislative Authority of Parliament to Alter or Replace the Senate*, [1980] 1 SCR 54 at p. 71.
[117]Peter H. Russell, review of Cheffins and Johnson, op. cit., in *Canadian Journal of Political Science* 19 (1986), p. 832.

3. CABINET, MINISTERS AND THE CIVIL SERVICE

[1]*Hansard*, 7 March 1966, p. 2281.
[2]However, the Minister of Justice or Attorney General may offer advice to the governor on particular judicial matters.
[3]Eugene Forsey and Graham Eglington, *The Question of Confidence in Responsible Government: A Study Prepared for the Special Committee on Reform of the House of Commons*, Ottawa, 1985, pp. 320-4. I add to their data the appointment of John Turner as Prime Minister in 1984.
[4]R. MacGregor Dawson, *The Government of Canada* (5th ed.), revised by Norman Ward, Toronto: University of Toronto Press, 1970, p. 179.
[5]Ibid., p. 179; J. R. Mallory, *The Structure of Canadian Government*, pp. 87-93; Joseph Munro, *The Constitution of Canada*, Cambridge: Cambridge University Press, 1889, p. 183; R.M. Punnett, *The Prime Minister in Canadian Government and Politics*, Toronto: Macmillan, 1976, p. 65; D.V. Smiley and R. Watts, op. cit., ch. 5; David E. Smith, 'The Federal Cabinet in Canadian Politics' in Michael S. Whittington and Glen Williams, *Canadian Politics in the 1980s* (2nd ed.), Toronto: Methuen, 1984, pp. 363-5; Richard J. Van Loon and Michael S. Whittington, *The Canadian Political System* (3rd ed.), Toronto: McGraw-Hill Ryerson, 1981, pp. 440-3.
[6]Punnett, op. cit., p. 66.
[7]Van Loon and Whittington, op. cit., p. 447; see also Dawson, op. cit., pp. 182-3.
[8]Dawson, op. cit., p. 178.
[9]*Arseneau v. The Queen*, [1979] 2 SCR 136.
[10]*A.G. Quebec v. Blaikie* (No. 2), [1981] 1 SCR 312.
[11]Ibid., at p. 320.
[12]Geoffrey Marshall and Graeme Moodie, *Some Problems of the Constitution* (3rd ed.), London: Hutchinson, 1964, p. 84.
[13]*Hansard*, 3 March 1976, p. 11575.
[14]Alistair Fraser, W.F. Dawson, and John Holtby, eds, *Beauchesne's Rules and Forms of the House of Commons of Canada* (6th ed.), Toronto: Carswell, 1989, p. 123.

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CONSTITUTIONAL LAW OF CANADA

Fifth Edition Supplemented

Volume 1

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1.8 Case law

The courts have the task of interpreting the Constitution Acts and the other constitutional statutes. Their decisions constitute precedents for later cases so that a body of judge-made or decisional law, usually called case law, develops in areas where there has been litigation. While the courts' role is simply one of interpretation, the cumulative effect of a series of precedents will constitute an important elaboration or even modification of the original text. In particular, the provisions of the Constitution Act, 1867 that distribute legislative power between the central Parliament and the provincial Legislatures are now overlaid by such an accumulation of cases that it would be unthinkable to attempt to ascertain the relevant rules by recourse to the Act alone. The Charter of Rights (Part I of the Constitution Act, 1982) has also attracted a vast case law despite its much shorter life. Obviously, the case law that interprets the Constitution Acts and the other constitutional statutes is also constitutional law.

As part of the process of "interpretation", the Supreme Court of Canada has not hesitated to find "unwritten" principles that "underlie" the text of the Constitution Act, 1867 and the Constitution Act, 1982.[73] We have already noticed the Court's use of the doctrine of parliamentary privilege, which is nowhere mentioned in the two Acts, to exempt the actions of legislative assemblies from the Charter of Rights.[74] In *Re Remuneration of Judges* (1997),[75] the majority of the Supreme Court of Canada asserted that there was an unwritten principle of judicial independence in the Constitution of Canada that could have the effect of invalidating statutes that reduced judicial salaries. La Forest J., in dissent, expressed his objection to the limiting of the powers of legislatures "without recourse to express textual authority".[76] In the *Secession Reference* (1998),[77] the Supreme Court of Canada invoked unwritten principles of democracy, federalism, constitutionalism and the protection of minorities to hold that, if a province were to decide in a referendum that it wanted to secede from Canada, the federal government and the other provinces would come under a legal duty to enter into negotiations to accomplish the secession.[78] These cases illustrate the active and creative role that the modern Supreme Court of Canada has carved out for itself.[79] The

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73 See ch. 15, Judicial Review on Federal Grounds, under heading 15.9(g), "Unwritten constitutional principles", below.

74 Section 1.7, "Parliamentary privilege", above.

75 [1997] 3 S.C.R. 3.

76 *Id.*, para. 316. This issue is more fully examined in ch. 7, Courts, under heading 7.1(h), "Inferior courts of civil jurisdiction", below.

77 *Re Secession of Quebec* [1998] 2 S.C.R. 217.

78 *Id.*, para. 88. This issue is more fully examined in ch. 5, Federalism, under heading 5.7(a), "The power to secede", below.

79 See also ch. 34, Civil Liberties, under heading 34.7(c), "Implied bill of rights", below (importation of civil liberties guarantees); ch. 47, Fundamental Justice, under heading 47.10(b), "Definition of fundamental justice", below (residuary theory of s. 7).

cases carry the Constitution of Canada way beyond the literal language of its text and way beyond the intentions of the framers. They raise the concern (expressed by La Forest J.) that the Court is trespassing into fields more properly left to the legislative and executive branches of government. This is a theme that cannot be fully explored here. It runs throughout this book.[80] For present purposes, the point is that case law is an exceedingly important source of constitutional law.

In addition, some of the common law, that is to say, case law which is independent of any statute or constitution, could be characterized as constitutional law. For example, the Crown (meaning the executive government) retains a few vestigial prerogative powers, which spring not from statute, but from the common law; the prerogative is discussed in the next section of this chapter. It is also the courts which have developed many of the rules concerning the liability of the Crown and its employees.[81] The courts have also made much of the law concerning civil liberties by establishing rules to limit the powers of government officials and administrative agencies, and procedures to enable private individuals to seek judicial review of administrative action.[82] The common law can always be changed by statute. In almost every field that initially developed purely as common law, there has been considerable statutory intervention, modifying the judge-made rules. That is true of the examples given, but much of the law is still case law.

1.9 Prerogative

The royal prerogative[83] consists of the powers and privileges accorded by the common law to the Crown. Dicey described it as "the residue of discretionary or arbitrary authority, which at any given time is left in the hands of the Crown".[84] The prerogative is a branch of the common law, because it is the decisions of the courts which have determined its existence and extent.[85]

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80 Among many cross-references, note in particular, ch. 5, Federalism, under heading 5.5, "Role of the courts", below, and ch. 36, Charter of Rights, under heading 36.4, "Expansion of judicial review", below.

81 See ch. 10, The Crown, below.

82 See ch. 34, Civil Liberties, under heading 34.2 "Common law", below.

83 See D.W. Mundell, "Legal Nature of Federal and Provincial Executive Governments" (1960) 2 Osgoode Hall L.J. 56; Cheffins and Tucker, *The Constitutional Process in Canada* (2nd ed., 1976), ch. 4; C.R. Munro, *Studies in Constitutional Law* (Butterworths, London, 2nd ed., 1999), ch. 8; Evatt, *The Royal Prerogative* (1987); E.G. MacDonald, *A Contemporary Analysis of the Prerogative* (LL.M. thesis, Osgoode Hall Law School, York University, 1988); de Smith and Brazier, *Constitutional and Administrative Law* (8th ed., 1998), ch. 6; Sunkin and Payne (eds.), *The Nature of the Crown* (1999); Hogg, Monahan and Wright, *Liability of the Crown* (4th ed., 2011), sec. 1.5(b).

84 Dicey, *Law of the Constitution* (10th ed., 1965), 424; but see note 98, below.

85 *Case of Proclamations* (1611) 12 Co. Rep. 74, 77 E.R. 1352 (K.B.), holding that "the King hath no prerogative, but that which the law of the land allows him".

The term prerogative should be confined to powers or privileges that are unique to the Crown. Powers or privileges enjoyed equally with private persons are not, strictly speaking, part of the prerogative. For example, the Crown has the power to acquire and dispose of property, and to enter into contracts, but these are not prerogative powers, because they are possessed by everyone. Sometimes, the term prerogative is used loosely, in a wider sense, as encompassing all the powers of the Crown that flow from the common law.[86] Although this usage is historically inaccurate,[87] it has become increasingly common. Nothing practical now turns on the distinction between the Crown's "true prerogative" powers and the Crown's natural-person powers, because the exercise of both kinds of powers is reviewable by the courts.[87a]

In the next chapter, we shall see that the Crown possessed certain prerogative legislative powers over British colonies. The King, acting without the concurrence of Parliament, had the power to create the office of Governor, executive council, legislative assembly and courts for a colony. In the case of a conquered colony (as opposed to a settled colony), the King possessed a general power of legislation but only until such time as the colony was granted its own legislative assembly.[88] These powers are of mainly historical interest for Canada today; but the constitutions of Nova Scotia, New Brunswick and Prince Edward Island still consist of prerogative instruments,[89] and the office of Governor General still depends upon a prerogative instrument.[90]

Apart from the power over the colonies, the courts held that there was no prerogative power to legislate: only the Parliament could make new laws.[91] The Bill of Rights of 1688 denied the prerogative powers to "suspend" a law for a period of time, or to "dispense" with a law in a particular case.[92] The Bill of Rights of 1688 also affirmed that only Parliament could levy taxes.[93] And the courts established that only Parliament could authorize the expenditure of public funds.[94] The courts also held that there was no prerogative power to administer

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86 Dicey, note 84, above, 455, said that "every act which the executive government can lawfully do without the authority of an Act of Parliament is done by virtue of the prerogative". For criticism of this usage, see Mundell, note 83, above, 58-59; Munro, note 83, above, 159-160.

87 W. Blackstone, *Commentaries* (1765), vol. 1, 239, says that: "It assumes in its etymology (from *prae* and *rogo)* something that is required or demanded before, or in preference to, all others".

87a Notes 101-108 and accompanying text, below.

88 See ch. 2, Reception, below.

89 *Id.*, under heading 2.2(c), "Amendment of received laws," below.

90 Letters Patent constituting the office of Governor General of Canada, 1947, R.S.C. 1985, Appendix II, No. 31.

91 *Case of Proclamations* (1611) 12 Co. Rep. 74, 77 E.R. 1352 (K.B.) (King by proclamation could not prohibit new buildings in London).

92 de Smith, note 83, above, 73-74; and see ch. 34, Civil Liberties, under heading 34.2, "Common law", below.

93 *Bowles v. Bank of England* [1913] 1 Ch. 57 (resolution of parliamentary committee, approved by House of Commons, cannot levy a tax).

94 *Auckland Harbour Bd. v. The King* [1924] A.C. 318 (P.C., N.Z.) (money spent by government without legislative appropriation is recoverable by government); E. Campbell, "Parliamentary Appropriations" (1971) 4 Adelaide L.R. 145.

justice: only the courts could adjudicate disputes according to law.[95] These decisions confined the prerogative to executive governmental powers. And within this area the prerogative was further limited by the doctrine that most executive action which infringed the liberty of the subject required the authority of a statute.[96] Moreover, the prerogative could be abolished or limited by statute,[96a] and, once a statute had occupied the ground formerly occupied by the prerogative, the Crown had to comply with the terms of the statute.[97] All of these rules, and especially the last (displacement by statute), have had the effect of shrinking the prerogative powers[98] of the Crown down to a very narrow compass. The conduct of foreign affairs, including the making of treaties[98a] and the declaring of war, continues to be a prerogative power in Canada. So are the appointment of the Prime Minister (by the Governor General) and other ministers (by the Governor General on the advice of the Prime Minister),[98b] the issue of passports, the

95 *Prohibition del Roy* (1607) 12 Co. Rep. 63, 77 E.R. 1342 ("The King in his own person cannot adjudge any case, either criminal . . . or betwixt party and party").

96 *Entick v. Carrington* (1765) 19 St. Tr. 1030, 95 E.R. 807 (K.B.), (no prerogative power of search and seizure). An exception was that property could be taken or destroyed in time of war, although the prerogative power was accompanied by an obligation to pay compensation: *Burmah Oil Co. v. Lord Advocate* [1965] A.C. 75 (H.L.) (Crown ordered to pay compensation for oil installations in Burma destroyed during second world war).

96a Any bill diminishing the Crown's prerogative should receive "royal consent" signified by the Governor General at some stage in the bill's consideration in either one of the two Houses. Royal consent is not to be confused with "royal assent", which of course is the final stage in the enactment of every bill. Royal consent is helpfully explained by the Speaker of the Senate in "Speaker's Ruling: Bill C-232 and the Royal Consent", Senate of Canada, March 21, 2011 (holding that royal consent was not needed for a statute that did not affect any Crown prerogative). This requirement is one of internal parliamentary procedure only. In a case where royal consent was required, and was not obtained, if the bill went through all stages of enactment, including royal assent, the statute would be validly enacted. On the conferral of royal assent, "the question of royal consent becomes moot": *Id.*, 4.

97 *A.G. v. De Keyser's Royal Hotel* [1920] A.C. 508 (H.L.) (Crown ordered to satisfy statutory requirement of compensation for building occupied in time of war). Compare *Barton v. Cth. of Aust.* (1974) 131 C.L.R. 477 (extradition under prerogative upheld; not displaced by statute); *R. v. Home Secretary; Ex parte Northumbria Police Authority* [1989] Q.B. 26 (C.A.) (prerogative power to supply riot equipment to police not displaced by statute); *Ross River Dena Council Band v. Can.* [2002] 2 S.C.R. 816, para. 58 (prerogative power to create Indian reserves "limited" but not "ousted" by statute); *Can. v. Khadr* [2010] 1 S.C.R. 44, para. 35 (prerogative power over foreign affairs not displaced by statute).

98 As well as prerogative powers, there are a number of prerogative privileges or immunities, which give to the Crown immunities from some kinds of legal proceedings, priority in the payment of debts, etc. This miscellaneous class of prerogatives, which is ignored in Dicey's definition accompanying note 84, above, has also been reduced by statute, but some of it lingers on. The part concerned with the liability of the Crown to legal proceedings is discussed in ch. 10, The Crown, below.

98a *Turp v. Can.* (2012) 415 F.T.R. 192 (F.C.) (prerogative power to withdraw from Kyoto Accord, despite parliamentary implementation of treaty).

98b *Guergis v. Novak* (2012) 112 O.R. (3d) 118 (S.C.J.), paras. 10-15 (Prime Minister has prerogative power to dismiss minister at pleasure without judicial review). The plaintiff was also unsuccessful in challenging her dismissal from the government caucus; the Court held that the P.M. had that power too, although its source was parliamentary privilege, not Crown prerogative: *Id.*, paras. 16-22. On appeal under the same name, these rulings were affirmed without discussion: (2013) 116 O.R. (3d) 280 (C.A.).

creation of Indian reserves,[99] and the conferring of honours such as Queen's Counsel.[99a] But most governmental power in Canada[100] is exercised under statutory, not prerogative power.

It used to be asserted that the exercise of prerogative powers was not subject to judicial review.[101] The assertion is belied by the many cases in which the exercise or purported exercise of prerogative powers has been reviewed by the courts. The courts will determine whether a prerogative power that is asserted by the Crown does in fact exist,[102] and, if it does exist, what are its limits and whether any restrictions on the power have been complied with.[103] The courts will also determine whether a prerogative power has been displaced by statute.[104] The courts will also require, not only that prerogative powers be exercised in conformity with the Charter of Rights[105] and other constitutional norms,[106] but also that administrative-law norms such as the duty of fairness be observed.[107] The courts will also determine whether a prerogative power has been properly delegated.[108]

Before the development of responsible government, the prerogative powers of the Crown were exercised by the reigning monarch in accordance with his or her own discretion. Such powers could not survive the growth of democratic ideals,

99 *Ross River Dena Council Band v. Can.* [2002] 2 S.C.R. 816.

99a *Black v. Chrétien* (2001) 54 O.R. (3d) 215 (C.A.).

100 Canada being a federal state, the prerogative powers had to be distributed between the federal government (the Crown in right of Canada) and the provincial governments (the Crown in right of each province). The Constitution Act, 1867 was silent on the point. The courts held that the prerogative powers followed the comparable legislative powers: see ch. 9, Responsible Government, under heading 9.3, "Law and Convention", below.

101 de Smith, note 83, above, 136-137, rejecting the assertion.

102 The leading cases are cited in notes 91-96, above.

103 *Burmah Oil Co. v. Lord Advocate* [1965] A.C. 75 (H.L.) (prerogative power accompanied by a duty to pay compensation). Compare judicial review of claims to withhold evidence by virtue of Crown privilege: ch. 10, The Crown, under heading 10.4, "Crown privilege", below.

104 Note 97, above.

105 *Operation Dismantle v. The Queen* [1985] 1 S.C.R. 441 (weapon testing under prerogative upheld, but prerogative power in principle subject to Charter); *Can. v. Kamel* [2009] 4 F.C.R. 449 (F.C.A.) (refusal of passport upheld under s. 1 of Charter); *Abdelrazik v. Can.* [2010] 1 F.C.R. 267 (F.C.) (refusal of passport struck down for breach of Charter); *Can. v. Khadr* [2010] 1 S.C.R. 44 (declaration of breach of Charter issued even though remedial action might involve exercise of prerogative power over foreign affairs).

106 *Air Can. v. B.C.* [1986] 2 S.C.R. 539 (mandamus issued to overrule denial of royal fiat for proceedings against Crown to recover unconstitutional taxes).

107 *R. v. Criminal Injuries Comp. Bd.; Ex parte Lain* [1967] 2 Q.B. 864 (certiorari issued for error of law on face of record by board established under prerogative); *Council of Civil Service Unions v. Minr. for Civil Service* [1985] 1 A.C. 374 (H.L.) (remedy denied, but prerogative control of civil service held in principle to be subject to duty of fairness); *R. v. Foreign Secretary; Ex parte Everett* [1989] Q.B. 811 (C.A.) (remedy denied, but refusal of passport under prerogative held to be subject to duty of fairness); *R. v. Secretary of State; Ex parte Bentley* [1994] Q.B. 349 (Div. Ct.) (ministerial refusal to exercise prerogative of mercy struck down on ground that all alternatives had not been considered); *Black v. Chrétien* (2001) 54 O.R. (3d) 215 (C.A.) (remedy for denial of honour denied, but prerogative powers affecting individual rights held to be reviewable).

108 *Ross River Dena Council Band v. Can.* [2002] 2 S.C.R. 816, paras. 63-64 (Governorin Council would "normally" exercise prerogative power to create Indian reserves, but duly authorized agent of the Crown could also do so; no agent had authority to do so in this case).

for the monarch was not (and still is not) an elected official. In most countries, the acceptance of democratic ideals led to the abolition of the monarchy: all executive and legislative powers were then conferred on elected officials. In the United Kingdom, the acceptance of democratic ideals led to the system of responsible government, under which the King (or Queen) continued as head of state, and retained many of his powers, but he exercised those powers only on the "advice" of (meaning at the direction of) his ministers. The ministers were the leaders of the party commanding a majority in the elected House of Commons. In this way, the requirements of democracy were satisfied without giving up the forms of monarchical government.

Responsible government had not been extended to the colonies by 1776. Indeed, it was not established in the United Kingdom itself until the nineteenth century. For the 13 American colonies that declared their independence in 1776, the democratic answer to rule by an absentee King and his appointed governors was independence under a republican form of government. For the loyal British North American colonies that remained in the Empire until after responsible government was established in the United Kingdom, the solution turned out to be the gradual extension of responsible government to each colony. At first just the colonial governor, but later the King or Queen as well, was to act on the advice of the ministers who enjoyed the confidence of the local representative assembly. At first various matters of imperial concern (for example, treaty-making) were excluded from responsible government and reserved for British decision, but eventually local responsible government extended to everything. The story of the extension of responsible government to British North America, and the working out of the full implications of that idea, is the story of Canada's achievement of independence.[109]

An extraordinary feature of the system of responsible government is that its rules are not legal rules in the sense of being enforceable in the courts. They are conventions only. The exercise of the Crown's prerogative powers is thus regulated by conventions, not laws.[110] Conventions are the topic of the next section of this chapter.

109 The history of responsible government is related in ch. 9, Responsible Government, below.

110 The Queen in the United Kingdom, and her representatives elsewhere in the Commonwealth, retain a few "personal prerogatives", namely, powers which are exercised at the personal discretion of the Queen (or Governor General or Lieutenant Governor). These powers are needed for the situation where there is no ministry that commands the confidence of the elected assembly. They are discussed in ch. 9, Responsible Government, under heading 9.7, "The Governor General's personal prerogatives", below.

1.10 Conventions

(a) Definition of conventions

Conventions are rules of the constitution that are not enforced by the law courts.[111] Because they are not enforced by the law courts, they are best regarded as non-legal rules, but because they do in fact regulate the working of the constitution, they are an important concern of the constitutional lawyer. What conventions do is to prescribe the way in which legal powers shall be exercised. Some conventions have the effect of transferring effective power from the legal holder to another official or institution. Other conventions limit an apparently broad legal power, or even prescribe that a legal power shall not be exercised at all.

Consider the following examples. (1) The Constitution Act, 1867, and many Canadian statutes, confer extensive powers on the Governor General or on the Governor General in Council, but a convention stipulates that the Governor General will exercise those powers only in accordance with the advice of the cabinet or in some cases the Prime Minister.[112] (2) The Constitution Act, 1867 makes the Queen, or the Governor General, an essential party to all federal legislation (s. 17), and it expressly confers upon the Queen and the Governor General the power to withhold the royal assent from a bill that has been enacted by the two Houses of Parliament (s. 55), but a convention stipulates that the royal assent shall never be withheld.[113]

Each of these two conventions is discussed later in this book, and many other examples will be encountered as well. The two that have been described are two of the most fundamental rules of the Canadian Constitution. Yet, like all conventions, they are not enforceable in the courts. If the Governor General exercised one of his powers without (or in violation of) ministerial advice, the courts would not deny validity to his act. If the Governor General withheld his assent to a bill enacted by both Houses of Parliament, the courts would deny the force of law to the bill, and they would not issue an injunction or other legal remedy to force the Governor General to give his assent. None of these things has ever happened, because conventions are in fact nearly always obeyed by the officials whose conduct they regulate.

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111 The best-known of the abundant writings on conventions are Dicey, *The Law of the Constitution* (10th ed., 1965), chs. 14, 15; Jennings, *The Law and the Constitution* (5th ed., 1959), ch. 3; Wheare, *Modern Constitutions* (2nd ed., 1966), ch. 8; Marshall, *Constitutional Conventions* (1986); de Smith and Brazier, *Constitutional and Administrative Law* (6th ed., 1989), 28-47. A recent Canadian study is Heard, *Canadian Constitutional Conventions* (1991). Conventions are also discussed in Tremblay, *Droit Constitutionnel — Principes* (2nd ed., 2000), 19-30; W.J. Newman, "Of Dissolution, Prorogation, and Constitutional Law, Principle and Convention: Maintaining Fundamental Distinctions during a Parliamentary Crisis" (2009) 27 Nat. J. Con. Law 217.

112 See ch. 9, Responsible Government, below.

113 See ch. 9, Responsible Government, under heading 9.5, "The legislative branch", below.

If a convention is disobeyed by an official, then it is common, especially in the United Kingdom, to describe the official's act or omission as "unconstitutional". But this use of the term unconstitutional must be carefully distinguished from the case where a legal rule of the constitution has been disobeyed. Where unconstitutionality springs from a breach of law, the purported act is normally a nullity and there is a remedy available in the courts.[114] But where "unconstitutionality" springs merely from a breach of convention, no breach of the law has occurred and no legal remedy will be available.[115]

(b) Conventions in the courts

Although a convention will not be enforced by the courts, the existence of a convention has occasionally been recognized by the courts. For example, the courts have taken notice of the conventions of responsible government, which make a Minister accountable to Parliament, as a consideration in deciding to give a broad rather than a narrow interpretation to a statute conferring power on a

(Continued on page 1-23)

114 In some cases of breach of a constitutional law, there is no remedy, for example, because the legal rule is held to be non-justiciable, or because the legal rule is held to be directory only and not mandatory, or because no individual is sufficiently affected by the breach of the legal rule to have "standing" to seek a judicial remedy, or because there is no appropriate remedy. But these are unusual cases.

115 In *Re Resolution to Amend the Constitution* [1981] 1 S.C.R. 753, 909, the Court distinguished between these two senses of the word unconstitutional, and held that breach of a convention did not cause invalidity or give rise to any remedy. Other cases where courts have explicitly refused to enforce a convention are *Re Disallowance and Reservation of Provincial Legislation* [1938] S.C.R. 71; *Currie v. MacDonald* (1949) 29 Nfld. & P.E.I.R. 294 (Nfld. C.A.); *Madzimbamuto v. Lardner-Burke* [1969] 1 A.C. 645 (P.C., So. Rhodesia).

Minister.[116] In these cases, and in other cases in which the existence of a convention has been recognized,[117] the existence of the convention was relevant to the disposition of a legal issue, usually the interpretation of either a statute or a written constitution.

In the *Patriation Reference* (1981),[118] the Supreme Court of Canada was asked on a reference whether there was a convention requiring that the consent of the provinces be obtained before the federal government requested the United Kingdom Parliament to enact an amendment to the Constitution of Canada that would affect the powers of the provinces. The Court was also asked whether there was a legal requirement of provincial consent. The questions had been referred to the courts by three of the eight provinces that were opposed to Prime Minister Trudeau's proposals for a constitutional settlement to patriate the constitution and obtain an amending procedure and a charter of rights.[119] The Supreme Court of Canada obviously had to decide the legal question, and it did so by holding that there was no legal requirement of provincial consent to the constitutional proposals. But the Court went on to decide the convention question as well. A majority of the Court held that there was a convention, and that the convention required the federal government to obtain a "substantial degree" or "substantial measure" of provincial consent[120] before requesting the requisite legislation from the United Kingdom.[121]

The decision in the *Patriation Reference* did not, strictly speaking, enforce a convention. Indeed, as related above, the Court specifically held that there was no legal obligation upon the federal government to obtain the consent of the provinces. Nonetheless, as a matter of practical politics, the decision made it impossible for the federal government to proceed with its constitutional proposals without a "substantial degree" of provincial consent. After the decision, Prime Minister Trudeau and the Premiers met again to try and reach the agreement which had hitherto eluded them, and on November 5, 1981 they did in fact reach agreement on the constitutional settlement which became the Canada Act 1982 and the Constitution Act, 1982.

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116 E.g., *Liversidge v. Anderson* [1942] A.C. 206 (H.L.); *Carltona v. Commrs. of Works* [1943] 2 All E.R. 560 (C.A.); compare *A.-G. Que. v. Blaikie* (No. 2) [1981] 1 S.C.R. 312, 320 (Acts include regulations in view of conventions linking government with Legislature).

117 Other cases are cited in *Re Resolution to Amend the Constitution* [1981] 1 S.C.R. 753, 775-784, 885. Add to these *OPSEU v. Ont.* [1987] 2 S.C.R. 2, 44-45 (convention of political neutrality of Crown servants recognized).

118 *Re Resolution to Amend the Constitution* [1981] 1 S.C.R. 753.

119 The history of this constitutional settlement is related in ch. 4, Amendment, below.

120 [1981] 1 S.C.R. 753, 905.

121 Four opinions were written, none attributed to an individual judge. On the legal question, there was a majority opinion, signed by Laskin C.J., Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ., and a dissenting opinion, signed by Martland and Ritchie JJ. On the convention question, there was a majority opinion, signed by Martland, Ritchie, Dickson, Beetz, Chouinard and Lamer JJ., and a dissenting opinion signed by Laskin C.J., Estey and McIntyre JJ.

The Supreme Court of Canada in the *Patriation Reference* had said that the convention required a "substantial degree" of provincial consent to amendments as far-reaching as those proposed by Prime Minister Trudeau. After the agreement of November 5, 1981, doubt remained as to whether this rule had been satisfied. The agreement included nine of the ten provinces, but did not include Quebec, the only predominantly French-speaking province and one that (at that time) included over 25 per cent of Canada's population. Was the consent of Quebec necessary as part of a "substantial degree" of provincial consent? Quebec referred this question to its Court of Appeal for answer. By the time the question reached the Supreme Court of Canada, the Canada Act 1982 had actually been enacted by the United Kingdom Parliament. Not only was the question solely about a convention, but the issue was moot even in a political sense. Nonetheless, in the *Quebec Veto Reference* (1982),[122] the Supreme Court of Canada answered the question, deciding that Quebec's consent was not necessary to make up the requisite "substantial degree" of provincial consent. By this decision the Court destroyed the spectre of an "unconstitutional constitution"![123]

The convention questions in the *Patriation Reference* and *Quebec Veto Reference* raised no legal issues, and the answers could not lead to any legal consequences. Was the Supreme Court of Canada wrong to answer the questions? The Court pointed out that courts had in previous cases recognized the existence of conventions,[124] but, as mentioned earlier, in the previous cases the existence of the convention had been relevant to the disposition of a legal issue. That was not true in the *Patriation Reference*, where the answer to the convention question had no bearing on the answer to the legal question; nor was it true in the *Quebec Veto Reference*, where no legal question was asked. The Court also pointed out that the convention questions had been referred to the Court for answers,[125] but the Court has in the past often asserted (and exercised) a discretion not to answer questions referred to it that are unsuitable for judicial determination.[126] The issue really comes down to the question whether the convention questions were suitable for judicial determination. The only possible effect of answering the convention question in the *Patriation Reference* was to influence the outcome of the political

122 *Re Objection by Que. to Resolution to Amend the Constitution* [1982] 2 S.C.R. 793..

123 Of course, if the decision had been otherwise, the Canada Act 1982 and the Constitution Act, 1982 would still have been valid; they would have been unconstitutional only in the conventional sense; see note 115, above.

124 [1981] 1 S.C.R. 753, 885.

125 [1981] 1 S.C.R. 753, 884.

126 The discretion not to answer questions posed on a reference is described in ch. 8, Supreme Court of Canada, under heading 8.6, "Reference jurisdiction", below.

negotiations over the 1981-82 constitutional settlement.[127] The answer to the convention question strengthened the hands of the provinces in that negotiation, and is probably the reason why the provinces were able to secure the insertion of the override clause in the Charter of Rights and the substitution of the opting-out amending formula — the two major concessions made by the federal government to achieve the agreement of November 5, 1981. In my view, the Court, which is not an elected body, and which is not politically accountable for its actions, should have confined itself to answering the legal question, and should not have gone beyond the legal question to exert any further influence over the negotiations.[128]

(c) Convention and usage

Conventions are often distinguished from "usages": a convention is a rule which is regarded as obligatory by the officials to whom it applies; a usage is not a rule, but merely a governmental practice which is ordinarily followed, although it is not regarded as obligatory. An example of a usage is the practice of appointing to the position of Chief Justice of Canada the person who is the senior puisne judge of the Supreme Court of Canada at the time of the vacancy. This practice has been observed many times, but it is probable that the Prime Minister (who by convention makes the recommendation to the Governor General who by law makes the appointment) does not feel obliged to follow the practice, for it has been departed from in recent appointments,[129] those of Chief Justice Laskin in 1973 and Chief Justice Dickson in 1984, neither of whom was the senior puisne judge at the time of his appointment. The practice was resumed with the appointment of Chief Justice Lamer in 1990, but was again departed from with the appointment of McLachlin C.J. in 2000.[130]

A usage may develop into a convention. If a practice is invariably followed over a long period of time, it may come to be generally regarded as obligatory and thereby cease to be merely a usage. The resulting convention may be called a custom. This process of evolution from usage to convention (or custom) is the way in which most conventions have been established. It should be noticed,

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127 In the *Que. Veto Reference*, note 122, above, even this effect was missing, since the amendments had been enacted. The Supreme Court of Canada (at pp. 805-806) gave two reasons for answering the question: (1) the Quebec Court of Appeal had answered it, and (2) "it appears desirable that the constitutional question be answered in order to dispel any doubt over it". It may be noted that the Court is rarely so deferential to the lower court, or so intolerant of doubt on questions that need not be decided.

128 This position is argued, and other criticisms made of the *Patriation Reference*, in P.W. Hogg, Comment (1982) 60 Can. Bar Rev. 307.

129 Another departure occurred on the appointment of Anglin C.J. in 1924.

130 Another example of a usage is the practice of appointing three judges to the Supreme Court of Canada from Ontario. This practice was consistently followed until 1978 when Spence J. (from Ontario) retired and was replaced by McIntyre J. (from British Columbia). In 1982, when Martland J. (from Alberta) retired, he was replaced by Wilson J. (from Ontario), and Ontario's usual complement of three members was restored.

however, that very little turns on the question whether a practice is a usage or a convention, because a convention is as unenforceable as a usage. The most that can be said is that there is a stronger moral obligation to follow a convention than a usage, and that departure from convention may be criticized more severely than departure from usage.

Before the *Patriation Reference* (1981),[131] it was generally assumed that there was no judicial procedure for adjudicating a dispute about whether a particular practice was a convention or a usage. Since no legal consequence could flow from the answer, the issue appeared to be non-justiciable. In the *Patriation Reference*, however, as we have seen, the Supreme Court of Canada undertook, for the first time in any common law jurisdiction, to adjudicate such a dispute. The issue was whether the past practice of securing provincial consents to constitutional amendments affecting provincial powers was a usage (as the federal government and two provinces argued) or a convention (as eight provinces argued). In order to resolve the dispute, the Court looked at three questions: (1) what were the precedents? (2) what were the beliefs of the actors in the precedents? and (3) what was the reason for the practice?[132] With respect to the precedents, the Court surveyed the history of constitutional amendment in Canada and concluded that there had been an invariable practice of obtaining provincial consents to amendments that made a change in legislative powers. With respect to the beliefs of the actors, the Court concluded from statements in a federal white paper and by federal ministers that the actors on the federal side felt bound to obtain provincial consents to such amendments. With respect to the reason for the practice, the Court found it in a "federal principle" which condemned any modification of provincial powers "by the unilateral action of the federal authorities".[133] The Court accordingly concluded that there was a convention.

Having decided that there was a convention, the Court had to decide what the convention was. As noted earlier, the Court decided that the convention required a "substantial degree" or "substantial measure" of provincial consent, but that it was not necessary to decide exactly what the requisite degree was.[134] It was enough to decide that the constitutional proposals, which at that time enjoyed the support of only Ontario and New Brunswick, did not have "a sufficient measure of provincial agreement".[135] This part of the Court's decision was rather

131 Note 118, above.

132 The three questions were taken from Jennings, *The Law and the Constitution* (5th ed., 1959), 136. The discussion of the questions is to be found in [1981] 1 S.C.R. 753, 888-909.

133 [1981] 1 S.C.R. 753, 905-906.

134 *Id.*, 905.

135 *Ibid.*

unsatisfactory, not only because it was an implausible reading of the history of constitutional amendment,[136] but also because it was so vague.

The vagueness of the "substantial degree" rule quickly led to further litigation. After the agreement of November 5, 1981, in which the federal government obtained the consents of nine out of ten provinces to a modified constitutional settlement, Quebec returned to the Supreme Court of Canada with a new reference, the *Quebec Veto Reference* (1982),[137] which asked whether the convention of a "substantial degree" of provincial consent required the consent of Quebec. With respect to the precedents, it was clear that Quebec's consent had always been required in the past. With respect to the reason for the practice, it could be found in a principle of "duality", which implied special protection of the powers of the only predominantly French-speaking province. But the Supreme Court of Canada concentrated its attention on the beliefs of the actors, finding that a Quebec veto had never been articulated by any of the actors in the precedents (although it had never been denied either). In the Court's view, "a convention could not have remained wholly inarticulate, except perhaps at the inchoate stage when it has not yet been accepted as a binding rule".[138] The Court accordingly held that there was no requirement of Quebec's consent: the nine predominantly English-speaking provinces comprised a "substantial degree" of provincial consent, which satisfied the convention.

(d) Convention and agreement

As noticed above, most conventions have developed from a long history of past practice, which has eventually attracted a sense of obligation or normative character. But this process of evolution from usage to convention (or custom) is not the only way in which a convention may be established. If all the relevant officials agree to adopt a certain rule of constitutional conduct, then that rule may immediately come to be regarded as obligatory.[139] The resulting convention could

136 In my comment (1982) 60 Can. Bar Rev. 307, I argue that the history was consistent with either a convention of unanimity (contended for by seven provinces) or no convention at all (contended for by the federal government and two provinces), but not the substantial degree rule (contended for by only one province).

137 Note 122, above.

138 [1982] 2 S.C.R. 793, 817. This point seems dubious. There is undoubtedly a convention that the Queen or Governor General or Lieutenant Governor will not withhold the royal assent from bills which have been passed by the appropriate legislative chambers, but I am not aware that any Queen or King or Governor General or Lieutenant Governor has ever explicitly acknowledged the obligation. The convention is well understood although tacit. For further criticism of the decision, see A. Petter, "The Quebec Veto Reference" (1984), 6 Supreme Court L.R. 387.

139 Latham, *The Law and the Commonwealth* (1949), 610, makes the point that "in domestic affairs agreement rarely, if ever, creates constitutional convention, because the usual parties namely, ministers, members of Parliament, the Houses of Parliament, and the King have no moral authority to bind their successors by mere agreement apart from precedent. But in Commonwealth relations it has long been recognized that the agreement of the executive government of

hardly at the beginning be described as a custom. For example, in 1930 the Prime Ministers of the self-governing dominions of the Commonwealth agreed that thenceforth the King (or Queen) would appoint the Governor General of a dominion solely on the advice of the government of the dominion.[140] They also agreed that thenceforth the imperial Parliament would not enact a law for any of the dominions except at the request and with the consent of the dominion.[141] These agreements established conventions. It should be noticed too that conventions established by agreement will normally be written down by the officials concerned in precise and authoritative terms. Conventions are not necessarily unwritten rules, although conventions established by custom are rarely written down in terms that are accepted as precise and authoritative.[142]

(e) Convention and law

A convention could be transformed into law by being enacted as a statute.[143] A convention would also be transformed into law if it were enforced by the courts. If a court gave a remedy for a breach of convention, for example, by ordering an unwilling Governor General to give his or her assent to a bill enacted by both Houses of Parliament, then we would have to change our language and say that the Governor General was under a legal obligation to assent, and not merely a conventional obligation. In that event, a convention would have been transformed into a rule of common law.

In the *Patriation Reference* (1981),[144] it was argued by the provinces that the convention requiring provincial consents to constitutional amendments had "crystallized" into law, so that there was a legal obligation to obtain provincial consents. But it was not clear how this process had occurred, and there seemed to be no precedents of crystallization. The Court rejected the argument in terms which

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a member binds its successors, because it would be derogatory to its autonomy if other members, in order to ascertain their rights and obligations in relation to it, were compelled to examine its internal affairs". It may perhaps be noticed that the problem of "moral authority to bind their successors" exists in Commonwealth relations too, but agreements to create conventions of Commonwealth relations have been made and observed.

140 See ch. 9, Responsible Government, under heading 9.3, "Law and Convention", below.

141 See ch. 3, Independence, under heading 3.3, "Statute of Westminster, 1931". This convention accorded with prior usage and may even have been established before the agreement in 1930, but the agreement settled its status as a convention.

142 The distinction between written and unwritten rules is hard to draw and is rarely useful. For example, even conventions established by custom are written down in textbooks on government or constitutional law, and such accounts are of persuasive authority in determining the existence or scope of a particular convention. Note also the *Quebec Veto Reference*, holding that no convention had been established, because the claimed rule had never been articulated: note 138 and accompanying text, above.

143 Legislation implementing a conventional rule, in this case the convention of public service neutrality, makes the rule subject to the Charter of Rights: *Osborne v. Can.* [1991] 2 S.C.R. 69 (restrictions on political activity by public servants held unconstitutional).

144 *Re Resolution to Amend the Constitution* [1981] 1 S.C.R. 753.

suggested that a convention could never be transformed into a rule of common law. Their lordships pointed out that a convention develops through precedents established by political officials, while the common law develops through precedents established by the courts.[145] One of the opinions even disapproved my statement in an earlier edition of this book that a judicial decision could have the effect of transforming a convention into a legal rule.[146] But, with respect, the statement is true by definition. If a court did enforce a convention (and admittedly no court has ever done so), the convention would be transformed into a legal rule, because the rule would no longer be unenforceable in the courts, and that is the only characteristic which distinguishes a convention from a legal rule.

Since conventions are not legally enforceable, one may well ask: why are they obeyed? The primary reason is that breach of a convention would result in serious political repercussions, and eventually in changes in the law. An attempt by a Governor General to act without advice or to refuse assent to a bill would quickly be followed by his dismissal, and would lead to an irresistible demand to enact a statute embodying the terms of the convention. Similar kinds of grave political consequences would flow from breach of the other conventions, for example, the refusal of the Queen to appoint as Governor General the person recommended by the Canadian government, or the refusal by the Prime Minister to resign after losing his majority in the House of Commons.

Law and convention are "closely interlocked", as the examples given show; the conventions "do not exist in a legal vacuum".[147] They regulate the way in which legal powers shall be exercised, and they therefore presuppose the existence of the legal powers. Their purpose is "to ensure that the legal framework of the constitution will be operated in accordance with the prevailing constitutional values or principles of the period".[148] They bring outdated legal powers into conformity with current notions of government. Each convention takes a legal power that would be intolerable if it were actually exercised as written, and makes it tolerable. If the convention did not exist, the legal power would have to be changed. It would be intolerable to Canadians if the Queen or Governor General were actually to exercise significant governmental powers. Such powers would be inconsistent with representative democracy. But the legal powers can continue to exist, so long as they are invariably exercised in conformity with the conventions that assure democratic control of the powers. Thus, the conventions allow the law to adapt to changing political realities without the necessity for formal amendment.

Not only do conventions presuppose the existence of law, much law presupposes the existence of conventions. The Constitution Act, 1867 was drafted the way it was because the framers knew that the extensive powers vested in the

145 *Id.*, 774-775.
146 *Id.*, 856.
147 de Smith, note 111, above, 36-37.
148 *Re Resolution to Amend the Constitution* [1981] 1 S.C.R. 753, 880.

Queen and Governor General would be exercised in accordance with the conventions of responsible government, that is to say, under the advice (meaning direction) of the cabinet or in some cases the Prime Minister. Modern statutes continue this strange practice of ignoring the Prime Minister (or provincial Premier) and his cabinet. They always grant powers to the Governor General in Council[149] (or the Lieutenant Governor in Council) when they intend to grant powers to the cabinet. The numerous statutes that do this are of course enacted in the certain knowledge that the conventions of responsible government will shift the effective power into the hands of the elected ministry where it belongs.

While much law is enacted in the shadow of established conventions which will govern the way the law is implemented, it is not normally plausible to regard the enactment of a statute as also creating a brand-new convention, especially one that is inconsistent with the text of the statute. That difficult argument was made in *Conacher v. Canada* (2010),[150] which was an action for a declaration that Prime Minister Harper had acted in violation of a constitutional convention in advising the Governor General to dissolve Parliament for an election on a date that was a year earlier than the date stipulated in the fixed-election-date legislation. (The legislation had been recently enacted by Parliament at the initiative of Mr Harper's government.) It was argued that the Hansard debates made clear that the intent of the legislation was to restrict the calling of elections to the statutory date, except in the case where the Prime Minister had lost the confidence of the House. What the legislation said was that: "Nothing in this section [establishing the fixed dates] affects the powers of the Governor General, including the power to dissolve Parliament at the Governor General's discretion." This unqualified language could not be interpreted as including the suggested restriction. And so the applicant argued that the Hansard debates had established a convention embodying the suggested restriction. The Hansard debates were of course debates about the establishment of a new statute, not (at least in any explicit way) about the establishment of a new convention, let alone a convention that significantly narrowed the application of the statute. The only relevant precedent was the election that was under challenge, which contradicted the suggested convention and made clear that the relevant actors, the Prime Minister and Governor General, did not believe in the existence of any such convention. Therefore, the existence of the convention was not established.[151]

149 The actual phrase that is used in modern statutes is "the Governor in Council", which omits the word "General".

150 (2010) 320 D.L.R. (4th) 530 (F.C.A.). The opinion of the Court was written by Stratas J.A.

151 The decision is criticized by A. Heard, "*Conacher* Missed the Mark on Constitutional Conventions and Fixed Election Dates" (2010) 19 Constitutional Forum 21, and supported by R.E. Hawkins, "The Fixed-Date Election Law: Constitutional Convention or Conventional Politics?" (2010) 19 Constitutional Forum 33.

(f) Convention and policy

In two cases,[152] the Supreme Court of Canada was faced with an argument by public school supporters that provincial education statutes violated a constitutional convention. The objection to the statutes was that they restricted the traditional autonomy of the public school boards by imposing increased central governmental control over them. The argument, if successful, would not have invalidated the statutes, because a convention cannot override a statute, but the proponents presumably believed that a favourable ruling would help them to secure a political remedy, namely, the repeal or amendment of the statutes. The Court held in both cases that no convention restricted the policy or substance of what could be enacted by the provincial Legislature in exercise of its power to make laws in relation to education. (The power is in s. 93 of the Constitution Act, 1867.) Conventions affected only the structure of governmental power, not the policies to which governmental power was addressed. Iacobucci J. for the Court said that the fact that "the province has used a particular design [of public school system] for an extended period of time reflects consistency in public policy. It does not announce the arrival of a new principle of responsible government".[153]

152 *Public School Boards' Assn. of Alta. v. Alta.* [2000] 2 S.C.R. 409, paras. 38-42; *Ont. English Catholic Teachers' Assn. v. Ont.* [2001] 1 S.C.R. 470, paras. 63-66.

153 *Ont. English Catholic Teachers'* case, previous note, para. 65.

9

RESPONSIBLE GOVERNMENT

9.1 Definition of responsible government

"Responsible government" (or cabinet or parliamentary government)[1] is the term that is used to describe the system of government that evolved in the United

1 See Dawson, *The Government of Canada* (6th ed., 1987 by Ward), chs. 9, 10; Mallory, *The Structure of Canadian Government* (rev. ed., 1984), chs. 1-3; de Smith and Brazier, *Constitutional and Administrative Law* (8th ed., 1998), Part 2; Forsey, *Freedom and Order* (1974), Parts 1, 2; Cheffins and Johnson, *The Revised Canadian Constitution* (1986), ch. 6; Beaudoin, *La Constitution du Canada* (3rd ed., 2004), ch. 2; Aucoin, Jarvis and Turnbull, *Democratizing the Constitution: Reforming Responsible Government* (2011).

Kingdom and was exported to the British colonies, including those of British North America. In a system of responsible government, there is a "dual executive", consisting of a formal head of state and a political head of state. The *formal* head of state for Canada is the Queen, but she is represented in Canada by the Governor General of Canada and the Lieutenant Governors of the provinces. In Canada, the Queen rarely exercises any power, except for the occasional act on a royal visit. Most of the time, the role of formal head of state is performed nationally by the Governor General and provincially by the Lieutenant Governors. The *political* head of state for Canada is the Prime Minister, who is the leader of the party that commands a majority in the elected House of Commons. In each province, the equivalent of the Prime Minister is the Premier, who is the leader of the party that commands a majority in the elected Legislative Assembly.

The formal head of state retains many functions, of which the most important is the giving of the royal assent to bills that have been enacted by the Houses of Parliament or the provincial Legislatures. But in a system of responsible government the formal head of state must nearly always act under the "advice" (meaning direction) of the political head of state. In this way, the forms of monarchical government are retained, but real power is exercised by the elected politicians who give the advice to the Queen and her representatives. In a democracy, it would of course be unacceptable for real powers of government to be possessed by an unelected official, whether a King, a Queen, a Governor General or a Lieutenant Governor. Responsible government transfers the real power to the elected Prime Minister. The Queen, the Governor General and the Lieutenant Governors, who are not elected officials, do not exercise any personal initiative or discretion in the exercise of the normal powers of government. (There are certain "reserve powers", or "personal prerogatives" which are exercised by the Governor General or Lieutenant Governors under their own personal discretion, but these apply only in exceptional circumstances when the Prime Minister or Premier no longer commands a majority in the House of Commons or Legislative Assembly.)[2]

The government is "responsible" in the sense that the executive is responsible to the legislative assembly, meaning that the executive must have the confidence of the legislative assembly in order to continue in office. The Prime Minister is the leader of the party that commands a majority in the House of Commons. He must be a member of parliament and he must draw his ministers from the ranks of the members of parliament. The ministers meet together as a cabinet to take important decisions. Because the Prime Minister is the leader of the party that commands a majority in the House of Commons (and the Premier of a province is in the same situation), he can normally control the House of Commons. If he loses control of the House of Commons, then he must either resign to allow the Governor General to appoint a new Prime Minister who can control the House of

2 Section 9.7, "The Governor General's personal prerogatives", below.

Commons, or he must advise the Governor General to call an election to form a new House of Commons. This is quite unlike the position of the President of the United States (or the Governor of a state), who is elected for a fixed term of four years, and who remains in office for the entire term regardless of whether the Congress supplies the money and passes the bills that he recommends. In the United States, it is quite common for the President to be of a different party from the majority in the House of Representatives. And, even when they are of the same party, the House of Representatives may still disagree with the President about important issues. That cannot happen in a system of responsible government.

In any legal system, there will be a legislative branch, an executive branch and a judicial branch. Each branch has distinct functions. In Canada, the legislative branch consists of the Parliament of Canada and the Legislatures of the provinces, and these are the only institutions that have the power to supply public money for government and the only institutions that have the power to make new laws. The executive branch, which in Canada consists of the Prime Minister or Premier and his cabinet and the government departments that they head, is restricted to spending the money supplied by the legislative branch and executing the laws enacted by the legislative branch. The judicial branch, consisting of the courts, decides disputes arising under the laws.

It is very important in any system of government for the courts to be independent of the other branches of government, because otherwise they will not be able to render just decisions on issues that affect the other branches of government. For example, in Canada, the Crown (meaning the executive branch) is a litigant before the courts in every criminal prosecution and in many civil cases. Obviously, the courts must be, and must be seen to be, even-handed between Crown and subject. In other words, the judicial power must be separate from the legislative and executive powers. But, in a system of responsible government, the separation of powers does not extend to the legislative and executive branches of government. While the powers of the legislative and executive branches remain distinct, these two branches do not operate independently of each other. This is because the executive branch is headed by the same persons as lead the majority party in the elected legislative assembly. The executive branch therefore exercises considerable control over the legislative branch. The control is important, because, as this chapter will explain, a loss of control on an important issue (an issue of "confidence") leads to either the resignation of the government or (more commonly) an election. Again, the obvious contrast is the constitution of the United States, which observes a separation between all three branches of government. In the United States, not only are the courts independent of the legislative and executive branches (as in Canada), but the executive branch has no power of control over the legislative branch (unlike Canada).

9.2 History of responsible government

By 1832, the colonies of British North America had achieved representative government,[3] but they had not achieved responsible government. The government of each colony was "representative", because it included a legislative assembly elected by the people of the colony. The assembly had the power to make laws, to raise taxes, and to grant supply (money) to the executive. But colonial government was not "responsible", because the executive was not responsible to the assembly. Executive power was possessed by the British-appointed governor, who was responsible to the Colonial Office of the United Kingdom government, which had appointed him, instructed him, and continued to supervise his work. The governor also received advice from a local executive council whom he appointed, but the members of the executive council in each province were drawn from a wealthy elite who not only lacked the confidence of the assembly but who often actively opposed the policies determined upon by the assembly. This meant that laws enacted by the assembly would often not be enforced; policies opposed by the assembly would often be implemented; civil servants regarded as unsuitable or incompetent by the assembly would often be appointed; and colonial revenues which did not come from taxes would often be spent for purposes of which the assembly disapproved.

In every colony, there was chronic conflict between the assembly and the governor (and his executive council). In Upper and Lower Canada, these frustrations led to armed rebellions in 1837. After the rebellions, Lord Durham was appointed governor of all the British North American colonies with instructions to report upon the causes of and remedies for the colonial discontent. Lord Durham reported in 1839.[4] He accurately identified the causes of conflict between assembly and executive, and he recommended the institution of responsible government: in Durham's view, the Colonial Office should instruct each governor to appoint to his executive council only persons who enjoyed the confidence of a majority of the assembly. This recommendation simply applied to the colonies the same system that had recently evolved in the United Kingdom to reconcile the powers of the representative Parliament and the hereditary King.[5] In

3 British Columbia was an exception. As related in ch. 2, Reception, British Columbia did not acquire a fully elective assembly until 1871. That chapter describes the establishment of assemblies in all the other colonies, the last being Newfoundland in 1832.

4 Lord Durham's Report (1839) has been published in an edited version by McClelland and Stewart: G.M. Craig (ed.), *Lord Durham's Report* (1963).

5 Lederman, *Continuing Canadian Constitutional Dilemmas* (1981), 50-51, notes that the thirteen American colonies, forming their new government in 1789 before responsible government had developed in the United Kingdom (the development was not complete until around the time of Lord Durham's report), created a President whose relationship to the Congress was similar to that of George III in relation to the British Parliament. Once a President has been elected, for his four-year term he possesses executive power independent of the Congress. Conflict between the legislative and executive branches is therefore a characteristic of the American Constitution to this day. The Americans thus froze this aspect of the constitutional arrangements of 1789, which in the United Kingdom continued to evolve into a new system of responsible government.

the colonies, however, there was a further complication. How could the governor obey instructions from the Colonial Office in London as well as following the advice of his local executive council? Durham's solution was to distinguish between matters of imperial concern and matters of local concern. The only matters of imperial concern, he submitted, were constitutional arrangements, foreign affairs, external trade, and the disposal of public lands. On these matters, the governor would act on the instructions of the Colonial Office. On all other matters, the governor would act on the advice of his local executive council.

At first, the government of the United Kingdom would not accept Lord Durham's wise recommendation (although it readily accepted his foolish plan for the union of Upper and Lower Canada).[6] But in 1846 a new Colonial Secretary, Earl Grey, did accept the recommendation and instructed the governors along the lines indicated by Lord Durham. In 1848 the new system was put to the test in Nova Scotia, when after a general election the assembly carried a vote of no confidence in the executive council. The council resigned and the governor appointed the leader of the majority party in the assembly to be premier with power to name the other members of the new council — all in accordance with the conventions of responsible government. Changes of government occurred in the same way in the united province of Canada and in New Brunswick also in 1848, in Prince Edward Island in 1851, and in Newfoundland in 1855. Responsible government was thus achieved in those provinces. British Columbia did not achieve responsible government until 1872, a year after its admission to Canada. Manitoba (created in 1870), Alberta (created in 1905) and Saskatchewan (also created in 1905) were each granted responsible government at the time of their creation.[7]

9.3 Law and convention

In a system of "responsible government" (or cabinet or parliamentary government, as it may also be called) the formal head of state, whether King or Queen, Governor General or Lieutenant Governor, must always act under the "advice" (meaning direction) of ministers who are members of the legislative branch and who enjoy the confidence of a majority in the elected house of the legislative branch. Responsible government is probably the most important non-federal characteristic of the Canadian Constitution. Yet the rules which govern it are almost entirely "conventional", that is to say, they are not to be found in the ordinary legal sources of statute or decided cases.[8]

As noted in the previous section of this chapter, responsible government had been achieved in each of the uniting colonies at the time of confederation in 1867.

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6 See ch. 2, Reception, under heading 2.2(c), "Amendment of received laws", above.

7 See Dawson, *The Government of Canada* (5th ed., 1970), ch. 1 (not in 6th ed.). Some of the history of the provincial governments is also described in ch. 2, Reception, above.

8 Conventions and their role in the Constitution are discussed in sec. 1.10, "Conventions", above.

The intention to continue the same system after confederation was evidenced by the assertion in the preamble to the Constitution Act, 1867 that Canada was to have "a constitution similar in principle to that of the United Kingdom". Other than this vague reference, however, the Constitution Act is silent on responsible government; it confers powers on the Queen and the Governor General but makes no mention of the Prime Minister or the cabinet. Thus, s. 9 provides that the "executive government" of Canada is vested in "the Queen"; s. 10 contemplates that the Queen's powers may be exercised by a "Governor General"; and s. 11 establishes a "Queen's Privy Council for Canada" whose function is "to aid and advise in the government of Canada" and whose members are to be appointed and removed by the Governor General. The Governor General is also an essential part of the legislative branch in that a "bill" which has been enacted by both Houses of Parliament passes into law (and becomes an "Act" or a "statute") only after the Governor General (or the Queen) has given the royal assent to the bill (ss. 17, 55). In addition, the Governor General is given power to appoint the members of the appointed upper house, the Senate (s. 24), to summon into session the members of the elective lower house, the House of Commons (s. 38), to dissolve the House of Commons (s. 50), to withhold the royal assent from a bill passed by both Houses of Parliament or to "reserve" the bill "for the signification of the Queen's pleasure" (s. 55). The Queen herself has a discretion whether or not to assent to a bill reserved by the Governor General (s. 57), and she has the further power to "disallow" (annul) any statute enacted by the Canadian Parliament (s. 56).[9]

In each province, there is a "Lieutenant Governor" and an "Executive Council" with powers similar to those of the Governor General and Privy Council (ss. 58-68, 90). The Lieutenant Governors are appointed by the Governor General in Council (s. 58),[10] and it is the Governor General (rather than the Queen) to whom a Lieutenant Governor reserves a provincial bill; and it is the Governor

9 Reservation and disallowance of federal statutes have been nullified by convention: see ch. 3, Independence, under heading 3.1, "Bonds of Empire", above.

10 The fact that the Lieutenant Governor is to be appointed by the Governor General (the federal government) led to early controversy as to whether he was a representative of the Crown or of the federal government. The issue was important because if the Lieutenant Governor were not the representative of the Crown then the provincial government would not be entitled to the executive powers and prerogatives of the Crown; all executive powers and prerogatives would rest with the central government, unless specifically delegated to the provinces. In *Liquidators of Maritime Bank v. Receiver General of N.B.* [1892] A.C. 437, the Privy Council, speaking through Lord Watson, emphatically rejected the view that the Lieutenant Governors (and their provincial governments) were subordinate to the Governor General (and his federal government): "a Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of provincial government as the Governor-General himself is for all purposes of Dominion government" (p. 443). It followed that the federal distribution of legislative power entailed a matching distribution of executive powers and prerogatives as well: see also *Bonanza Creek Gold Mining Co. v. The King* [1916] 1 A.C. 566. In the early years of confederation, the Lieutenant Governors did also fulfil a secondary role as federal officers, but this has fallen into disuse: Hendry, *Memorandum on the Office of Lieutenant-Governor of a Province* (1955); Saywell, *The Office of Lieutenant-Governor* (1957), chs. 1, 7. For analysis of the significance of these decisions, see S.M. Birks, "The Survival of the Crown in the Canadian State" (LL.M. thesis, Osgoode Hall Law School, York University, 1980).

General in Council (rather than the Queen in Council) in whom is vested the power of disallowance of a provincial statute (s. 90).[11] There are other provisions of the Constitution Act, 1867 which confer specific powers on the Governor General or the Lieutenant Governors. Furthermore, the statute books will reveal that the Canadian Parliament and provincial Legislatures to this day usually confer major powers of government upon the Governor General in Council (often shortened to the "Governor in Council") or the Lieutenant Governor in Council.

The Constitution Act, 1867 also tells us that Canada is a monarchy, that is to say, the formal head of state is "the Queen". The Queen is vested with executive authority over Canada (s. 9), and she is also a formal part of the Parliament of Canada, along with the Senate and House of Commons (s. 17). The Constitution Act, 1867 does not expressly define "the Queen", but the preamble to the Act recites that the uniting provinces are to be "federally united into one Dominion under the Crown of the United Kingdom". That recital makes clear that the Queen or King of Canada is to be the same person as the Queen or King of the U.K.[11a] That person is identified by the law of royal succession of the United Kingdom. When the law of royal succession is changed by the U.K. Parliament, as it was in 1936, when Edward VIII abdicated, and in 2013, when some discriminatory provisions respecting sex and religion were eliminated, the U.K. law automatically takes effect in Canada, not because the U.K. law applies in Canada, but because Canada takes as its monarch whoever is entitled to be monarch of the U.K. Canada has a rule of recognition rather than its own rules of succession. All that Canada needs to do — and this is a requirement of convention, not strict law—is for Parliament to provide its "assent" to the U.K. change.[11b] Of course, Canada, as a sovereign country, is free to adopt rules of succession that diverge from those of the U.K., but that unlikely initiative would be a change in the definition of the Queen in the Constitution of Canada and would involve a constitutional amendment.[11c]

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11 Reservation and disallowance of provincial statutes have probably been nullified by convention: see ch. 5, Federalism, under heading 5.3(c), "Judicial interpretation of the distribution of powers", above.

11a The Constitution Act, 1867, by s. 2, provided that references to "the Queen" "extend also to the heirs and successors of Her Majesty, Kings and Queens of the United Kingdom". This provision reinforced the preamble with a clear statement that the Queen of Canada was the same person as the Queen of the U.K. Section 2 was repealed by the Statute Law Revision Act, 1893 (U.K.) when the provision was replicated by the Interpretation Act, 1889 (U.K.).

11b The convention was adopted at the imperial conference of 1930, which had the goal of enhancing the equality of the Dominions with the U.K., and it is recited in a preamble to the Statute of Westminster, 1931 (U.K.), which says that "it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration of the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom". The changes to the law of succession of the U.K. in 1936 and 2013 were accompanied by Canadian statutes providing the "assent" of the Parliament of Canada: Succession to the Throne Act, S.C. 1937, c. 16, s. 1; Succession to the Throne Act, S.C. 2013, c. 6, s. 2. For excessive detail, see P.W. Hogg, "Succession to the Throne" (2013), to be published in Nat. J. Con. Law, especially note 13.

The Queen has in fact delegated all of her powers over Canada[12] to the Canadian Governor General, except of course for the power to appoint or dismiss the Governor General.[13] Moreover, most powers of government, whether conferred by the Constitution or by ordinary statute, are conferred upon the Governor General (or the Governor General in Council) directly. It is therefore simpler, and sufficiently accurate for most purposes, to speak of the Governor General being the formal head of state.[14] He or she is appointed by the Queen, and in colonial times of course the Queen acted on the advice of her British ministers in making the appointment. However, the imperial conference of 1926 declared that the Governor General was not the "representative or agent" of the British government, and the imperial conference of 1930 resolved that thenceforth the Governor General would be appointed by the Queen acting on the advice of the ministers of the dominion concerned.[15] Since 1930, all Canadian Governors General have been selected by the Canadian Prime Minister with the Queen

11c Part V of the Constitution Act, 1982 seems to call for the unanimity procedure: s. 41(a) ("the office of the Queen"). That would certainly be the case if Canada decided to abolish the monarchy.

12 An exception may be the power to appoint additional senators under s. 26 of the Constitution Act, 1867, which by referring to both the Governor General and the Queen perhaps implies a continuing non-delegable role for the Queen, to be exercised however only on the advice of Canadian ministers. When this power was exercised in 1990 (for the first time in Canadian history), a direction from the Queen was in fact obtained: see cases referred to in note 40, below.

13 Letters Patent constituting the office of Governor General of Canada (1947), R.S.C. 1985, Appendix II, No. 31, art. II; Mallory, *The Structure of Canadian Government* (rev. ed., 1984), 21, 37-39. As Mallory explains, a few powers are still in practice exercised by the Queen, but the delegation is complete so that they could be exercised by the Governor General. Needless to say, those powers which are conferred by the Constitution or by statute upon the Governor General directly do not require any delegation from the Queen for their exercise. Article VIII of the Letters Patent provides that the office devolves upon the Chief Justice of Canada "in the event of the death, incapacity, removal, or absence of Our Governor General out of Canada"; and upon "the senior judge for the time being of the Supreme Court of Canada" in the event of "the death, incapacity, removal or absence out of Canada of Our Chief Justice"; while the powers are vested in the Chief Justice or senior judge, he or she is "to be known as Our Administrator".

14 Within each province the office of Lieutenant Governor is equivalent to that of Governor General of Canada (see note 10, above); to that extent the Letters Patent constituting the office of Governor General (1947) (see previous note) are misleading in their delegation of "all powers and authorities" to the Governor General. There is no provision in the Constitution Act, 1867 (or elsewhere) for an acting Lieutenant Governor in the event of the death or incapacity of the Lieutenant Governor; this means that government business requiring the imprimatur of the Lieutenant Governor, for example, new statutes and orders in council, has to await the appointment by the federal government of a replacement.

15 On the imperial conferences of 1926 and 1930, see ch. 3, Independence, above. No comparable convention has been established with respect to the appointment of Lieutenant Governors. Under s. 58 of the Constitution Act, 1867, such appointments are to be made by the Governor General in Council; this power is exercised on the advice of the federal Prime Minister (notes 15, 26, below) not the provincial Premier. This means that the appointee will often be a member of the political party in power in Ottawa, and the provincial Premier may not even be consulted, especially if he is not a member of that party: Saywell, *The Office of Lieutenant-Governor* (1957), ch. 1; MacKinnon, *The Government of Prince Edward Island* (1951), 144-149; Donnelly, *The Government of Manitoba* (1963), 115-116; Forsey, *Freedom and Order (1914)*, 161-164. In Australia, the state governors are appointed on the advice of the state governments, not the federal government.

merely formalizing the appointment.[16] It is also the Canadian Prime Minister who determines the Governor General's term of office, and the Canadian Parliament that fixes the salary.[17]

The Governor General does not use any personal initiative or discretion in the exercise of the powers of government that belong to the office, except for certain "reserve powers" or "personal prerogatives", which are exercisable only in exceptional circumstances, and which are discussed later in this chapter.[18] The effect of responsible government is to transfer effective political power to elected officials.

9.4 The executive branch

(a) The ministry

What precisely are the conventions of responsible government? For convenience of exposition, I shall concentrate on Canada's federal government, but the rules are much the same in each of the provinces (and indeed in all those jurisdictions outside Canada whose governments are responsible in the technical sense).[19] Where there is any significant variation in provincial practice, that fact will be noted.

The narrative must start with an exercise by the Governor General of one of the exceptional reserve powers or personal prerogatives. In the formation of a government, it is the Governor General's duty to select the Prime Minister. The Governor General must select a person who can form a government that will enjoy the confidence of the House of Commons. For reasons that will be explained later, the Governor General rarely has any real choice as to whom to appoint: he or she must appoint the parliamentary leader of the political party that has a majority of seats in the House of Commons. But it is still accurate to describe the Governor General's discretion as his or her own, because, unlike nearly all of his or her other decisions, it is not made upon ministerial advice.

When the Prime Minister has been appointed, he selects the other ministers, and advises the Governor General to appoint them. With respect to these appointments, the Governor General reverts to his or her normal non-

16 By convention the advice is tendered by the Prime Minister, and the decision is his alone, although no doubt he would usually consult his cabinet: Mallory, *The Structure of Canadian Government* (rev. ed., 1984), 93. Similarly, by convention it is the Prime Minister who tenders advice as to the appointment of Lieutenant Governors: Saywell, *The Office of Lieutenant-Governor* (1957), 24.

17 Constitution Act, 1867, s. 105, confers the power to fix the salary, but the Act is silent with respect to appointment and tenure.

18 Section 9.7, "The Governor General's personal prerogatives", below.

19 For the provinces, see MacKinnon, *The Government of Prince Edward Island* (1951); Beck, *The Government of Nova Scotia* (1957); Saywell, *The Office of Lieutenant-Governor* (1957); Donnelly, *The Government of Manitoba* (1963); Schindeler, *Responsible Government in Ontario* (1969); Bellamy, Pammett, Rowat (eds.), *The Provincial Political Systems* (1976), esp. ch. 20 (by Saywell).

discretionary role and is obliged by convention to make the appointments advised by the Prime Minister. If the Prime Minister later wishes to make changes in the ministry, as by moving a minister from one portfolio to another, or by appointing a new minister, or by removing a minister, then the Governor General will take whatever action is advised by the Prime Minister, including if necessary the dismissal of a minister who has refused the Prime Minister's request to resign.

It is basic to the system of responsible government that the Prime Minister and all the other ministers be members of Parliament.[20] Occasionally a person who is not a member of Parliament is appointed as a minister, but then the minister must quickly be elected to the House of Commons or appointed to the Senate. If the minister fails to win election, and is not appointed to the Senate, then he or she must resign (or be dismissed) from the ministry. The usual practice when a non-member of Parliament is appointed to the ministry is that a member of the Prime Minister's political party will be induced to resign from a "safe seat" in Parliament, which will precipitate a by-election in which the newly-appointed minister will be the candidate from the Prime Minister's party.

A ministry lasts as long as the tenure of the Prime Minister. When a Prime Minister dies, resigns or is dismissed, the ministry comes to an end, and a new ministry is formed by his or her successor.[20a] A ministry does not come to an end when Parliament is dissolved for an election; that would leave the country without a government. The ministry continues in office and awaits the result of the election. If the election is won by the governing party, there is no interruption in the ministry. If the election is lost by the governing party, the Prime Minister will no longer command a majority in the House of Commons and will resign (or be dismissed by the Governor General).

When a government (ministry) remains in office following a dissolution of Parliament, whether or not the government has lost the confidence of the House of Commons, there is a risk that the government will lose the ensuing election and

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20 The responsibility to Parliament of each minister is explained in sec. 9.4(d), "Ministerial responsibility", below. Note that the term "deputy minister" is used in Canada to describe the permanent head of a government department, who is of course a civil servant and not a member of Parliament. In Australia, New Zealand or the United Kingdom any title including the word "minister" would imply a parliamentary appointee.

20a Although the ministry is dissolved by the death, resignation or dismissal of the Prime Minister, individual ministers, who of course hold their positions by virtue of a commission from the Crown (granted by the Governor General), continue to exercise their functions until the new Prime Minister requests their resignation. No actual resignation is needed; the office is simply at the disposal of the new Prime Minister. If there is no change of government, the new Prime Minister may well want some ministers to remain in office. For those portfolios, no new appointments are necessary. The Prime Minister will simply advise the Governor General of the continuing roles, and the ministers will continue in office under their existing commissions, although they are now in a new ministry under the new Prime Minister. If there is a change of government, the new Prime Minister will normally want to replace all of the ministers in the outgoing ministry. They will, however, continue to exercise their functions until the Governor General, on the advice of the new Prime Minister, commissions new ministers to replace the members of the outgoing ministry, causing the automatic "resignation" of the members of the outgoing ministry.

will not command a majority in the House of Commons of the next Parliament. The period from the dissolution of one Parliament, through the election campaign and the election, until the summoning of the new Parliament, is often a long time: the average is well over four months (144 days) and it has been as long as six months.[20b] During this period, the government retains its full panoply of legal powers (statutory, prerogative and common law), and of course it has to continue to govern the country. However, by *convention*, it is expected to behave as a caretaker and to restrain the exercise of its *legal* authority. This "caretaker convention" was clarified in 2008, when the Privy Council Office of the Government of Canada issued guidelines in writing for decisions by federal ministers and senior officials in the federal public service. For the caretaker period,[20b] the guidelines stipulate that "in matters of policy, expenditure and appointments", the government should restrict itself "to activity that is: (a) routine, or (b) non-controversial, or (c) urgent and in the public interest, or (d) reversible by a new government without undue cost or disruption, or (e) agreed upon by the Opposition (in those cases where consultation is appropriate)" .[20c] The Clerk of the Privy Council would be expected to remind the Prime Minister and the senior ranks of the public service of these restrictions during caretaker periods. A similar caretaker convention applies to the governments of the provinces and territories. Like other conventions,[20d] the caretaker convention is observed because it is well understood to be the only appropriate behaviour; there is no legal sanction for a breach. But obviously a clear breach would attract severe criticism and be politically damaging to the offending party.

(b) The cabinet and the Privy Council

When the ministers meet together as a group they constitute the cabinet.[21] The cabinet is not mentioned in the Constitution Act, 1867, although we have already noticed that a body called the Queen's Privy Council for Canada is

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20b For details, see C.E.S. Franks, "Parliaments, 1945-2008", Appendix 2 to Canada's Public Policy Forum, *Towards Guidelines on Government Formation* (Public Policy Forum, Ottawa, 2012), 20-23.

20b The period starts with the dissolution of Parliament and would end with the beginning of the new Parliament. It could however end earlier. A decisive election outcome in favour of the incumbent government would bring it to an end, as would a decisive election outcome in favour of the Opposition, in which case the caretaker period would end with the resignation of the incumbent government and the commissioning of the new government.

20c Government of Canada, *Guidelines on the Conduct of Ministers, Secretaries of State, Exempt Staff and Public Servants During an Election* (Government of Canada, Ottawa, 2008); quoted in *Towards Guidelines on Government Formation*, previous note, 6 with the explanation that the document had been obtained under Canada's Access to Information Act.

20d Chapter 1, Sources, under heading 1.10, "Conventions", above.

21 The ministry and the cabinet are not necessarily identical. In the United Kingdom and Australia, for example, not all ministers are members of cabinet. Whether a particular minister is admitted to the cabinet lies in the discretion of the Prime Minister. The usual Canadian practice has been for the Prime Minister to admit all ministers to the cabinet: Dawson, *The Government of Canada* (6th ed., 1987 by Ward), 196; and this has been the general practice of the provincial Premiers as well.

established by s. 11,[22] The cabinet ministers are all appointed to the Queen's Privy Council for Canada. But the Privy Council includes many other people as well.[23] Appointments to the Privy Council are for life, so that its membership always includes not only the ministers of the government in office, but also all living persons who were ministers in past governments. Moreover, appointments to the Privy Council are often made to persons of distinction as an honour, so that its membership will include such persons as the Duke of Edinburgh, the Prince of Wales, a British Prime Minister, a Canadian High Commissioner, or a provincial Premier; and of course such honorific appointments will be for life. The whole Privy Council would be a body of some one hundred members of widely differing political persuasions. Such a body could not, and does not, conduct the business of government. The whole Privy Council meets very rarely, and then only for ceremonial occasions.[24]

The cabinet, which does meet regularly and frequently, is in most matters the supreme executive authority. (The "reserve powers" remain in the Governor General, and some powers are vested in the Prime Minister; these powers are discussed later.) The cabinet formulates and carries out all executive policies, and

(Continued on page 9-11)

22 Canada's Privy Council is of course modelled on the Privy Council in the United Kingdom, which is a body under the formal duty of advising the Queen as to the government of the United Kingdom. The United Kingdom's Privy Council used to have considerable significance for Canada in that its Judicial Committee was the final court of appeal for Canadian law-suits. The appeal to the Judicial Committee was abolished in 1949.

23 This is not true in the provinces, where the membership of the executive council and the cabinet is identical.

24 The last occasion was on April 17, 1982, when the Queen proclaimed into force the Constitution Act, 1982.

it is responsible for the administration of all the departments of government. It constitutes the only active part of the Privy Council, and it exercises the powers of that body. The Governor General does not preside over, or even attend, the meetings of the cabinet.[25] The Prime Minister presides. Where the Constitution or a statute requires that a decision be made by the "Governor General in Council" (and this requirement is very common indeed), there is still no meeting with the Governor General. The cabinet (or a cabinet committee to which routine Privy Council business has been delegated) will make the decision, and send an "order" or "minute" of the decision to the Governor General for signature (which by convention is automatically given).[26] Where a statute requires that a decision be made by a particular minister, then the cabinet will make the decision, and the relevant minister will formally authenticate the decision. Of course a cabinet will be content to delegate many matters to individual ministers, but each minister recognizes the supreme authority of the cabinet should the cabinet seek to exercise it.

(c) The Prime Minister

While in most matters the cabinet is the supreme executive authority, the Prime Minister (or provincial Premier)[27] has certain powers which he or she does not need to share with his or her colleagues.[28] Two of these are of great importance. First, there is the power to select the other ministers, and the power to promote, demote or dismiss them at pleasure. (Technically, of course, the Prime Minister only has power to recommend such measures to the Governor General, but the recommendations will invariably be acted upon.) Secondly, the Prime Minister is personally responsible for tendering advice to the Governor General as to when

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25 In the provinces, too, the Lieutenant Governor never presides over or attends meetings of the cabinet: Saywell, *The Office of Lieutenant-Governor* (1957), 35-36.

26 Mallory, note 13, above, 74-75.

27 On the office of Prime Minister, see generally Hockin (ed.), *Apex of Power* (2nd ed., 1977); Savoie, *Governing from the Centre: The Concentration of Power in Canadian Politics* (1999).

28 Privy Council minute, P.C. 3374, October 25, 1935 provides:

> the following recommendations are the special prerogative of the prime minister: dissolution and convocation of Parliament: Appointment of — privy councillors; cabinet ministers; lieutenant governors (including leave of absence to same); provincial administrators, speaker of the Senate; Chief Justices of all courts, senators, sub-committees of council; Treasury Board; . . .
>
> Not included in this list is the recommendation to the Queen for appointment of a Governor General, which is another power that, by convention, the Prime Minister may exercise independently of the other ministers.

Parliament should be dissolved for an election, and when an elected Parliament should be summoned into session.[29]

Not only are these powers important in their own right, but the Prime Minister's possession of them also ensures that the Prime Minister's voice will be the most influential one within the cabinet. In addition, the Prime Minister enjoys the special authority which derives from having been selected by a political party as its leader, and from having led the party to victory in the previous election. Modern Canadian election campaigns have increasingly emphasized the qualities of the competing leaders, and this practice inevitably strengthens the position within the party of the leader of the victorious party. No doubt the extent of a Prime Minister's personal power varies from government to government, depending upon a number of factors. But in some governments a Prime Minister, who chooses to take on his own initiative, or on the advice of a few ministers, decisions which would traditionally be the preserve of the cabinet, is politically able to do so; and the extent to which the full cabinet plays a role in important decision-making may depend in large measure upon the discretion of the Prime Minister. In this connection it is important to notice that the Prime Minister calls the meetings of cabinet, settles the agenda, presides over the meetings, and "defines the consensus"[30] on each topic.

The Prime Minister (or provincial Premier) effectively controls the executive branch of government through his control over ministerial appointments and over the cabinet. But, as will be explained in more detail later in this chapter, the Prime Minister effectively controls the legislative branch as well. In the normal situation of majority government (and assuming a compliant Senate), the Prime Minister's leadership of the majority party in the House of Commons, reinforced by strict party discipline, and sanctioned by his power to dissolve the House for an election, enables him to determine what legislation will be enacted. This latter power is not possessed by the President of the United States (or a state Governor), who is elected for a fixed term independently of the Congress, who does not control either of the Houses of Congress (even if they both happen to be dominated by his own party, which is rarely the case), and who can rely only on moral suasion to influence the Congress's legislative agenda. The Canadian system of responsible government thus leads to a concentration of power in the hands of the Prime Minister that has no counterpart in the presidential system.

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29 These important powers are limited by the Constitution Act, 1982, s. 4 of which prescribes a maximum duration for the House of Commons or a provincial legislative assembly of five years, and s. 5 of which requires that there be a sitting of Parliament and of each Legislature at least once every twelve months. See also ss. 50 and 86 of the Constitution Act, 1867.

30 Votes are not taken at cabinet meetings. When the Prime Minister believes that there has been sufficient discussion of a topic, he will "define a consensus" on the topic. Observers have noted that the "consensus" is often not a consensus and is not even always the majority view: Savoie, note 27, above, 85-87. The practice appears to be the same in provincial cabinets, with the Premier defining the consensus.

(c) Resignation or dismissal

If a Prime Minister whose government has lost the support of the House of Commons does resign (whether voluntarily or because a dissolution has been refused by the Governor General), or is dismissed from office by the Governor General, then the Governor General would have to find a member of parliament who could become Prime Minister and form a government which would enjoy the confidence of the House. In selecting a new Prime Minister, as we have already noticed, the Governor General is entitled to exercise a personal discretion.[63]

9.7 The Governor General's personal prerogatives

(a) The principle

The Governor General has certain "personal prerogatives" or "reserve powers" which he or she may exercise upon his or her own personal discretion.[64] Whereas in the exercise of governmental powers generally the Governor General must act in accordance with the advice of the Prime Minister or cabinet, there are some occasions on which he or she may act without advice, or even contrary to advice.

The definition of those occasions when the Governor General may exercise an independent discretion has caused much constitutional and political debate. But it is submitted that the basic premise of responsible government supplies the answer: so long as the cabinet enjoys the confidence of a majority in the House of Commons, the Governor General is always obliged to follow lawful and constitutional advice which is tendered by the cabinet. But there are occasions, as we have seen, when a government continues in office after it has lost the confidence of the House of Commons, or after the House of Commons has been dissolved. There are also occasions, for example, after a very close election, or after a schism in a political party, where for a period it is difficult to determine whether or not the government does enjoy the confidence of a majority in the House of Commons. In all these situations it is submitted that the Governor General has a discretion to refuse to follow advice which is tendered by the ministry in office.

63 The narrow scope of the "discretion" is explained in the next section of this chapter.

64 There are two major studies of the reserve powers: Evatt, *The King and His Dominion Governors* (2nd ed., 1967) and Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth* (1943, reprinted with new preface, 1968). See also McWhinney, *The Governor General and the Prime Ministers* (2005), for an historical and anecdotal account of relationships between the Governor General and the Prime Minister.

When a government is in office without the support of the House of Commons, there are the makings of a constitutional crisis: not only can the government not secure the passage of any legislation, it cannot even secure parliamentary

(Continued on page 9-25)

approval of supply to meet government expenditures. The crisis can be resolved or averted by a new election or by the resignation or dismissal of the ministry. But the ministry in office, which lacks the support of the House of Commons and which stands to lose most by the resolution of the crisis, is not the fittest group to determine the mode of resolution of the crisis. It is true of course that the Governor General has even less of a political base than the ministry in office, but it is for this very reason that the Governor General may reasonably be trusted to set aside partisan considerations and act impartially in the interests of the country as a whole. In this situation the role of Governor General is somewhat akin to that of a judge — another non-elected official to whom we readily entrust large powers in the expectation that they will be exercised impartially.

(b) Appointment of Prime Minister

Perhaps the clearest and least controversial of the Governor General's reserve powers or personal prerogatives is the power to select a Prime Minister.[65] This power has to be exercised whenever a Prime Minister resigns. The resignation of the Prime Minister (unless it is a personal retirement) automatically vacates all ministerial offices, and thus involves the resignation of the entire ministry or government. Resignation may occur, as we have seen, when the House of Commons withdraws its confidence from the government. The more usual case of resignation occurs after an election in which the government party has failed to obtain a majority of the seats in the House of Commons. The theory of responsible government indicates that the Prime Minister would be justified in remaining in office until the House of Commons assembles and votes against the government, but the modern practice (perhaps it is now a convention) is to resign as soon as the election results make clear that the opposition party has gained control of the House of Commons. However, if the election gave no party a clear majority, and it was not clear which major party would attract the support of minor parties or independent members, the Prime Minister would certainly be justified in awaiting a Commons vote.[66]

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65 On the selection of provincial Premiers, see Saywell, *The Office of Lieutenant-Governor* (1957), ch. 4.

66 Prime Minister St. Laurent resigned after the election of 1957 as soon as the election results showed that his Liberal party had won fewer seats than the Progressive Conservative party, despite the fact that neither party had an absolute majority. He apparently did not want to appear to be clinging to office after an electoral "defeat". But since the election results did not answer the question of who could command the support of a majority in the House of Commons, it seems to me that the Prime Minister would have been fully justified in remaining in office until the parliamentary situation was clear, which might not have been until Parliament met. It turned out, however, that the Progressive Conservative party was able to form a government which lasted for a year so that Prime Minister St. Laurent's resignation could be interpreted as an accurate reading of the parliamentary situation. Prime Minister King had been faced with a similar situation after the election of 1925 in which his Liberal government won fewer seats

Once a government has resigned, for whatever reason, the appointment of a new Prime Minister has to be made by the Governor General. This decision is always a personal one in the sense that the Governor General does not act upon ministerial advice. But other conventions of responsible government have now severely limited the discretion that the Governor General really possesses. The Governor General must find the person who has the ability to form a government which will enjoy the support of the House of Commons. The only person with this qualification is the leader of the party which has a majority of seats in the House of Commons. Moreover, each Canadian party has procedures for selecting its own parliamentary leader. This means that in most cases the Governor General's "choice" is inevitable.

One situation which has occurred and could again is the death or retirement of a Prime Minister in office before his party has selected a successor. In that case, when the government still retains a majority in the House, the death or retirement is personal and the government as a whole does not vacate office.[67] The country does not lack a government, but merely a Prime Minister. How is he or she to be replaced? Canadian political parties do not normally choose a deputy leader or second-in-command at the same time as they select a leader. The cabinet will usually designate a minister to act as Prime Minister during the absence from Ottawa of the Prime Minister, but the Acting Prime Minister is not intended to be the successor to the Prime Minister in the event of the Prime Minister's death or retirement.[68] Before 1896, there were a number of occasions on which a Governor General had to use his own initiative to find a Prime Minister by reason of the death or retirement of the Prime Minister in office.[69] The situation has not recurred since 1896, because every Prime Minister since then has decently refrained from dying or retiring until his party has selected a successor. However, Dawson says that "there is no reason whatever to assume that the power has vanished in the interval".[70] But Dawson is probably wrong on this point. If a Prime Minister did die or retire in office without a successor, it is certain that the government party would want to choose the successor by its own procedures, and would not be content to accept the Governor General's choice. Given this political

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than the Conservative party. He did not resign, and it turned out that he was able to continue in office for eight months with the support of Progressive, Labour and Independent members.

67 The cabinet, which is the creation of the Prime Minister (or Premier), is automatically dissolved by the death or retirement of the Prime Minister, but the ministers, who have been appointed by the Governor General (or Lieutenant Governor), continue to hold their offices and continue in their membership of the Privy Council (or Executive Council): J.R. Mallory, "The Royal Prerogative in Canada: The Selection of Successors to Mr Duplessis and Mr Sauvé" (1960) 26 Can. J. Ec. and Pol. Sci. 314, 316. Moreover, there is nothing to stop them from meeting informally (like a cabinet) if they wish to do so before a new Prime Minister has been appointed.

68 Mallory, *The Structure of Canadian Government* (rev. ed. 1984), 98-99.

69 Mallory, previous note, 78-79; Dawson, *The Government of Canada* (6th ed., 1987 by Ward), 184.

70 Dawson, previous note, 184.

fact, the Governor General would be obliged to appoint the party's choice, for only the party's choice would be successful in forming a government. The utmost initiative which I can conceive of the Governor General exercising would be the appointment of a caretaker Prime Minister for the period when the party was making its choice; but even in this circumstance it is likely that the party, perhaps by vote of its parliamentary caucus,[71] would also wish to designate the caretaker, and, in the absence of some gross impropriety in the mode of selection, a Governor General would be obliged to defer to the party's wish.[72]

(c) Dismissal of Prime Minister

The second reserve power of the Governor General is the power to dismiss the Prime Minister. The dismissal (or resignation) of a Prime Minister automatically involves the dismissal (or resignation) of the entire ministry. Thus what is formally a dismissal of a Prime Minister is in substance the dismissal of the ministry or government.

The power of dismissal has been exercised very rarely. In Canada no federal Prime Minister has ever been dismissed, and no provincial Premier has been dismissed since 1905.[73] In the United Kingdom no Prime Minister has been dismissed since 1783.[74]

When does the power of dismissal arise? It is obvious that a Governor General may not dismiss a ministry because he or she believes its policies to be unwise, or because he or she believes it to be incompetent. Those are judgments which in a democracy may be made only by the people or their elected

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71 Strictly speaking, the only person who can "advise" the Governor General (or Lieutenant Governor) is the Prime Minister (or Premier), and there is no such person. However, others can make recommendations. Strictly speaking, a recommendation could not be made by the cabinet, because the cabinet was dissolved by the death or retirement of the Prime Minister (or Premier). In any event, the practice is for the recommendation to be made by the parliamentary caucus: see next note. A.M. Dodek, "Rediscovering Constitutional Law: Succession upon the Death of the Prime Minister" (2000) 49 U.N.B.L.J. 33 argues that it would be a better practice for the governing party to appoint a Deputy Prime Minister whose duty would not be merely to act in the absence or incapacity of the Prime Minister, but to act on the death or retirement of the Prime Minister (until a new permanent leader had been selected by the governing party). To be sure, this would be a quicker and easier transition, but the practice is otherwise: see next note.

72 Three Quebec Premiers have died in office: Duplessis in 1959, Sauve in 1960 and Johnson in 1968; in each case the parliamentary caucus of the governing Union Nationale party selected a successor, and presented a "petition" to the Lieutenant Governor asking him to commission the person chosen; the Lieutenant Governor complied. In the last case the Premier so chosen, Premier Bertrand, insisted upon his appointment also being ratified by a subsequent party leadership convention: see Mallory, note 68, above, 79-80. Although there have been no recent deaths of Premiers, there have been the sudden resignations of Premiers van der Zalm (B.C., 1991), McKenna (N.B., 1997) and Clark (B.C., 1999). In each case, the Lieutenant Governor appointed a successor on the basis of a recommendation of the parliamentary caucus: R.I. Cheffins, "The Royal Prerogative and the Office of Lieutenant Governor" (2000) 23 Can. Parliamentary Review 14, 18-19.

73 Saywell, *The Office of Lieutenant-Governor* (1957), ch. 5.

74 de Smith and Brazier, *Constitutional and Administrative Law* (8th ed., 1998), 122.

representatives. Could the Governor General dismiss a ministry because he or she believed its policies to be illegal? There is a New South Wales precedent for such a dismissal, but it is soundly criticized by Evatt on the ground that the Governor of New South Wales (or any other head of state) has neither the competence nor the authority to assume to adjudicate a question of law and to provide a remedy for a finding of illegality; questions of illegality are properly justiciable and remediable in the courts.[75] There is also the Australian federal precedent of the dismissal in 1975 of Prime Minister Whitlam. The Whitlam Labour government had a secure majority in the lower house, but could not obtain supply from the upper house. This dismissal also seems improper since its effect was to install in office a government which the Governor General knew could not command a majority in the lower house. It is true that the Governor General stipulated that the new government should be a "caretaker government" only, which would "make no appointments or dismissals or initiate new policies before a general election is held". But to solve a political crisis by dismissing a government with a majority in the lower house seems to me to be a breach of the conventions of responsible government — a political initiative that is well outside the narrow realm of vice-regal discretion..[76]

My opinion is that the only occasion upon which a Governor General would be justified in dismissing a ministry is when the ministry has lost the support of a majority of the House of Commons. When this happens, as we have already noticed, one of two changes must occur: either the House must be dissolved for an election which will produce a new House, or the ministry must resign to make way for a new ministry which will enjoy the confidence of the existing House. If a Prime Minister who had lost parliamentary support refused to advise dissolution and refused to resign, then the Governor General would have no alternative but to dismiss the Prime Minister and call upon the leader of the opposition to form a government.

A related question is whether a Prime Minister whose advice has been rejected by the Governor General is obliged by convention to resign. It is often assumed that there is such a convention, but this is probably wrong because there does not seem to be a good reason for the convention. The Prime Minister is responsible to the House of Commons, not to the Governor General. The only precedent is the King-Byng dispute of 1926, which is described in the next section of this chapter.[76a] In that case, Prime Minister King resigned immediately when Governor General Byng refused his request for a dissolution. That is not a very

75 Evatt, *The King and His Dominion Governors* (2nd ed., 1967), chs. 19, 20. See also G. Lindell, "The role of a State Governor in relation to illegality" (2012) 23 Public Law Review (Australia) 268.

76 The dismissal means that the Australian Senate can force a federal government out of office by denying supply, despite the fact that the government is not responsible to the Senate, and the action would not ordinarily involve the risk of the Senate's own dissolution. The Governor General's correct course, in my view, was to do nothing, and wait for a political resolution of the crisis. Commentary on the crisis is cited, note 45, above.

76a Section 9.7(d), "Dissolution of Parliament", below.

useful precedent since the Prime Minister's resignation could as easily be attributed to partisan motives as to the existence of any convention. The Prime Minister had not at that point lost the confidence of the House of Commons, but he wanted to avoid the continuation of a parliamentary debate that was likely to lead to a resolution of censure of his government. As well, he knew that his immediate resignation would create a problem for the Governor General by leaving little time for the Governor General to explore the viability of an alternative government formed by the opposition leader, Mr. Meighen.[76b]

(d) Dissolution of Parliament

The Constitution Act, 1867, by s. 50, provides that a House of Commons "shall continue for five years" unless it is "sooner dissolved by the Governor General". (The Constitution Act, 1982, by s. 4, makes a similar stipulation, which applies to the legislative assemblies of the provinces as well as to the House of Commons.)[76c] It has never been the practice of Canadian Prime Ministers to allow the House of Commons to continue until the expiration of the five-year term. The practice has been for the Prime Minister to select what he regards as a propitious time for an election (usually about four years from the last election) and to advise the Governor General to dissolve the House in time for a new election on the selected date. In the normal situation of majority government, the Prime Minister has not lost the confidence of the House, and is simply seeking an earlier renewal of the government's mandate than would be provided by the eventual expiration of the House. (Exactly the same practice has been followed in the provinces, where the Premier has normally advised the Lieutenant Governor to dissolve the legislative assembly in time for an election on a date chosen by the Premier.)

There is only one Canadian precedent of a refusal by the Governor General of a request for a dissolution by a Prime Minister, and that is the famous King-Byng precedent of 1926. In 1926, Prime Minister Mackenzie King's minority Liberal government, which had been governing with the support of some of the Progressive, Labour and Independent members,[77] was faced with an opposition motion of censure that was likely to carry (since the government had been

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76b The same question could have arisen out of the prorogation issue of 2008, which is discussed in sec. 9.7(d.2), "Prorogation of Parliament", below. Governor General Jean in fact granted Prime Minister Harper's request for a prorogation of Parliament, but, if she had refused the request, there is no reason why the Prime Minister should have felt obliged to resign. He still possessed the confidence of the House, and he could have remained in office (where he would soon have had to face a no-confidence motion in the House of Commons).

76c Section 4(2) permits an extension beyond five years by a two-thirds majority vote "in time of real or apprehended war, invasion or insurrection". This is of no use for the House of Commons, because s. 50 was not similarly amended at the same time. During the First World War, the House of Commons was in fact extended to a term of 5 years, 10 months and 22 days, the longest Parliament in Canadian history. Section 50 was overcome by a temporary amendment to the British North America Act, 1867, which (pre-1982) required an imperial statute applicable to Canada, namely, the British North America Act, 1916 (U.K.), which was immediately spent and was formally repealed by the Statute Law Revision Act, 1927 (U.K.).

defeated on motions to amend and to adjourn). Before the motion of censure was voted on (and certainly before any vote of no-confidence was held), Prime Minister King advised the Governor General, Lord Byng, to dissolve Parliament for an election. Lord Byng took the view that he had a discretion in the matter, by reason of the short time since the previous election (it was 11 months) and the imminence of the vote of censure, and he refused the dissolution.[77a] Prime Minister King immediately resigned. Lord Byng then called on the leader of the opposition Conservative Party, Mr Meighen, to form a government. Mr Meighen did so, but within a week his government was defeated, and so he advised Lord Byng to dissolve Parliament. Lord Byng accepted this advice, thereby granting to Mr Meighen the dissolution that he had so recently denied to Mr King. In the ensuing election, Mr King used the incident as an issue of independence from the Empire (represented by Lord Byng), and the Liberals won the election, bringing Mr King back into office. It is clear that Lord Byng's failure to follow Prime Minister King's advice was unwise,[77b] but there is no agreement among constitutional writers as to whether it was in violation of a constitutional convention.

Nevertheless, the King-Byng precedent surely carries important lessons for Governor Generals today. The main lesson is that, absent extraordinary circumstances, a request for dissolution from a Prime Minister should be granted. If it is refused, there is a risk that the Prime Minister will resign (as Mr King did)[77c] and the Governor General will have to commission a new Prime Minister

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77 The exact standings of the parties in the House of Commons were: Liberals, 101; Conservatives, 116; Progressives, 24; and Labour and Independents, 4.

77a Forsey, *The Royal Power of Dissolution in the British Commonwealth* (1943, reprinted, 1968), 146-162, takes the view that in some situations refusal of a dissolution would be appropriate, e.g., where a motion of censure is under debate in the House of Commons, or where the last election was very recent. For both these reasons he would support Lord Byng's refusal of a dissolution in 1926 (discussed in the text following) even if Mr. King still had the support of a majority in the House of Commons. For provincial precedents, see Saywell, *The Office of Lieutenant-Governor* (1957), ch. 6.

77b The most thorough study of the King-Byng dispute is Forsey's *The Royal Power of Dissolution of Parliament in the British Commonwealth* (1943, reprinted, 1968), chs. 5, 6, and Forsey comes down strongly in support of Lord Byng's action: see previous note. My view that Lord Byng's refusal to dissolve Parliament was at least unwise is based on the fact that Lord Byng and Mr. Meighen must have known that Meighen would have great difficulty in forming a government because of the legal requirement of that time (it was repealed in 1931) that each minister with portfolio had to vacate his seat and seek re-election in a by-election. If Meighen had formed a ministry in the normal way he would have lost about 15 of his supporters in the House. Since he could not afford such a loss (see the voting figures: Forsey, 159), he formed a "temporary ministry" of ministers without portfolio who became "acting ministers" of the departments of government. This device evaded the necessity for ministerial by-elections, but led to a motion in the House of Commons condemning the device which passed by one vote: Forsey, 131-139. While the exact fashion of the Meighen government's downfall was obviously not foreseeable when Byng refused King's request for a dissolution, it was manifest at that time that the formation of a government by Meighen would present "unusual difficulties" (as Forsey, 135, admits). Marshall, *Constitutional Conventions* (1984), 39, suggests that convention authorizes the refusal of a dissolution only if the Governor General can rely on finding a Prime Minister who can form an alternative government; if this is correct, Lord Byng did not observe the convention.

from within the existing House (as Lord Byng did). If the Governor General cannot be sure that the leader of the opposition can form a reasonably stable government, then there is no alternative to granting the dissolution. If the Governor General does commission the leader of the opposition as Prime Minister (as Lord Byng did), and if the new government falls soon after the old one fell (as Mr Meighen's did), then the Governor General's initial refusal of the dissolution were created a political crisis in which the legitimacy and neutrality of the Governor General's decisions inevitably become the topic of partisan debate (as happened in 1926). The crisis would not arise if the first request for dissolution had been granted. That is why, apart from the lonely King-Byng precedent, every Canadian Governor General has always granted a request by a Prime Minister for a dissolution, regardless of whether the Prime Minister possessed a secure majority in the House, or had been defeated on an issue of confidence, or who anticipated defeat on an issue of confidence, or who claimed that Parliament had become dysfunctional, or who simply saw some partisan advantage in an election. From the Governor General's point of view, any impulse to say "no" to a request for dissolution is normally overwhelmed by the difficulties that a "no" answer would create.

(d.1) Fixed election dates

The Prime Minister's effective power to select the date of the next election (within the five-year constitutional time frame) is often regarded as giving the governing party an advantage in the election. This has led to suggestions that Canada should move to a system of fixed election dates, like those of the United States, in order to strip the Prime Minister of a discretion that may be used for purely partisan purposes. Needless to say, in a system of responsible government, any regime of fixed election dates needs to preserve the discretion of the Governor General to dissolve the House in the event that the government loses the confidence of the House of Commons before the stipulated date. But as long as this discretion is preserved, fixed election dates are not inconsistent with responsible government. In fact, fixed election dates at intervals of four years have now been established by statute for the federal House of Commons[78] and for seven of the ten provincial legislative assemblies.[79]

77c I say "a risk", because, in my view, the Prime Minister is not obliged to resign when his advice is rejected: text accompanying notes 76a and 76b, above.

78 An Act to Amend the Canada Elections Act, S.C. 2007, c. 10. This Act is discussed in more detail in the next paragraph of text.

79 B.C.: Constitution (Fixed Election Dates) Amendment Act, 2001, S.B.C. 2001, s. 36; Alta.: No statute; Sask.: The Legislative Assembly and Executive Council (Fixed Election Dates) Amendment Act, 2008, S.S. 2008, c. 6; Man.: Amendments to the Elections Act, S.M. 2008, c. 43; Ont.: An Act to Amend the Election Act, S.O. 2005, c. 35; Que.: No statute; N.B.: An Act to Amend the Legislative Assembly Act, S.N.B. 2007, c. 57; N.S.: No statute; P.E.I.: An Act to Amend the Election Act, S.P.E.I. 2007, c. 29; N.F.L.: An Act to Amend the House of Assembly

Another "tactical" (and therefore controversial) prorogation occurred in Ontario on October 18, 2012. Premier Dalton McGuinty requested and was granted a prorogation of the Legislature with the effect of closing down a legislative committee that was pursuing allegations that the Premier and two of his senior ministers had misled the Legislature about the cost of closing two gas plants just before the last election (which had taken place a year earlier). One of the ministers had already been charged with contempt of the Legislature for failure to disclose documents to the committee, and the committee was considering contempt proceedings against the Premier. On the same day as the prorogation was granted, Premier McGuinty announced his retirement from the Premiership. In this case, the prorogation proclamation did not stipulate the date at which the prorogation would end, and the Premier announced publicly that his (as yet unknown) successor as Premier would decide when to recall the Legislature, thereby leaving the date of recall quite indefinite.[101a] However, the Premier, although leading a minority government, possessed the confidence of the Legislature, and was not facing a vote of no-confidence. The Lieutenant Governor was therefore bound to accept his advice. The prorogation in fact lasted for four months. During that time, the Ontario Liberal Party chose a new leader, Kathleen Wynne, who was sworn in as Premier on February 11th, 2013, and, on her advice, the Lieutenant Governor summoned the Legislature back into session on February 19, 2013.

(e) Appointments to Senate and bench

The Governor General's power to appoint senators (Constitution Act, 1867, s. 24) and judges (s. 96) is of course exercised on the advice of the cabinet.[102] In 1896, however, after Parliament had been dissolved and after a new election had decisively defeated the incumbent Conservative government of Prime Minister Tupper, the Tupper government advised the Governor General, Lord Aberdeen, to appoint a number of senators and judges. The Governor General refused to make the appointments. The Tupper government accordingly resigned (as it would have had to do anyway because of the election result). The Governor General then invited Mr. Laurier, the leader of the Liberal Party, which had won the election, to form a new government. Mr. Laurier did so, and his government filled the vacancies which the previous government had attempted to fill. The action of the Governor General in this case seems to me to be both wise and in accordance with convention. It was quite improper for the Tupper government to attempt to strengthen its support in the Senate and (less obviously) the bench after it had been defeated at the polls. True, the government was still in office, but the

101a In Ontario, it is not necessary to name a recall date in the instrument of prorogation: note 86a, above.

102 To be precise, the appointment of Chief Justices and senators is made on the advice of the Prime Minister alone: note 28, above.

Governor General was entitled to recognize that it was not going to have a majority in the newly-elected House of Commons. In this circumstance the Governor General had a discretion to refuse to concur in an important and irrevocable decision which could await the early and inevitable formation of a new government which was bound to enjoy a majority in the House of Commons.[103]

(f) The justification for a formal head of state

A system of responsible government cannot work without a formal head of state who is possessed of certain reserve powers. While the occasions for the exercise of these powers arise very rarely, the powers are of supreme importance, for they insure against a hiatus in the government of the country or an illegitimate extension of power by a government which has lost its political support. The strength and the weakness of responsible government lie in the executive's dependence on support in the legislature. The strength lies in its provision of an executive which is in accord with the latest expression of the electorate's wishes and which is able to execute its policies. The weakness lies in the absence of clear legal rules as to when governmental power shall be assumed or relinquished and when elections shall be held. In situations where a discredited government is reluctant to relinquish its power, or where parliamentary support is fluid, the head of state is able to resolve the impasse impartially, either through formation of a government, or through an election.

This function of the head of state is unnecessary in a presidential (or gubernatorial) form of government, where the president (or governor) is directly elected for a fixed term and is not dependent upon the support of the legislative branch. The Americans have therefore been able to unite in the one office the formal head of state and the political executive of the nation (or state). The countries which have inherited the British system of responsible government have all had to establish a dual executive in which a formal head of state presides over a government which is actually administered by political officials. While the formal head of state rarely has to exercise the reserve powers, it should not be overlooked that he or she also performs many formal, ceremonial and social functions which are important in the life of the nation.

(g) The monarchy

While responsible government requires a dual executive, it does not require that the formal head of state be the Queen. This is demonstrated by countries such as India, Ireland, Israel and South Africa, which possess responsible government, but no monarchy.[104] Canada could if it chose easily become a republic by the

103 Accord, Mallory, *The Structure of Canadian Government* (rev. ed. 1984), 83.

104 Abolition of the monarchy would not entail leaving the Commonwealth. The Queen would no longer be Canada's head of state, and would play no role in the government of Canada, but she would still be recognized by Canada as the head of the Commonwealth and as the symbol of that

simple device of securing an amendment of the Constitution to make the Governor General the formal head of state in his or her own right.[105] Many constitutional and statutory powers are in any case conferred directly upon the Governor General or the Governor General in Council, and would need no alteration. Those powers that are expressly conferred on the Queen could easily be amended to substitute the Governor General for the Queen. The personal prerogatives which are nowhere authoritatively defined, but which are exercised by the Governor General under a delegation from the Queen, should probably be explicitly conferred on the Governor General directly, although it could be argued that they are implicit in the position of a head of state in a system of responsible government. Certainly, they would not need to be defined in detail, unless that exercise was regarded as worthwhile in itself.[106] A new mode of appointing the Governor General would have to be worked out, because at present the appointment is made by the Queen. But the Queen makes the appointment on the advice of the Canadian Prime Minister anyway, and so the real power of appointment has already been domesticated. In short, the shift from a monarchy to a republic could be accomplished with practically no disturbance of present constitutional practice. In considering the question whether Canada should make the change, the constitutional considerations may be dismissed as neutral or unimportant; obviously, such matters as tradition, sentiment and ceremony are the important considerations.[107]

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association. This was the formula which was adopted in 1949 when India decided to become a republic within the Commonwealth; since then, of course, many of the members of the Commonwealth have become republics: Wheare, *The Constitutional Structure of the Commonwealth* (1960), ch. 7; de Smith and Brazier, *Constitutional and Administrative Law* (8th ed., 1998), 118; McWhinney, *The Governor General and the Prime Ministers* (2005), ch. 7.

105 The Constitution Act, 1982, by s. 41, requires the assents of the federal Parliament and all provinces (unanimity procedure) for an amendment in relation to "the office of the Queen".

106 Evatt in *The King and His Dominion Governors* (2nd ed., 1967) deplores the uncertainty in the scope of the personal prerogatives and argues that they should be reduced to writing and enacted as a statute. Significantly, however, he does not himself attempt to draft a model statute and that is the hard part. On the question of reducing conventions to writing, see also K.J. Keith, "The Courts and the Conventions of the Constitition" (1967) 16 Int. Comp. L.Q. 542.

107 For strong support of the monarchy, see MacKinnon, *The Crown in Canada* (1976). Forsey, *Freedom and Order* (1974), 21-32, in opposing the "absurd" suggestion that Canada might abolish the monarchy, exaggerates the constitutional problems which would be involved. The Canadian Bar Association's Committee on the Constitution has recommended the replacement of the monarchy with a Canadian Head of State chosen by the House of Commons: *Towards a New Canada* (1978), 34-35. The issue is discussed by J.D. Whyte, "The Australian Republican Movement and its Implications for Canada" (1993) 4 Constitutional Forum (U. of Alta.) 88.

Much of the practice and procedure of judicial review is simply the practice and procedure of whatever kind of litigation happens to yield the constitutional issue.[5] The balance of this chapter is concerned with those issues that are distinctive to constitutional cases: standing, mootness, ripeness, alternative grounds and intervention.[6] The next chapter, Proof,[7] deals with legislative history and evidence.

59.2 Standing

(a) Definition of standing

The question whether a person has "standing" (or locus standi)[8] to bring legal proceedings is a question about whether the person has a sufficient stake in the outcome to invoke the judicial process. The question of standing focuses on the position of the party seeking to sue, not on the issues that the lawsuit is intended to resolve.

Restrictions on standing are intended (1) to avoid opening the floodgates to unnecessary litigation; (2) to ration scarce judicial resources by applying them to real rather than hypothetical disputes; (3) to place limits on the exercise of judicial power by precluding rulings that are not needed to resolve disputes; (4) to avoid the risk of prejudice to persons who would be affected by a decision but are not before the court; (5) to avoid the risk that cases will be inadequately presented by parties who have no real interest in the outcome; and (6) to avoid the risk that a court will reach an unwise decision of a question that comes before it in a hypothetical or abstract form, lacking the factual context of a real dispute. In constitutional cases, however, there is the countervailing idea of constitutionalism (or rule of law), which dictates that remedies ought to be available when governments fail to abide by the law of the constitution.[9] This idea often suggests that a private litigant who, for public rather than private reasons, wishes to raise a

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5 Occasionally the existence of the constitutional issue will cause a court to strike down restrictions on the availability of remedies: see ch. 40, Enforcement of Rights, under heading 40.2(f), "Court of competent jurisdiction", above.

6 For more detailed discussion, see Lokan and Dassios, *Constitutional Litigation in Canada* (looseleaf, supplemented).

7 Chapter 60, Proof, below.

8 See S.M. Thio, *Locus Standi and Judicial Review* (Singapore U.P., 1971); Law Reform Commission of British Columbia, *Report on Civil Litigation in the Public Interest* (1980); S. Blake, "Standing to Litigate Constitutional Rights and Freedoms in Canada and the United States" (1984) 16 Ottawa L. Rev. 66; Sharpe (ed), *Charter Litigation* (1987), ch. 1 (by W.A. Bogart); Cromwell, *Locus Standi* (1986); Strayer, *The Canadian Constitution and the Courts* (3rd ed., 1988), ch. 6; Ontario Law Reform Commission, *Report on the Law of Standing* (1989); Sharpe, *The Law of Habeas Corpus* (2nd ed., 1989), 222-224; Sossin, *Boundaries of Judicial Review* (1999), 202-214; Lokan and Dassios, note 6, above, ch. 3. For the (more restrictive) law of the United States, see L.H. Tribe, *American Constitutional Law* (Foundation Press, New York, 3rd ed., 2000), vol. 1, 385-464.

9 See ch. 1, Sources, under heading 1.1, "Constitutional law", above.

constitutional question ought to be allowed to do so. This is probably the reason for the remarkable relaxation in the Canadian law of public interest standing that will be described in the text that follows.

Where a constitutional issue arises in the course of ordinary civil or criminal litigation, a question of standing is rarely controversial.[10] The validity of a statute (or some other official instrument or act) must be determined in order to resolve the issue between the parties. It goes without saying that only the party who would be affected by the application of the statute has any right to raise the issue of its constitutionality. That person has standing to attack the validity of the statute.

The issue of standing may become controversial where a private individual or firm initiates legal proceedings for the sole purpose of challenging the constitutionality of a statute (or other official instrument).[11] For the private party,[12] the proceeding of choice for this purpose[13] is an action for a declaration.[14] In all Canadian jurisdictions, a superior court may make "binding declarations of right, whether or not any consequential relief is or could be claimed".[15] This means that a court can make a declaration as to the rights of the parties even in cases where the plaintiff has no cause of action in the sense of an entitlement to coercive relief in the form of damages, an injunction, specific performance or the like. The declaration has become a popular remedy to challenge official action of various kinds, because the aggrieved party often lacks a cause of action in the traditional sense, and yet the absence of coercive relief is rarely a problem when the defendant is the government or a public body that can normally be relied upon to obey the declaratory judgment.

(b) Exceptional prejudice

Although it is clear in principle that a declaration can be issued at the suit of a party who has no right to damages or other coercive relief, the courts have

10 But note sec. 59.2(e), "Enforcing other people's rights", below.

11 The rules of standing differ depending upon the remedy sought, and the area of law involved: see the works by Thio, Cromwell, Strayer, note 8, above. This account is confined to the remedy of declaration in constitutional cases. Note, however, that in *Finlay v. Can.* [1986] 2 S.C.R. 607, discussed in text accompanying note 33, below, the Court held (at pp. 634-635) that the same rule of standing extended to an ancillary injunction.

12 For a Canadian government, the proceeding of choice is a reference, a proceeding which is not available to a private litigant: see ch. 8, Supreme Court of Canada, under heading 8.6, Reference jurisdiction, above.

13 Standing to seek a remedy under s. 24 of the Charter of Rights is discussed in ch. 40, Enforcement of Rights, below. As that chapter explains, s. 24(1) does not preclude the traditional declaration of invalidity in Charter cases; the latter remedy depends upon s. 52 of the Constitution Act, 1982.

14 See I. Zamir, *The Declaratory Judgment* (Sweet & Maxwell, London, 3rd ed., 2002, by Lord Woolf and J. Woolf).

15 The history of this provision is related in Zamir, previous note, ch. 2. The current Canadian references are collected in Cromwell, note 8, above, 121.

imposed a requirement of standing on the availability of the declaration. The general rule is that the Attorney General is the guardian of the public interest, and only the Attorney General has standing to bring proceedings to vindicate the public interest.[16]

In the context of a challenge to the validity of a statute, this rule denies standing to an individual who is affected by the statute no differently from any other member of the public. If, however, an individual is "exceptionally prejudiced" by the statute, that is, the statute applies to him or her differently from the public generally, then the individual has standing to bring a declaratory action to challenge the validity of the statute.[17]

In *Charlottetown v. Prince Edward Island* (1998),[18] a municipality in Prince Edward Island sued for a declaration that the province's electoral boundaries legislation was invalid, because the boundaries left the residents of the municipality so under-represented in the provincial Legislature as to violate their right to vote. The municipality's standing to seek the declaration suffered from the problem that it was organized as a corporation, and the right to vote in s. 3 of the Charter was possessed by individual citizens. However, if an individual citizen had brought the action, the plaintiff would not be able to show the exceptional prejudice that was necessary for standing, because the impact of the law on the plaintiff would be no different from its impact on other individuals living in the same municipality. The Appeal Division of the Prince Edward Island Supreme Court held that the municipality had the standing to seek the declaration. The corporation was the local authority for a community that claimed to be inadequately represented in the Legislature as the result of the boundaries legislation, and the corporation had an interest in ensuring that its populace was effectively represented. In effect, the Court held that the community suffered exceptional prejudice, and could properly bring an action for a declaration through its municipal corporation.[19]

16 The Attorney General can either bring proceedings of his or her own motion (ex officio), or can consent to a private litigant bringing a "relator action" in the name of the Attorney General. A relator action is expressed as having been brought by the Attorney General "at the relation of" the private litigant (the relator). The relator has the carriage of the proceedings, and is responsible for costs. However, the Attorney General retains some rights to control the litigation. See Edwards, *The Attorney General, Politics and the Public Interest* (1984), 130-145, 286-295.

17 *Smith v. A.G. Ont.* [1924] S.C.R. 331, 337.

18 (1998) 167 D.L.R. (4th) 268 (P.E.I. C.A.).

19 Mitchell J.A. for the Court was explicit (para. 4) that the municipality's right to seek the declaration was not based on discretionary public interest standing: see sec. 59.2(d), "Discretionary public interest standing", below.

(c) Role of the Attorney General

Underlying the exceptional prejudice rule is the assumption that the Attorney General can be counted on to act as guardian of the public interest. If there is no individual who is exceptionally prejudiced, a public wrong will not necessarily go unredressed, because the Attorney General has the power to bring remedial proceedings.

The Attorney General's role as plaintiff in public interest litigation developed in England in cases involving such matters as obstructions of public highways or waterways, public nuisances or misapplications of the funds of charitable trusts. In such cases, no policy of the Attorney General's own government is in issue, and the Attorney General may reasonably be expected to exercise a wise discretion as to whether or not to institute legal proceedings. But this is not so where the gravamen of the complaint is the unconstitutionality of a statute, or the illegality of some policy or act of the government. The problem is that the Attorney General is a member of the government. Like other ministers, he or she is committed to the policies of the government, and will normally be obliged to defend the legality of those policies.[20]

The Supreme Court of Canada has recognized the conventional constraints that preclude the Attorney General from bringing proceedings to challenge the policies of his or her own government.[21] This recognition has been an important factor influencing the court to create a discretionary category of public interest standing which may be conferred on an individual who wishes to challenge the constitutionality of a statute despite the fact that he or she has not been exceptionally prejudiced by the statute.

(d) Discretionary public interest standing

The exceptional prejudice rule, which was established in 1924,[22] is still the law of Canada in that only exceptional prejudice *entitles* a plaintiff to the standing needed to bring a declaratory action to challenge the validity of a statute. But in

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20 In Sharpe (ed.), note 8, above, 52-53, Professor J.Ll.J. Edwards seems to argue for a more independent role for the Attorney General, asserting that: "The Attorney General is entitled to oppose the policy of his ministerial colleagues at every stage of its formulation and implementation, including discussions within the appropriate cabinet committee or in the cabinet itself." Obviously, the Attorney General or any other minister is free to express his or her independent views when policy is being formulated within cabinet or cabinet committees. But, in my view, once the policy has been formulated the Attorney General like any other cabinet minister is bound by the convention of collective responsibility and would have to resign the office if he or she wished to continue to oppose the policy. K. Roach, "Not Just the Government's Lawyer: The Attorney General as Defender of the Rule of Law" (2006) 31 Queen's L.J. 598 argues for the Edwards position.

21 *Thorson v. A.-G. Can.* [1975] 1 S.C.R. 138, 146. This case is discussed in the text accompanying note 23, below.

22 Note 17, above.

a series of cases the Supreme Court of Canada has held that there is a discretion to grant standing to a private plaintiff who seeks to vindicate a public interest and who is not exceptionally prejudiced.

The first case is *Thorson v. Attorney General of Canada* (1974).[23] In that case, the plaintiff sued for a declaration that the federal Official Languages Act was invalid. The plaintiff was not exceptionally prejudiced by the Act, which applied to him no differently than to other Canadians. Nonetheless, the Supreme Court of Canada by a majority granted standing to the plaintiff. The Court held that it had a discretion to grant standing to a plaintiff who was not exceptionally prejudiced, and that the discretion should be exercised in this plaintiff's favour. Laskin J., writing for the majority of the Court, pointed out that, because the Official Languages Act was declaratory and directory, not even imposing penalties for its breach, no-one would be able to establish exceptional prejudice. Moreover, it was not realistic to suppose that the federal Attorney General would exercise his undoubted right to bring proceedings, since he was a member of the government that had secured the passage of the Act, and indeed he was the minister responsible for its implementation. Therefore, the effect of the traditional standing rules would be to immunize the Act from constitutional challenge. Laskin J. asserted[24] that it would be a cause for alarm if the legal system provided no route by which a question concerning the constitutionality of a statute could be determined by the courts.[25]

The second case in the series of public interest standing cases is *Nova Scotia Board of Censors v. McNeil* (1975),[26] in which the plaintiff brought an action for a declaration that Nova Scotia's film censorship statute was invalid. This statute differed from the Official Languages Act in that the censorship statute was not merely declaratory. The statute was regulatory, and film exhibitors were subject to the regulatory regime and liable to penalties for non-compliance. An exhibitor would be entitled to standing under the exceptional prejudice rule. The plaintiff, however, was not an exhibitor; he was a member of the public who objected to the banning in Nova Scotia of the movie "Last Tango in Paris". Did the new discretion to grant standing extend to a plaintiff who had not suffered exceptional prejudice, when the object of the challenge was a regulatory statute and those regulated by the statute had chosen not to sue? The Supreme Court of Canada, now speaking unanimously through Laskin C.J., answered yes. The Court took the view that the plaintiff was asserting an interest different from that of the exhibitors, in that the statute controlled what the public could see at the movies. Since the statute had not been challenged by the exhibitors (or by the Attorney

23 [1975] 1 S.C.R. 138. The Court divided six to three, with Laskin J. writing for the majority, and Judson J. writing for the minority.

24 *Id.*, 145.

25 The issue reached the Supreme Court of Canada on the merits in a reference in which Mr. Thorson appeared as counsel for one of the interveners: *Jones v. A.G.N.B.* [1975] 2 S.C.R. 182, where the legislation was upheld.

26 [1976] 2 S.C.R. 265.

General), there was no practical way in which the public's interest in what it could see at the movies could be translated into a constitutional challenge. Therefore, the Court held, it should exercise its discretion in favour of granting standing to the plaintiff.[27]

The third case in the series of public interest standing cases is *Minister of Justice of Canada v. Borowski* (1981),[28] in which the plaintiff sued for a declaration that the therapeutic abortion provisions of the Criminal Code were inoperative through conflict with the Canadian Bill of Rights (the Charter of Rights not being in the Constitution at this time). This case differed from the previous two cases in that the impugned legislation was neither declaratory (as in *Thorson)* nor regulatory (as in *McNeil),* but rather exculpatory: abortion was a criminal offence, but the constitutional challenge was brought against provisions that exempted therapeutic abortions from the offence. The other new element of the case was that the impugned provisions could have no direct impact on the plaintiff,[29] because he was male, and was not a doctor. Nevertheless, the Supreme Court of Canada, by a seven to two majority, exercised its discretion to grant standing to the plaintiff. Martland J., who wrote for the majority of the Court, pointed out that neither doctors performing abortions nor women seeking abortions would want to challenge provisions that were exculpatory. He summarized *Thorson* and *McNeil* in these terms:[30]

> I interpret these cases as deciding that to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court.

Laskin C.J., who had written the judgments in *Thorson* and *McNeil,* now dissented, holding[31] that the plaintiff had no "judicially cognizable interest in the matter he raises".[32]

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27 The action reached the Supreme Court of Canada on the merits in *N.S. Bd. of Censors v. McNeil* [1978] 2 S.C.R. 662, where the legislation was upheld.

28 [1981] 2 S.C.R. 575. The Court divided seven to two, with Martland J. writing for the majority, and Laskin C.J. writing for the minority.

29 Public interest standing was granted to a corporation in *Energy Probe v. Can.* (1989) 68 O.R. (2d) 449 (C.A.) (the challenge to the Nuclear Liability Act was unsuccessful on the merits: *Energy Probe v. Can.* (1994) 17 O.R. (3d) 717 (Gen. Div.)) and *Can. Council of Churches v. Can.* [1990] 2 F.C. 534 (C.A.); reversed on other grounds [1992] 1 S.C.R. 236; although the challenged legislation could not in either case affect the corporation. These cases establish that the public interest plaintiff may sue through a corporate vehicle.

30 [1981] 2 S.C.R. 575, 598.

31 *Id.*, 587.

32 The plaintiff's case was never decided by the Supreme Court of Canada on the merits. It did reach the Court, but by that time the entire Criminal Code section respecting abortion, the offence part (which Borowski wanted to preserve) as well as the exculpatory part (which Borowski attacked) had been struck down in *R. v. Morgentaler (No. 2)* [1988] 1 S.C.R. 30 (a criminal prosecution of doctors for performing abortions without complying with the exculpatory provisions). The Court dismissed Borowski's appeal on the grounds that (1) the issue he raised was moot, and (2) he had lost standing. On the latter ground, the Court held that the standing cases *(Thorson, McNeil,*

The fourth case in the series of public interest standing cases is *Finlay v. Minister of Finance of Canada* (1986).[33] In that case, the plaintiff sought a declaration that payments by the federal government to the province of Manitoba were illegal, on the ground that Manitoba was not fulfilling the conditions of the cost-sharing agreement between the two governments under which the payments were made. The plaintiff was a recipient of income support under provincial legislation that he contended did not fulfil the agreed-upon conditions. However, success in his action would have no direct effect on his own (or anyone else's) entitlement to support, because that entitlement arose under the provincial legislation, and the validity of the provincial legislation would not be affected by the illegality of the federal funding. (The plaintiff's hope, of course, was that success in the action would persuade the province to amend the provincial legislation.)

Finlay raised the question whether the public interest standing discretion could be extended to a non-constitutional challenge to the legality of a federal public expenditure. The Supreme Court of Canada, in a unanimous judgment written by Le Dain J., answered yes. Although the plaintiff's claim raised no constitutional issue, it did raise a question of law that was justiciable. Then, taking Martland J.'s summary of the cases in *Borowski* (quoted earlier)[34] as his text, Le Dain J. held[35] that the plaintiff was "a person with a genuine interest in these issues and not a mere busybody"; and there was "no other reasonable and effective manner in which the issue may be brought before a court".[36]

The result of these four cases is to establish a very liberal rule for public interest standing. While it is still the case that a private plaintiff has no right to bring a declaratory action when he or she has no special personal interest in an issue of constitutional or public law, the courts will grant standing as a matter of discretion to the plaintiff who establishes (1) that the action raises a serious legal question, (2) that the plaintiff has a genuine interest in the resolution of the question, and (3) that there is no other reasonable and effective manner in which the question may be brought to court.[37]

The third requirement — that there is no other reasonable and effective manner in which the question may be brought to court — is a corollary of the purpose of granting public interest standing, which is to make sure that governments and legislative bodies adhere to the Constitution and other applicable laws. If there is no obstacle to judicial review at the suit of someone

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Borowski) required an individual to challenge a specific law or a specific government act, which Borowski could no longer do: *Borowski v. Can.* [1989] 1 S.C.R. 342.

33 [1986] 2 S.C.R. 607.

34 Quotation in text accompanying note 30, above.

35 [1986] 2 S.C.R. 607, 633.

36 The issue reached the Supreme Court of Canada on the merits in *Finlay v. Can.* [1993] 1 S.C.R. 1080, where a majority held that Manitoba was not in breach of the federal conditions; the declaration was therefore denied.

37 E.g., *Chaoulli v. Que.* [2005] 1 S.C.R. 791, paras. 35, 188 (physician and patient granted standing to challenge Quebec's prohibition on private health insurance).

who is directly affected by a particular government measure, then it is not a wise use of scarce judicial resources to permit proceedings by persons or bodies that have no special interest in the measure. In *Canadian Council of Churches v. Canada* (1992),[38] the Canadian Council of Churches brought an action for a declaration of invalidity in respect of newly-enacted provisions of the Immigration Act that stipulated the procedure for determining claims by immigrants of refugee status. The Supreme Court of Canada struck out the statement of claim on the ground that the Council lacked standing to pursue it. The first two requirements for public interest standing were satisfied, because (1) the action raised a serious issue as to the validity of the new refugee determination procedures, and (2) the Council had a genuine interest in the issue, because it provided services to refugees and other recent immigrants. But the third requirement was not satisfied, because individual refugee claimants, who had been arriving at the rate of about 3,000 per month, each had standing to challenge the legislation, and some of them had in fact done so. It was clear therefore that persons with a direct interest in the issue could bring it to court, and there was no possibility that the legislation would be immunized from judicial review by a denial of standing to the Canadian Council of Churches. The Council was therefore denied standing.[39]

Canada v. Downtown Eastside Sex Workers United Against Violence Society (2012)[39a] was an action, brought in British Columbia, for a declaration of invalidity of the prostitution provisions of the Criminal Code (keeping a bawdy house, living off the avails of prostitution, and soliciting in a public place). The plaintiff in the action[39b] was a registered B.C. society, whose members were women who were current or former sex workers, and whose object was to improve working conditions for female sex workers in the Downtown Eastside of Vancouver. The standing of the Society to bring the action was challenged. It was the third requirement of the test for public interest standing that was difficult. Could it be said that there was no other reasonable and effective manner to bring the issue to court? On this point, the case was very like *Canadian Council of Churches* in that there were hundreds of prosecutions under the impugned provisions every year in British Columbia. Any of these accused persons were free to bring constitutional challenges to the provisions under which they were charged, and in many cases constitutional challenges had in fact been brought. As

38 [1992] 1 S.C.R. 236. Cory J. wrote the opinion for the unanimous Court.

39 See also *CARAL v. N.S.* (1990) 69 D.L.R. (4th) 241 (N.S.A.D.) (public interest standing to challenge abortion law denied, because criminal charge under law had been laid against doctor who was also challenging law); *Hy and Zel's v. Ont.* [1993] 3 S.C.R. 675 (public interest standing to challenge Sunday-closing law denied, because of other (unspecified) ways of bringing the issue to court); *Can. Civil Libs. Assn. v. Can.* (1998) 161 D.L.R. (4th) 225 (Ont. C.A.) (public interest standing to challenge powers of Canadian Security Intelligence Service denied, because private litigant had already brought a similar case).

39a [2012] 2 S.C.R. 524. Cromwell J. wrote the opinion of the Court.

39b There was also an individual plaintiff, who was a former sex worker and now a community worker, but the Court chose to decide the case on the public interest standing of the Society; the individual plaintiff was also granted standing on the same public interest basis without deciding whether she also qualified for private interest standing: *Id.*, para. 77.

well, in Ontario, an action for a declaration of invalidity of the prostitution provisions was being vigorously and effectively pursued and had reached the Court of Appeal, where it had been mainly successful.[39c] Despite these various ways in which the constitutional issue could (and had) come before a court, the Supreme Court of Canada granted public interest standing to the Society in the B.C. case. Cromwell J., who wrote the opinion of the Court, first made a crucial modification to the third requirement. It was no longer necessary to show that there was "no other" reasonable and effective manner to bring the issue to court; it was sufficient, he held, to find that "the proposed suit is, in all the circumstances, a reasonable and effective means of bringing the matter before the court".[39d] As for the prosecutions of individual sex workers, a multitude of similar challenges to particular prostitution offences was not a wise use of judicial resources, and a summary conviction proceeding was not the most appropriate setting for a complex constitutional challenge; the Society's "comprehensive declaratory action is a more reasonable and effective means of obtaining final resolution of the issues raised".[39e] As for the Ontario case, its existence did not "weigh very heavily" in the discretionary balance: it was taking place in a different province, there were some differences in the way the claim was framed, and the claimants were not primarily involved in street-level sex work, whereas in the B.C. case the main focus was on street-level sex work.[39f] The Society's proposed proceedings were comprehensive, were supported by a strong factual record (including expert reports and 90 affidavits by Downtown Eastside sex workers), and were conducted by experienced human rights lawyers. The Supreme Court concluded that the (reformulated) third requirement for public interest standing was met: the Society's B.C. action was a reasonable and effective manner to bring the issue to court.[39g] Since the first and second requirements — (1) serious issue to be tried and (2) genuine interest on the part of the plaintiff — were also met, public interest standing was granted to the Society.

In *Vriend v. Alberta* (1998),[40] the plaintiff, who alleged that he had been dismissed from his job because of his homosexuality, brought proceedings to challenge Alberta's human rights statute under s. 15 of the Charter of Rights. The statute prohibited discrimination in employment on a range of grounds, but did not include sexual orientation among the prohibited grounds. It was clear that the plaintiff had standing to challenge the provision prohibiting discrimination in employment, since the plaintiff was directly affected by its failure to include sexual orientation. However, the plaintiff also wanted to challenge other provisions of

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39c This was *Can. v. Bedford* (2012) 109 O.R. (3d) 1 (C.A.).

39d [2012] 2 S.C.R. 524, para. 52.

39e *Id.*, para. 70.

39f *Id.*, para. 65.

39g Folld., *Manitoba Métis Federation v. Can.* [2013] 1 S.C.R. 623, 2013 SCC 14, paras. 43-44, 160 (public interest standing granted to Manitoba Métis Federation, although there were individual plaintiffs, whose standing was not challenged, in the same action).

40 [1998] 1 S.C.R. 493.

the statute dealing with discrimination in housing, retail goods and services, public facilities, trade union membership, signs and advertising. These all suffered from the same constitutional infirmity as the provision dealing with employment, he argued, and it was desirable to deal with all of them at the same time. With respect to these non-employment provisions, the plaintiff's standing had to be based on discretionary public interest standing. The Supreme Court of

(Continued on page 59-11)

Canada held that the plaintiff should be granted the standing that he sought. There was a serious legal question as to the validity of the provisions, the plaintiff as a homosexual had a genuine interest in the resolution of the question, and it would be wasteful, delaying and unfair to wait for other acts of discrimination and require a separate challenge to each of the provisions. On the merits, the plaintiff succeeded, and the Court added ("read in") the ground of sexual orientation to all of the challenged provisions.

(e) Enforcing other people's rights

As has been explained, a constitutional issue will arise in the course of ordinary civil or criminal litigation if a party alleges that an ostensibly applicable statute is unconstitutional. When the validity of a statute is attacked by a private person on federalism (distribution of powers) grounds, the private challenger is asserting that the statute is outside the power of the enacting legislative body. If the challenged statute is a provincial one, a successful challenge would mean only that the power to enact the statute was possessed by the federal Parliament rather than by the provincial Legislature. It is arguable that only the federal government has the requisite interest in defending the federal domain from encroachment by provincial Legislatures. If this argument were accepted, it would follow that a private individual, motivated only by a desire to avoid compliance with the law, ought to be denied standing to challenge the statute.

Although it has been argued that private persons ought not to be permitted to challenge a statute on federalism grounds,[41] the argument has never been considered by the courts. On the contrary, it has always been assumed that a private person does have standing to challenge on federalism grounds a law that purportedly applies to him. This assumption, although never articulated and defended, accords with a basic notion of constitutionalism that insists that governments must stay within the limits of their legal powers. When a private person challenges a law on federalism grounds, no matter how selfish the motive of the challenger, the private person is enforcing a regime of constitutionalism that requires governments to obey the Constitution.

When the validity of a statute is attacked by a private person on Charter grounds, the challenger is usually enforcing a constitutional right that applies to the challenger. For example, people who were stopped from distributing leaflets at an airport challenged the law prohibiting the activity on the basis that the law deprived the distributors of their right to freedom of expression.[42] In that case, the distributors were vindicating their own right to freedom of expression, a right that is conferred on "everyone" by s. 2(b) of the Charter of Rights. No issue of standing arose, because it was obvious that the distributors had standing to chal-

41 Weiler, *In the Last Resort* (1974), ch. 6. The argument is criticized in Swinton, *The Supreme Court and Canadian Federalism* (1990), ch. 2.

42 *Committee for Cth. of Can. v. Can.* [1991] 1 S.C.R. 139.

lenge the law. But not all cases are so obvious. Can a private person challenge a law on the ground that it violates *someone else's* Charter rights?

In *Benner v. Canada* (1997),[43] a man successfully challenged a law that discriminated against women. The law was a provision of the federal Citizenship Act which provided for the citizenship of children born outside Canada to Canadian parents. A child born outside Canada before 1977 to a Canadian *mother* had to make application for citizenship, which involved passing a security check. A child born outside Canada before 1977 to a Canadian *father* was automatically entitled to Canadian citizenship. Mr. Benner had been born in the United States in 1962 to a Canadian mother and an American father. He was refused Canadian citizenship when he applied in 1987, because by that time he had acquired a criminal record, which caused him to fail the security check. Had his father been the Canadian parent, instead of his mother, he would have been entitled to Canadian citizenship regardless of the criminal record. He brought proceedings to quash the refusal of citizenship and to strike down the provision of the Act that imposed more stringent requirements on children of Canadian mothers than on children of Canadian fathers. The Supreme Court of Canada agreed that the distinction drawn by the Act was a breach of the equality rights in s. 15, because it was discrimination on the ground of sex. But the offensive distinction applied to the parents of applicants for citizenship, not to the applicants themselves. The situation of the applicants was fixed at birth and did not vary according to their sex. The Court held nonetheless that Mr Benner had standing to invoke the discrimination. He was the person with the most direct interest in challenging the discriminatory law, because the law burdened him rather than his mother. He was not really relying on the breach of his mother's equality rights. It was a breach of *his* equality rights to make his right to Canadian citizenship depend upon the gender of his Canadian parent. The Court therefore struck down the discriminatory law.

Freedom of conscience and religion is a right which, although guaranteed to "everyone" by s. 2(a) of the Charter, cannot apply to a corporation, because a corporation has no conscience and no religion. Nevertheless, in *R. v. Big M Drug Mart* (1985),[44] a corporation, Big M Drug Mart Ltd., successfully invoked the right to freedom of religion as a defence to a criminal charge. The charge was one of selling goods on a Sunday in violation of the federal Lord's Day Act. The Supreme Court of Canada held that the Lord's Day Act violated s. 2(a) of the Charter, because the purpose of the Act was to compel the observance of the Christian sabbath. It was irrelevant whether a corporation could enjoy or exercise freedom of religion. The law was unconstitutional because it abridged the right of *individuals* to freedom of religion. Therefore, the law was of no force or effect

43 [1997] 1 S.C.R. 358.

44 [1985] 1 S.C.R. 295. The opinion of Dickson J. was agreed to by all members of the Court, except Wilson J., who wrote a separate concurring opinion, disagreeing with one part of Dickson J.'s opinion. On the issue discussed here, the Court was unanimous.

by virtue of the supremacy clause of s. 52. The "undoubted corollary" of the principle that the Constitution is supreme is that "no one can be convicted of an offence under an unconstitutional law".[45] It followed that "any accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid".[46] The Court held that the Lord's Day Act was unconstitutional, and acquitted the accused corporation.

Big M Drug Mart establishes the rule that a defendant to a criminal charge may raise any constitutional defect in the law under which the charge was laid. This redounded to the benefit of a corporation in that case, but the rule applies to individuals as well. In *Big M Drug Mart* itself, Dickson J. gave the example of an "accused atheist", who "would be equally entitled to resist a charge under the Act".[47] In *R. v. Morgentaler (No. 2)* (1988),[48] a male doctor, who was charged under the abortion provisions of the Criminal Code, successfully defended the charge on the ground that the abortion provisions violated the Charter rights of pregnant women. Similarly, an individual would be entitled to defend a charge laid under a discriminatory law that was invalid under s. 15, even though the defendant was not one of the persons discriminated against.[49] As McLachlin J. has said:[50]

> Any constitutional defect may be raised in the defence of a criminal charge. This is only just. A person should not be convicted under an invalid law.

The Court in *Big M Drug Mart* pointed out that the defendant corporation was not seeking a special Charter remedy under s. 24. Under s. 24, it would be necessary for the corporation to show that its rights had been infringed or denied.[51] Therefore, no remedy under s. 24 would be available to a corporation for the infringement or denial of rights, such as freedom of religion, that do not extend to a corporation. The same rule would apply to individuals who are not within the class of persons protected by a right, such as the atheist in Dickson J.'s example; they too could not invoke s. 24. But, as Dickson J. pointed out: "Where, as here [that is, in *Big M Drug Mart*], the challenge is based on the unconstitutionality of legislation, recourse to s. 24 is unnecessary and the particular effect

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45 *Id.*, 313.

46 *Id.*, 313-314.

47 *Id.*, 314.

48 [1988] 1 S.C.R. 30.

49 *R. v. Hess* [1990] 2 S.C.R. 906, 945 per McLachlin J. dissenting but not on this point.

50 *Ibid.* Compare *Boggs v. The Queen* [1981] 1 S.C.R. 49 (accused successfully claimed that offence of driving while suspended was not a valid criminal law on the ground that suspension could occur for such reasons as non-payment of licence fees, although accused's suspension was for impaired driving); *R. v. Smith* [1987] 1 S.C.R. 1045 (convicted drug importer successfully attacked minimum sentence on ground that it would be cruel and unusual in some hypothetical case, although the accused's own situation merited a severe sentence).

51 See ch. 40, Enforcement of Rights, under heading 40.2(d), "Standing", above.

on the challenging party is irrelevant".[52] The Court thus excluded the s. 24 remedy from the rule of *Big M Drug Mart*, but did not otherwise indicate when corporations could invoke Charter rights that do not apply to corporations.

In *Irwin Toy v. Quebec* (1989),[53] a corporation, Irwin Toy Ltd., applied for a declaration that a Quebec law, which prohibited advertising that was directed at children, was unconstitutional. The declaration was sought on a number of constitutional grounds, all of which were unsuccessful. For present purposes, the point of interest was the Court's response to the corporation's argument that the law infringed s. 7 of the Charter. Section 7 provides that "everyone" has the right to "life, liberty and the security of the person", and the right not to be deprived thereof except in accordance with the principles of fundamental justice. The Court refused to address this argument on the merits, because a corporation by its nature could not enjoy "life, liberty or security of the person", and therefore could not invoke s. 7 in support of its declaration of invalidity.[54] The Court distinguished its earlier decision in *Big M Drug Mart*: "There are no penal proceedings pending in the case at hand, so the principle articulated in *Big M Drug Mart* is not involved".[55]

What are the limits of "the principle articulated in *Big M Drug Mart*"? It is clear that the principle catches the case where a corporation is charged with a criminal offence. In *R. v. Wholesale Travel Group* (1991),[56] a corporation was allowed to invoke s. 7 as a defence to a charge of false advertising laid under the federal Competition Act. The Supreme Court of Canada did in fact strike down one element of the offence — a requirement that the defendant make a timely retraction of the false claim — on the ground that it created the potential for absolute (no-fault) liability in breach of s. 7. Although s. 7 did not apply to corporations, the corporation was entitled to attack the law under s. 7, because the law applied to individuals as well as corporations, and was capable of depriving an individual of his or her liberty (imprisonment being a possible penalty for an individual under the law).[57] Lamer C.J., who spoke for the entire Court on this

52 [1985] 1 S.C.R. 295, 313.

53 [1989] 1 S.C.R. 927. The joint opinion of Dickson C.J., Lamer and Wilson JJ. is the majority opinion. McIntyre J., with whom Beetz J. agreed, wrote a dissenting opinion.

54 *Id.*, 1004 per joint opinion of majority; McIntyre J. for the minority (at 1009) agreed that s. 7 could not be invoked by the plaintiff corporation.

55 *Ibid. Irwin Toy* was followed in *Dywidag Systems v. Zutphen Bros.* [1990] 1 S.C.R. 705, 709 (refusing to allow a corporation to invoke s. 7 in non-penal proceedings). But note the obscure dictum of Stevenson J. for the Court in *R. v. CIP* [1992] 1 S.C.R. 843, 852: "In *Irwin Toy* it was not the absence of penal proceedings per se that precluded the respondent corporation from invoking s. 7".

56 [1991] 3 S.C.R. 154.

57 Accord, *Ont. v. CP* [1995] 2 S.C.R. 1031 (allowing a corporation to argue that environmental law with sanction of imprisonment was void for overbreadth and vagueness under s. 7; both arguments were rejected on the merits).

issue,[58] rejected the argument that a law could be unconstitutional for individuals but constitutional for corporations.[59] He added, in an obiter dictum,[60] that, if a statutory provision were drafted so as to apply only to corporations, a corporation would not be able to challenge the law under s. 7.[61] This would follow, because there would no longer be any threat of imprisonment, and therefore no deprivation of "liberty". (The same result would follow if a provision were left applicable to individuals as well as corporations, but was made punishable only by fine.)[62]

The principle of *Big M Drug Mart* also catches the case where a corporation is the defendant in a civil suit brought by government to enforce a regulatory scheme. This extension of the principle was established in *Canadian Egg Marketing Agency v. Richardson* (1998).[63] In that case, two corporations that produced eggs in the Northwest Territories challenged a federal law that had the effect of prohibiting egg producers in the territories from selling their eggs outside the territory of production. The corporations had been marketing their eggs outside the territory in defiance of the federal law. The issue came to court when the Canadian Egg Marketing Agency, an agency established by federal law to supervise the marketing of eggs in interprovincial and international trade, brought a civil suit against the corporations claiming an injunction to compel them to observe the law and damages. The corporations argued that the federal law was a breach of freedom of association under s. 2(d) of the Charter and of mobility rights under s. 6 of the Charter. Since both these rights were available only to individuals,[64] the question was whether the corporations could invoke the rights in defence of the civil suit. The Supreme Court of Canada held that, although the corporations were not facing criminal proceedings, they were facing coercive remedies at the suit of the state, and they ought to have the same right as criminal defendants to attack what they regarded as an unconstitutional law. They were therefore granted standing to make the constitutional arguments (which were, however, rejected on the merits).

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58 All judges, except for Cory, J. (with whom L'Heureux-Dubé J. agreed) said that they agreed with Lamer C.J. on the issue of standing, and the Court was unanimous in striking down the timely retraction provision for breach of s. 7 at the instance of the corporation.

59 [1991] 3 S.C.R. 154, 180-181.

60 *Id.*, 182.

61 McLachlin J., while generally agreeing with Lamer C.J. on the issue of standing, added (at 260) that she found it unnecessary to consider "the application of the Charter to a provision dealing with corporations only".

62 This method of salvaging a statute that violates s. 7 could be employed by the Court itself. Instead of striking down the substantive offence, the Court could simply strike down the penalty of imprisonment. Or the Court could hold that imprisonment is available only if the prosecution establishes a fault-requirement that would satisfy s. 7 (even though the statute does not require it); otherwise, imprisonment is not available. Both these approaches would be more restrained, preserving more of the statute, than the striking down of the offence.

63 [1998] 3 S.C.R. 157. The Court was unanimous on the standing issue.

64 *Id.*, para. 32, apparently assuming this point without discussion.

The difference between the *Canadian Egg Marketing Agency (CEMA)* case, where the corporation was allowed to invoke the individual's Charter right, and *Irwin Toy*, where the corporation was not allowed to invoke the individual's Charter right, is that the corporation in *CEMA* was brought involuntarily before the court by an agency of government, whereas the corporation in *Irwin Toy* voluntarily brought proceedings for a remedy against the government. But why should this difference be important? The plaintiff corporation in *Irwin Toy* was not relying on s. 24 of the Charter for its remedy. The corporation was simply seeking a declaration that the law was unconstitutional. It has always been regarded as axiomatic in Canadian constitutional law that an individual or corporation may seek a declaration of invalidity on *federal* grounds, despite the fact that no individual or corporation is directly implicated in the question whether a law should properly be enacted by one level of government rather than the other.[65] Indeed, in *Irwin Toy* itself, the plaintiff corporation, in addition to Charter grounds, attacked the law on a federal ground (that the provincial law could not apply to advertising in the federal medium of television), and the Court without any preliminary discussion addressed that ground on the merits (rejecting it in the result).

It is difficult to see what principle allows a plaintiff to bring an action for a declaration of invalidity on federal grounds, but not on Charter grounds. Assuming that the plaintiff has a sufficient interest in the validity of the law, which evidently was the case in *Irwin Toy* where the plaintiff's business of manufacturing and selling toys would be especially affected by the law, the plaintiff ought to be able to obtain a declaration that the law is unconstitutional on the basis of any part of the Constitution. To be sure, the plaintiff corporation in *Irwin Toy* could deliberately flout the law so as to bring on a prosecution. Then *Big M Drug Mart* would apply, and the corporation would be entitled to defend the charge on the basis of s. 7 or any other Charter right, whether or not it applied to a corporation. But why should the corporation have to subject itself to criminal proceedings in order to eradicate an invalid law? The principle of constitutionalism is surely offended by the erection of artificial barriers to constitutional challenges to legislation. At the very least, there should be no difference between federal and Charter grounds. Both grounds have the effect of withholding power from legislative bodies, and both grounds lead to invalidity under the supremacy clause.

The correct principle, it seems to me, is that a challenge to the constitutionality of a law (assuming that it involves no remedy other than a finding of invalidity) should be governed by the same rules of standing and procedure,

65 The leading case is *A.G. Can. v. Law Society of B.C.* [1982] 2 S.C.R. 307, holding that the superior courts cannot be deprived of their powers to grant declarations of invalidity at the suit of private individuals. See also the earlier discussion accompanying note 41, above.

regardless of whether the challenge is based on federal or Charter grounds.[66] This would mean not only that the challenge could be made as a defence to a criminal charge (as in *Big M Drug Mart*), but in any other proceedings, civil or criminal, where the law is potentially relevant, including proceedings for a declaration of invalidity.[67] However, unless and until the Supreme Court of Canada repents of its ruling in *Irwin Toy*, the position seems to be as follows. The general rule of *Irwin Toy* is that a Charter right that invalidates a law may be invoked by a person affected by the law only if the person affected by the law is also a person entitled to the benefit of the Charter right. If the person affected by the law is not entitled to the benefit of the Charter right, then the general rule will preclude the person from challenging the law, except where the person is the defendant in criminal or civil proceedings brought to enforce the law. In those cases, the *Big M Drug Mart* exception to the general rule will apply to prevent the person from suffering criminal or civil sanctions under the unconstitutional law.

59.3 Mootness

(a) Definition of mootness

A case is "moot" when there is no longer any dispute between the parties.[68] Mootness is like an absence of standing in that the court is being invited to rule on an issue that has no direct impact on the parties to the proceedings. The difference is that standing is judged at the commencement of the proceedings, whereas mootness is judged after the commencement of the proceedings. The parties to a moot case had a real dispute when the proceedings commenced, but the passage of time caused the dispute to disappear. A case becomes moot when

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66 In *R. v. Big M Drug Mart* [1985] 1 S.C.R. 295, 313, Dickson J. said:

> Standing and jurisdiction to challenge the validity of a law pursuant to which one is being prosecuted is the same regardless of whether that challenge is with respect to ss. 91 and 92 of the Constitution Act, 1867 or with respect to the limits imposed on the legislatures by the Constitution Act, 1982.

With respect, this seems to me to be correct, except for the phrase "pursuant to which one is being prosecuted". Why should the rule be limited to that situation?

67 This passage from the 3rd edition (1992) was approved by L'Heureux-Dubé J., dissenting with McLachlin J., in *Hy and Zel's v. Ont.* [1993] 3 S.C.R. 675, 715; the majority did not address this point, although it is clear by implication that they must have rejected it, since they required the plaintiffs to satisfy the requirements of public interest standing. For discussion, see R.S. Kay, "Jus tertii Standing and Constitutional Review in Canada" (1997) 7 Nat. J. Con. L. 129.

68 See P. Macklem and E. Gertner, "Re Skapinker and the Mootness Doctrine" (1984) 6 Supreme Court L. Rev. 369; Sharpe, note 8, above, ch. 12 (by Sharpe); Strayer, note 8, above, 211-215; Sossin, note 8, above, ch. 3; Lokan and Dassios, note 6, above, ch. 3. For the (more restrictive) law of the United States, see Tribe, note 8, above, 344-361.

there are factual issues in addition to legal issues, judges are often reluctant to further complicate the trial process by granting intervener status.

59.7 Costs

(a) Costs awards in constitutional cases

Costs are the costs of litigation, namely, court fees, counsel fees and other expenses. In Canada, following the English practice, in civil proceedings,[127] the general rule is that "costs follow the event", meaning that at the conclusion of the proceedings the presiding judge will normally order the unsuccessful party to pay the costs of the successful party. At common law, in proceedings against the Crown, the Crown neither received nor paid the other side's costs. Blackstone explained that "as it is his [the King's] prerogative not to pay them to a subject, so it is beneath his dignity to receive them".[128] This Crown immunity has been abolished in all Canadian jurisdictions by the Crown proceedings statutes that regulate proceedings against the Crown, and the Crown is now subject to the same rules respecting costs as a private party.[129]

While costs are generally awarded against the unsuccessful party, requiring that party to pay the costs of the successful party, the trial judge has a discretion to depart from the general rule. A common exercise of judicial discretion is to make no award of costs, which leaves the parties to bear their own costs. In constitutional cases that are won by the Crown, the court often makes no costs award, on the theory that the unsuccessful party has made a contribution to the public weal by litigating an important constitutional point (albeit unsuccessfully). On this theory, the unsuccessful party, which already bears the burden of its own costs, should not have to bear the additional burden of the Crown's costs. Besides (although this is never mentioned), the Crown has a deep pocket.

An unusual exercise of judicial discretion in a constitutional case that was won by the Crown was to require the Crown to pay the costs of the unsuccessful party. That was the costs award in *B. (R.) v. Children's Aid Society* (1995),[130] a case

(sometimes with some academic help), who then try and persuade professors to sign on. Fallon argues that the briefs have not always been prepared in accordance with the norms of scholarly integrity that should characterize truly academic scholarship, and that some professors (attracted by the hope of influencing a desired development in the law) sign on too readily. This practice has not migrated to Canada, and Fallon's article signals caution in allowing the practice to develop in Canada. In any event, the extra paper that it generates is unlikely to be welcome in the Supreme Court of Canada in view of the Court's control over intervention and its limits on the length of factums (briefs).

127 In criminal proceedings, while the judge has power to make a costs award, the prevailing convention is that no award is normally made, either to the defendant (in case of acquittal) or to the Crown (in case of conviction). For critique, see K. Jull, "Costs, the Charter and Regulatory Offences: the Price of Fairness" (2002) 81 Can. Bar Rev. 646.

128 W. Blackstone, *Commentaries on the Laws of England* (Oxford at Clarendon, 1768), book 3, ch. 24, 400.

129 Hogg, Monahan and Wright, *Liability of the Crown* (4th ed., 2011), sec. 4.3.

where parents (who were Jehovah's Witnesses) argued unsuccessfully that a blood transfusion given to their daughter against their wishes was a violation of their Charter rights. The trial judge awarded costs against the Crown, although it was the successful party. In the Supreme Court, La Forest J., for the majority, described the award as "highly unusual", but said (without elaboration) that that the case "raised special and peculiar problems".[131] On this basis, he allowed the award to stand.

(b) Advance costs

A radical inroad into the deep pocket of the Crown is an award of "advance costs" (or "interim costs"), ordering the Crown to pay the costs of a person suing it, and to do so in advance of the trial and regardless of the ultimate outcome.[132] This innovation came in *British Columbia v. Okanagan Indian Band* (2003).[133] In that case, four Indian bands were logging on Crown land without a licence from the provincial government. The government served the bands with stop-work orders, and when logging continued commenced proceedings to enforce the orders. The bands claimed that they had aboriginal title over the land, and that the statutory requirement of a licence was unconstitutional. The bands applied for an advance costs award to require the Crown to finance the bands' defence of the Crown's enforcement proceedings. The trial judge refused to make the award on the ground that there was no precedent for such an award, and the award if made would appear to be prejudging the outcome of the case. On appeal, the Court of Appeal granted the advance costs award, and that decision was affirmed by the Supreme Court of Canada. LeBel J., for the six-judge majority of the Supreme Court held that three criteria had to be present in order to justify an advance costs award against the Crown in what he described as "public interest litigation": (1) the applicants must be unable to afford to pay for the litigation; (2) the applicants must have a "prima facie meritorious" case; and (3) the case must raise issues of "public importance".[134] Since all three criteria were present in this case, the trial judge had a discretion to order that the impecunious party's costs be paid in advance by the Crown, and he fell into error in not making that order. Major J., writing for the three-judge dissenting minority, thought the trial judge's reasons for refusing the award were correct. He described the award as "a form of

130 [1995] 1 S.C.R. 315.
131 *Id., para.* 122.
132 Horsman and Morley (eds.), *Government Liability* (2006, annually supplemented), sec. 12.30.40(1). A less radical order that can be made in advance of a trial is a "protective" order, which guarantees the public-interest claimant that no costs order will be made against the claimant at the conclusion of the proceedings. Of course, that does not finance the proceedings; it merely mitigates the risk of loss.
133 [2003] 3 S.C.R. 371. LeBel J. wrote for a six-judge majority; Major J. wrote for a three-judge dissenting minority.
134 *Id.*,para.40.

The Modern Senate of Canada

1925-1963

A RE-APPRAISAL

F. A. Kunz

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particularly the case during the second half of the St. Laurent Administration, when the Prime Minister was faced with the disturbing phenomenon of a growing political disequilibrium in the Senate's membership.

The maintenance, to be sure, of the specified number of members in the Senate was very carefully provided for by the wording of two sections of the BNA Act. In addition to section 24, which provides for the appointment of Senators, section 32 says: "When a vacancy happens in the Senate, by resignation, death, or otherwise, the Governor General shall by summons to a fit and qualified person fill the vacancy." The reason that the Senate does not have a provision similar to the one in force in the House of Commons regarding a time limit within which vacancies must be filled is that the constitution itself is so clear and plain upon that subject. It distinctly says that appointments shall (not "may") be made when vacancies occur. This certainly does not mean the moment they occur because that would be impracticable. The principle in interpreting directory words of this kind is that action must be taken within a reasonable time.[106]

However, this rule seems to have had no effect upon the actions of Prime Ministers. Prior to the election of 1930 all the Senate vacancies were filled. In the eighteenth Parliament, 1930–35, under the Bennett Administration, there was an accumulation of nineteen vacancies in the Senate. They were filled before the general election. In the next Parliament, under the King Government, there was an accumulation of fourteen vacancies. Again, all but one—that one in Quebec—were filled before the general election of 1940. The Parliament of 1940–45 saw the accumulation of eighteen vacancies. All but one, in Nova Scotia, were filled before the election in that year. All those vacancies occurred under the King Administration, except the one in Nova Scotia. In the next Parliament of 1945–49, there was an accumulation of eleven vacancies. Only three were filled before the election and eight remained unfilled. By 1953 the number of vacancies increased to twenty-three, approaching one-quarter of the normal membership of the Senate; ten were filled before the election of 1953 and thirteen were left vacant. In 1955 the number of vacancies reached twenty-one with the gloomy prospect of climbing higher towards the end of that Parliament. They applied to all of Canada, with the exception of British Columbia and Saskatchewan; there were one in Alberta, two in Manitoba, three in Ontario, four in New Brunswick, three in Nova Scotia, one in Prince Edward Island,

[106]See Mr. MacLean's (PC, Queens) argument. *Ibid.*, p. 5482.

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PARLINFO

PARTY STANDINGS IN THE SENATE

This list is intended to reflect day-to-day events. **For confirmation of official party standings** in the Senate, click here.

Selected Link:
Women Candidates in General Elections

SEARCH CRITERIA

Houses of Parliament: Senate

Gender: -- ALL --

Province / Territory	C.P.C.	Lib.	Ind.	Ind. P.C.	Vacant	Total Seats
Alberta	3	2		1		**6**
British Columbia	3	2			1	**6**
Manitoba	2	1			3	**6**
New Brunswick	5	3			2	**10**
Newfoundland and Labrador	4	2				**6**
Northwest Territories		1				**1**
Nova Scotia	4	4			2	**10**
Nunavut	1					**1**
Ontario	11	4	2		7	**24**
Prince Edward Island		2	1		1	**4**
Quebec	10	6	2		6	**24**
Saskatchewan	3	2	1			**6**
Yukon	1					**1**
Total	**47**	**29**	**6**	**1**	**22**	**105**

CHANGES TO PARTY STANDINGS SINCE LAST GENERAL ELECTION (2011.05.02)

Date	Change
2015.07.04	Senator: LeBreton, Marjory Political Affiliation: Conservative Party of Canada Retirement
2015.06.30	Senator: Fortin-Duplessis, Suzanne Political Affiliation: Conservative Party of Canada Retirement
2015.06.17	Senator: Meredith, Don Political Affiliation: Conservative Party of Canada Party Change
2015.06.04	Senator: Boisvenu, Pierre-Hugues Political Affiliation: Conservative Party of Canada Party Change
2015.04.23	Senator: Nolin, Pierre Claude Political Affiliation: Conservative Party of Canada Passed away
2015.04.17	Senator: Charette-Poulin, Marie-P. Political Affiliation: Liberal Party of Canada

	Resignation
2015.01.31	Senator: Rivest, Jean-Claude Political Affiliation: Independent Resignation
2014.12.15	Senator: Seth, Asha Political Affiliation: Conservative Party of Canada Retirement
2014.12.01	Senator: Robichaud, Fernand Political Affiliation: Liberal Party of Canada Retirement
2014.11.27	Senator: Kinsella, Noël A. Political Affiliation: Conservative Party of Canada Resignation
2014.08.10	Senator: Buth, JoAnne L. Political Affiliation: Conservative Party of Canada Resignation
2014.07.25	Senator: Callbeck, Catherine S. Political Affiliation: Liberal Party of Canada Retirement
2014.07.17	Senator: Champagne, Andrée Political Affiliation: Conservative Party of Canada Retirement
2014.06.30	Senator: Kenny, Colin Political Affiliation: Independent Party Change
2014.06.17	Senator: Dallaire, Roméo A. Political Affiliation: Liberal Party of Canada Resignation
2014.06.15	Senator: Segal, Hugh Political Affiliation: Conservative Party of Canada Resignation
2013.11.30	Senator: Comeau, Gerald J. Political Affiliation: Conservative Party of Canada Resignation
2013.11.30	Senator: Braley, David Political Affiliation: Conservative Party of Canada Resignation
2013.11.22	Senator: Kenny, Colin Political Affiliation: Liberal Party of Canada Party Change
2013.11.16	Senator: Oliver, Donald H. Political Affiliation: Conservative Party of Canada Retirement
2013.08.26	Senator: Harb, Mac Political Affiliation: Independent Resignation

2013.08.02	Senator: De Bané, Pierre Political Affiliation: Liberal Party of Canada Retirement
2013.08.02	Senator: Zimmer, Rod A. A. Political Affiliation: Liberal Party of Canada Resignation
2013.05.17	Senator: Wallin, Pamela Political Affiliation: Conservative Party of Canada Party Change
2013.05.16	Senator: Duffy, Michael Political Affiliation: Conservative Party of Canada Party Change
2013.05.11	Senator: Finley, Doug Political Affiliation: Conservative Party of Canada Death
2013.05.10	Senator: Harb, Mac Political Affiliation: Liberal Party of Canada Party Change
2013.03.25	Senator: Tannas, Scott Political Affiliation: Conservative Party of Canada Appointed
2013.03.22	Senator: Brown, Bert Political Affiliation: Conservative Party of Canada Retirement
2013.03.16	Senator: Stratton, Terry Political Affiliation: Conservative Party of Canada Retirement
2013.02.11	Senator: McCoy, Elaine Political Affiliation: Progressive Conservative Party Party Change
2013.02.07	Senator: Brazeau, Patrick Political Affiliation: Conservative Party of Canada Party Change
2013.01.25	Senator: Oh, Victor Political Affiliation: Conservative Party of Canada Appointed
2013.01.25	Senator: Batters, Denise Political Affiliation: Conservative Party of Canada Appointed
2013.01.25	Senator: Wells, David M. Political Affiliation: Conservative Party of Canada Appointed
2013.01.25	Senator: Beyak, Lynn Political Affiliation: Conservative Party of Canada Appointed

2013.01.25	Senator: Black, Douglas Political Affiliation: Conservative Party of Canada Appointed
2013.01.18	Senator: Fairbairn, Joyce Political Affiliation: Liberal Party of Canada Resignation
2013.01.10	Senator: Mahovlich, Frank W. Political Affiliation: Liberal Party of Canada Retirement
2012.11.06	Senator: St. Germain, Gerry Political Affiliation: Conservative Party of Canada Retirement
2012.10.19	Senator: Peterson, Robert W. Political Affiliation: Liberal Party of Canada Retirement
2012.09.23	Senator: Cochrane, Ethel M. Political Affiliation: Conservative Party of Canada Retirement
2012.09.17	Senator: Poy, Vivienne Political Affiliation: Liberal Party of Canada Resignation
2012.09.06	Senator: Bellemare, Diane Political Affiliation: Conservative Party of Canada Appointed
2012.09.06	Senator: Ngo, Thanh Hai Political Affiliation: Conservative Party of Canada Appointed
2012.09.06	Senator: Enverga, Jr., Tobias C. Political Affiliation: Conservative Party of Canada Appointed
2012.09.06	Senator: McInnis, Thomas Johnson Political Affiliation: Conservative Party of Canada Appointed
2012.09.06	Senator: McIntyre, Paul E. Political Affiliation: Conservative Party of Canada Appointed
2012.07.21	Senator: Angus, W. David Political Affiliation: Conservative Party of Canada Retirement
2012.06.30	Senator: Di Nino, Consiglio Political Affiliation: Conservative Party of Canada Resignation
2012.06.18	Senator: Losier-Cool, Rose-Marie Political Affiliation: Liberal Party of Canada Retirement

2012.02.20	Senator: White, Vernon Political Affiliation: Conservative Party of Canada Appointed
2012.02.09	Senator: Dickson, Fred Political Affiliation: Conservative Party of Canada Death
2012.02.06	Senator: Meighen, Michael A. Political Affiliation: Conservative Party of Canada Resignation
2012.01.17	Senator: Dagenais, Jean-Guy Political Affiliation: Conservative Party of Canada Appointed
2012.01.06	Senator: Doyle, Norman E. Political Affiliation: Conservative Party of Canada Appointed
2012.01.06	Senator: Unger, Betty E. Political Affiliation: Conservative Party of Canada Appointed
2012.01.06	Senator: Seth, Asha Political Affiliation: Conservative Party of Canada Appointed
2012.01.06	Senator: Maltais, Ghislain Political Affiliation: Conservative Party of Canada Appointed
2012.01.06	Senator: Buth, JoAnne L. Political Affiliation: Conservative Party of Canada Appointed
2011.12.17	Senator: Banks, Tommy Political Affiliation: Liberal Party of Canada Retirement
2011.12.02	Senator: Fox, Francis Political Affiliation: Liberal Party of Canada Resignation
2011.10.17	Senator: Carstairs, Sharon Political Affiliation: Liberal Party of Canada Resignation
2011.09.26	Senator: Murray, Lowell Political Affiliation: Progressive Conservative Party Retirement
2011.09.21	Senator: Kochhar, Vim Political Affiliation: Conservative Party of Canada Retirement
2011.09.07	Senator: Pépin, Lucie Political Affiliation: Liberal Party of Canada Retirement

2011.06.13	Senator: Verner, Josée Political Affiliation: Conservative Party of Canada Appointed
2011.05.25	Senator: Manning, Fabian Political Affiliation: Conservative Party of Canada Appointed
2011.05.25	Senator: Smith, Larry Political Affiliation: Conservative Party of Canada Appointed
2011.05.13	Senator: Rompkey, Bill Political Affiliation: Liberal Party of Canada Retirement

PARLINFO

PARTY STANDINGS (1867 TO DATE) In the Senate

SEARCH CRITERIA

Houses of Parliament: Senate

41ST PARLIAMENT (2011.06.02 - 2015.08.02)

Date	C.P.C.	Lib.	Ind.	P.C.	Ind. P.C.	Vac.	Total
2015.08.02 *(Dissolution)*	47	29	6	0	1	22	105
2015.07.04	47	29	6	0	1	22	105
2015.06.30	48	29	6	0	1	21	105
2015.06.17	49	29	6	0	1	20	105
2015.06.04	50	29	5	0	1	20	105
2015.04.23	51	29	4	0	1	20	105
2015.04.17	52	29	4	0	1	19	105
2015.01.31	52	30	4	0	1	18	105
2014.12.15	52	30	5	0	1	17	105
2014.12.01	53	30	5	0	1	16	105
2014.11.27	53	31	5	0	1	15	105
2014.08.10	54	31	5	0	1	14	105
2014.07.25	55	31	5	0	1	13	105
2014.07.17	55	32	5	0	1	12	105
2014.06.30	56	32	5	0	1	11	105
2014.06.17	56	31	6	0	1	11	105
2014.06.15	56	32	6	0	1	10	105
2013.11.30	57	32	6	0	1	9	105
2013.11.22	59	32	6	0	1	7	105
2013.11.16	59	33	5	0	1	7	105
2013.08.26	60	33	5	0	1	6	105
2013.08.02	60	33	6	0	1	5	105
2013.05.17	60	35	6	0	1	3	105
2013.05.16	61	35	5	0	1	3	105
2013.05.11	62	35	4	0	1	3	105
2013.05.10	63	35	4	0	1	2	105
2013.03.25	63	36	3	0	1	2	105
2013.03.22	62	36	3	0	1	3	105
2013.03.16	63	36	3	0	1	2	105
2013.02.11	64	36	3	0	1	1	105
2013.02.07	64	36	3	1	0	1	105
2013.01.25	65	36	2	1	0	1	105
2013.01.18	60	36	2	1	0	6	105
2013.01.10	60	37	2	1	0	5	105
2012.11.06	60	38	2	1	0	4	105
2012.10.19	61	38	2	1	0	3	105
2012.09.23	61	39	2	1	0	2	105
2012.09.17	62	39	2	1	0	1	105
2012.09.06	62	40	2	1	0	0	105
2012.07.21	57	40	2	1	0	5	105
2012.06.30	58	40	2	1	0	4	105
2012.06.18	59	40	2	1	0	3	105
2012.02.20	59	41	2	1	0	2	105
2012.02.09	58	41	2	1	0	3	105
2012.02.06	59	41	2	1	0	2	105
2012.01.17	60	41	2	1	0	1	105

2012.01.06	59	41	2	1	0	2	105
2011.12.17	54	41	2	1	0	7	105
2011.12.02	54	42	2	1	0	6	105
2011.10.17	54	43	2	1	0	5	105
2011.09.26	54	44	2	1	0	4	105
2011.09.21	54	44	2	2	0	3	105
2011.09.07	55	44	2	2	0	2	105
2011.06.13	55	45	2	2	0	1	105
2011.05.25	54	45	2	2	0	2	105
2011.05.13	52	45	2	2	0	4	105
2011.05.02 *(Election)*	52	46	2	2	0	3	105

Changes to party standings

40TH PARLIAMENT (2008.11.18 - 2011.03.26)

Date	Lib.	C.P.C.	Ind.	P.C.	Ind. N.D.P.	Non aligned	Vac.	Total
2011.03.28	46	52	2	2	0	0	3	105
2011.03.26 *(Dissolution)*	46	53	2	2	0	0	2	105
2011.03.25	46	53	2	2	0	0	2	105
2011.03.21	46	54	2	2	0	0	1	105
2010.12.18	47	54	2	2	0	0	0	105
2010.12.06	47	52	2	2	0	0	2	105
2010.11.29	48	52	2	2	0	0	1	105
2010.07.09	49	52	2	2	0	0	0	105
2010.07.08	49	51	2	2	0	0	1	105
2010.06.01	49	51	1	2	0	1	1	105
2010.05.20	49	51	2	2	0	1	0	105
2010.05.17	49	50	2	2	0	1	1	105
2010.02.28	49	51	2	2	0	1	0	105
2010.01.29	49	50	2	2	0	1	1	105
2010.01.02	49	46	2	2	0	1	5	105
2009.12.13	50	46	2	2	0	1	4	105
2009.11.30	51	46	2	2	0	1	3	105
2009.10.31	51	46	3	2	0	1	2	105
2009.10.06	52	46	3	2	0	1	1	105
2009.08.27	53	46	3	2	0	1	0	105
2009.08.25	53	37	3	2	0	1	9	105
2009.08.02	54	37	3	2	0	1	8	105
2009.07.12	55	37	3	2	0	1	7	105
2009.06.27	55	38	4	2	0	1	5	105
2009.06.22	55	38	4	3	0	1	4	105
2009.05.11	56	38	4	3	0	1	3	105
2009.03.28	57	38	4	3	0	1	2	105
2009.03.16	58	38	4	3	0	1	1	105
2009.01.15	59	38	4	3	0	1	0	105
2009.01.14	58	38	4	3	1	1	0	105
2009.01.08	58	37	4	3	1	1	1	105
2009.01.02	58	35	4	3	1	1	3	105
2008.11.10	58	20	4	3	1	1	18	105
2008.10.22	58	21	4	3	1	1	17	105
2008.10.14 *(Election)*	59	21	4	3	1	1	16	105

Changes to party standings

39TH PARLIAMENT (2006.04.03 - 2008.09.07)

Date	Lib.	C.P.C.	Ind.	P.C.	Non aligned	Ind. N.D.P.	N.D.P.	Vac.	Total
2008.09.08	59	21	4	3	1	1	0	16	105
2008.09.07 *(Dissolution)*	59	22	4	3	1	1	0	15	105
2008.08.26	59	22	4	3	1	1	0	15	105
2008.02.04	60	22	4	3	1	1	0	14	105
2008.01.31	61	22	4	3	1	1	0	13	105
2007.12.13	61	23	4	3	1	1	0	12	105
2007.07.10	61	24	4	3	0	1	0	12	105

2007.06.30	61	23	4	3	0	1	0	13	105
2007.03.02	62	23	4	3	0	1	0	12	105
2006.12.31	63	23	4	3	0	1	0	11	105
2006.10.31	64	23	4	3	0	1	0	10	105
2006.09.21	65	23	4	3	0	0	1	9	105
2006.06.09	65	23	5	3	0	0	1	8	105
2006.04.28	65	24	5	3	0	0	1	7	105
2006.04.22	66	24	5	3	0	0	1	6	105
2006.03.28	66	25	5	3	0	0	1	5	105
2006.02.27	66	24	5	4	0	0	1	5	105
2006.02.01	66	23	5	4	0	0	1	6	105
2006.01.23 *(Election)*	67	23	5	4	0	0	1	5	105

Changes to party standings

38TH PARLIAMENT (2004.10.04 - 2005.11.29)

Date	Lib.	C.P.C.	P.C.	Ind.	N.D.P.	Vac.	Total
2005.12.27	67	23	4	5	1	5	105
2005.11.29 *(Dissolution)*	67	23	5	5	1	4	105
2005.11.16	67	23	5	5	1	4	105
2005.10.02	68	23	5	5	1	3	105
2005.09.21	68	24	5	5	1	2	105
2005.08.29	67	24	5	5	1	3	105
2005.08.02	65	24	5	5	1	5	105
2005.07.15	62	22	5	5	1	10	105
2005.06.29	63	22	5	5	1	9	105
2005.06.19	64	22	5	5	1	8	105
2005.03.24	64	23	5	5	1	7	105
2005.01.04	58	23	3	5	0	16	105
2004.11.28	59	23	3	5	0	15	105
2004.11.21	60	23	3	5	0	14	105
2004.10.22	61	23	3	5	0	13	105
2004.09.24	62	23	3	5	0	12	105
2004.08.31	64	23	3	5	0	10	105
2004.07.14	64	24	3	4	0	10	105
2004.06.28 *(Election)*	64	25	3	4	0	9	105

Changes to party standings

37TH PARLIAMENT (2001.01.29 - 2004.05.23)

Date	Lib.	P.C.	C.P.C.	Ind.	C.A.	Vac.	Total
2004.06.14	64	3	25	4	0	9	105
2004.06.08	64	3	25	5	0	8	105
2004.05.23 *(Dissolution)*	65	3	24	5	0	8	105
2004.05.21	65	3	25	5	0	7	105
2004.04.15	66	3	25	5	0	6	105
2004.02.08	66	3	26	5	0	5	105
2004.02.04	67	3	26	5	0	4	105
2004.02.03	66	3	26	6	0	4	105
2004.02.02	66	3	27	5	0	4	105
2004.01.31	66	29	0	5	1	4	105
2004.01.18	67	29	0	5	1	3	105
2003.12.10	68	29	0	5	1	2	105
2003.11.07	67	29	0	5	1	3	105
2003.09.10	66	29	0	5	1	4	105
2003.09.09	66	30	0	5	1	3	105
2003.07.03	64	30	0	4	1	6	105
2003.06.26	65	30	0	4	1	5	105
2002.12.12	63	30	0	4	1	7	105
2002.11.17	60	30	0	4	1	10	105
2002.09.30	61	30	0	4	1	9	105
2002.06.25	62	30	0	4	1	8	105
2002.06.16	61	30	0	4	1	9	105

2002.04.08	62	30	0	4	1	8	105
2002.03.26	62	30	0	5	1	7	105
2002.01.28	60	30	0	5	1	9	105
2002.01.15	61	30	0	5	1	8	105
2001.10.04	60	30	0	5	1	9	105
2001.08.11	57	30	0	5	1	12	105
2001.08.09	58	30	0	5	1	11	105
2001.07.23	58	31	0	5	1	10	105
2001.06.16	58	32	0	5	1	9	105
2001.06.13	58	33	0	5	1	8	105
2001.03.12	54	33	0	5	1	12	105
2001.03.08	54	34	0	5	1	11	105
2001.02.28	51	34	0	5	1	14	105
2001.02.27	52	34	0	5	1	13	105
2001.02.06	52	35	0	5	1	12	105
2001.01.04	54	35	0	5	1	10	105
2000.11.27 *(Election)*	55	35	0	5	1	9	105

Changes to party standings

36TH PARLIAMENT (1997.09.22 - 2000.10.22)

Date	Lib.	P.C.	Ind.	C.A.	Vac.	Total
2000.10.26	55	35	5	1	9	105
2000.10.22 *(Dissolution)*	56	35	5	1	8	105
2000.10.21	56	35	5	1	8	105
2000.10.18	57	35	5	1	7	105
2000.09.04	57	35	6	0	7	105
2000.09.01	58	35	6	0	6	105
2000.08.23	58	36	6	0	5	105
2000.07.21	59	36	6	0	4	105
2000.07.19	59	37	6	0	3	105
2000.06.30	59	38	6	0	2	105
2000.06.20	59	39	5	0	2	105
2000.06.16	57	39	5	0	4	105
2000.06.09	57	40	5	0	3	105
2000.04.07	55	40	5	0	5	105
2000.03.31	53	40	5	0	7	105
1999.12.12	53	41	5	0	6	105
1999.11.28	53	42	5	0	5	105
1999.11.19	54	42	5	0	4	105
1999.10.04	55	42	5	0	3	105
1999.09.02	54	42	5	0	4	105
1999.08.16	51	42	5	0	7	105
1999.08.15	52	42	5	0	6	105
1999.08.11	53	42	5	0	5	105
1999.07.23	50	42	5	0	8	105
1999.07.11	51	42	5	0	7	105
1999.06.12	52	42	5	0	6	105
1999.04.01	53	42	5	0	5	105
1999.03.24	53	42	5	0	4	104
1999.01.31	53	43	5	0	3	104
1998.12.10	54	43	5	0	2	104
1998.09.17	55	43	5	0	1	104
1998.08.28	52	43	4	0	5	104
1998.08.16	53	43	4	0	4	104
1998.06.21	54	43	4	0	3	104
1998.06.11	55	43	4	0	2	104
1998.06.05	51	43	3	0	7	104
1998.05.02	51	44	3	0	6	104
1998.03.23	52	44	3	0	5	104
1998.03.06	52	44	4	0	4	104
1998.03.04	49	45	4	0	6	104
1998.03.01	50	45	4	0	5	104

1998.01.28	51	45	4	0	4	104
1998.01.18	52	45	4	0	3	104
1998.01.04	52	46	4	0	2	104
1997.11.26	53	47	4	0	0	104
1997.11.20	51	47	4	0	2	104
1997.10.30	52	47	3	0	2	104
1997.09.23	52	48	3	0	1	104
1997.08.03	48	48	3	0	5	104
1997.07.05	49	48	3	0	4	104
1997.06.21	50	48	3	0	3	104
1997.06.20	50	49	3	0	2	104
1997.06.19	50	50	3	0	1	104
1997.06.02 *(Election)*	51	50	3	0	0	104

Changes to party standings

35TH PARLIAMENT (1994.01.17 - 1997.04.27)

Date	P.C.	Lib.	Ind.	Vac.	Total
1997.05.15	50	51	3	0	104
1997.04.27 *(Dissolution)*	50	51	3	0	104
1997.04.08	50	51	3	0	104
1997.04.03	50	50	3	1	104
1996.09.26	50	51	3	0	104
1996.08.09	50	50	3	1	104
1996.08.08	50	48	3	3	104
1996.07.06	50	49	3	2	104
1996.07.01	50	50	3	1	104
1996.05.16	50	51	3	0	104
1996.05.05	50	50	3	1	104
1996.03.07	50	51	3	0	104
1996.02.26	50	51	3	0	104
1996.02.16	50	50	3	1	104
1996.02.01	50	51	3	0	104
1995.09.21	51	50	3	0	104
1995.09.09	51	46	3	4	104
1995.07.25	51	47	3	3	104
1995.03.21	52	47	3	2	104
1994.12.25	52	45	3	4	104
1994.11.26	53	45	3	3	104
1994.11.23	54	45	3	2	104
1994.11.21	54	43	3	4	104
1994.11.10	54	44	3	3	104
1994.09.18	55	44	3	2	104
1994.09.15	56	44	3	1	104
1994.08.31	56	41	3	4	104
1994.08.29	56	40	3	5	104
1994.06.22	56	41	3	4	104
1994.06.13	57	41	3	3	104
1994.05.14	57	41	4	2	104
1994.01.20	58	41	4	1	104
1993.10.25 *(Election)*	58	41	5	0	104

Changes to party standings

34TH PARLIAMENT (1988.12.12 - 1993.09.08)

Date	P.C.	Lib.	Ind.	Ref.	Ind. Lib.	Vac.	Total
1993.09.08 *(Dissolution)*	58	41	5	0	0	0	104
1993.06.23	58	41	5	0	0	0	104
1993.06.18	57	41	5	0	0	1	104
1993.06.10	55	41	5	0	0	3	104
1993.06.08	54	41	5	0	0	4	104
1993.06.04	53	41	5	0	0	5	104
1993.05.31	51	41	5	0	0	7	104

1993.05.26	51	41	6	0	0	6	104
1993.03.25	48	41	5	0	0	10	104
1993.03.11	49	41	5	0	0	9	104
1993.02.09	47	41	5	0	0	11	104
1993.01.29	48	41	5	0	0	10	104
1992.12.09	49	41	5	0	0	9	104
1992.11.20	50	41	5	0	0	8	104
1992.11.03	50	42	5	0	0	7	104
1992.08.31	51	42	5	0	0	6	104
1992.07.01	51	43	5	0	0	5	104
1992.06.18	51	44	5	0	0	4	104
1992.06.17	52	44	5	0	0	3	104
1992.06.08	53	44	5	0	0	2	104
1991.11.03	53	45	5	0	0	1	104
1991.10.02	53	46	5	0	0	0	104
1991.09.25	53	47	5	0	0	-1	104
1991.09.04	53	47	5	1	0	-2	104
1991.06.11	53	48	5	1	0	-3	104
1991.04.26	53	49	5	1	0	-4	104
1991.03.24	54	49	5	1	0	-5	104
1991.01.26	54	50	5	1	0	-6	104
1990.10.04	54	51	4	1	1	-7	104
1990.09.27	54	52	4	1	1	-8	104
1990.09.26	45	52	4	1	1	1	104
1990.09.23	46	52	4	1	1	0	104
1990.09.12	41	52	4	1	1	5	104
1990.09.07	39	52	4	1	1	7	104
1990.08.30	36	52	4	1	1	10	104
1990.08.22	31	52	4	1	1	15	104
1990.08.07	32	52	4	1	1	14	104
1990.07.01	33	53	4	1	1	12	104
1990.06.11	34	53	4	1	1	11	104
1990.04.01	34	53	4	0	1	12	104
1990.03.05	34	54	4	0	1	11	104
1989.12.08	34	56	4	0	0	10	104
1989.11.29	35	56	4	0	0	9	104
1989.09.30	35	56	5	0	0	8	104
1989.01.28	36	56	5	0	0	7	104
1988.11.21 *(Election)*	36	57	5	0	0	6	104

Changes to party standings

33RD PARLIAMENT (1984.11.05 - 1988.10.01)

Date	Lib.	P.C.	Ind.	Ind. Prog.	Ind. P.C.	Ind. Lib.	Vac.	Total
1988.10.02	57	36	5	0	0	0	6	104
1988.09.27	58	36	5	0	0	0	5	104
1988.09.26	59	36	5	0	0	0	4	104
1988.07.01	59	32	5	0	0	0	8	104
1988.05.27	59	31	5	0	1	0	8	104
1988.03.17	60	31	5	0	1	0	7	104
1988.03.15	61	31	5	0	1	0	6	104
1988.02.17	61	32	5	0	0	0	6	104
1988.02.15	62	32	5	1	0	0	4	104
1988.01.22	63	32	5	0	0	0	4	104
1987.12.30	64	32	5	0	0	0	3	104
1987.09.28	64	31	5	0	0	0	4	104
1987.09.19	65	31	5	0	0	0	3	104
1987.06.28	65	31	5	0	0	1	2	104
1987.01.03	66	31	5	0	0	1	1	104
1986.12.29	67	31	5	0	0	1	0	104
1986.12.18	67	30	5	0	0	1	1	104
1986.11.17	68	30	5	0	0	1	0	104
1986.07.09	68	27	3	0	0	1	5	104
1986.06.30	68	28	5	0	0	1	2	104

1986.05.31	68	27	5	0	0	1	3	104
1986.05.02	69	27	5	0	0	1	2	104
1986.01.10	69	26	5	0	0	1	3	104
1985.06.26	72	26	3	0	0	1	2	104
1985.04.16	72	25	3	0	0	1	3	104
1985.04.01	72	24	3	0	0	1	4	104
1985.03.28	73	24	3	0	0	1	3	104
1985.03.19	73	25	3	0	0	1	2	104
1985.02.18	73	24	3	0	0	1	3	104
1984.12.21	73	25	3	0	0	1	2	104
1984.09.27	73	22	3	0	0	1	5	104
1984.09.13	73	23	3	0	0	1	4	104
1984.09.04 *(Election)*	74	23	3	0	0	1	3	104

Changes to party standings

32ND PARLIAMENT (1980.04.14 - 1984.07.09)

Date	Lib.	P.C.	Ind.	S.C.	Ind. Lib.	Vac.	Total
1984.07.26	74	23	3	0	1	3	104
1984.07.09 *(Dissolution)*	74	23	4	0	1	2	104
1984.06.29	71	23	4	0	1	5	104
1984.01.24	64	23	4	0	1	12	104
1984.01.16	63	23	4	0	1	13	104
1984.01.13	62	23	4	0	1	14	104
1983.12.23	57	23	4	0	1	19	104
1983.12.15	55	23	4	0	1	21	104
1983.11.01	56	23	4	0	1	20	104
1983.09.20	57	23	4	0	1	19	104
1983.07.29	57	23	4	1	1	18	104
1983.06.12	58	23	4	1	1	17	104
1983.04.20	59	23	4	1	1	16	104
1983.02.11	58	23	4	1	1	17	104
1983.01.15	58	24	4	1	1	16	104
1982.12.23	59	24	4	1	1	15	104
1982.12.22	58	23	4	1	1	17	104
1982.12.19	58	23	3	1	1	18	104
1982.10.20	58	24	3	1	1	17	104
1982.10.07	59	24	3	1	1	16	104
1982.05.20	60	24	3	1	1	15	104
1982.05.04	61	24	2	1	1	15	104
1982.01.12	62	24	2	1	1	14	104
1981.12.13	63	24	2	1	1	13	104
1981.10.31	63	25	2	1	1	12	104
1981.07.02	64	25	2	1	1	11	104
1981.06.18	63	25	2	1	1	12	104
1981.03.06	64	25	2	1	1	11	104
1980.10.25	64	26	2	1	1	10	104
1980.10.16	65	26	2	1	1	9	104
1980.09.29	66	26	2	1	1	8	104
1980.07.23	67	26	2	1	1	7	104
1980.07.07	68	26	2	1	1	6	104
1980.05.01	69	26	2	1	1	5	104
1980.04.17	70	26	2	1	1	4	104
1980.03.31	70	27	2	1	1	3	104
1980.02.18 *(Election)*	71	27	2	1	1	2	104

Changes to party standings

31ST PARLIAMENT (1979.10.09 - 1979.12.14)

Date	Lib.	P.C.	Ind.	S.C.	Ind. Lib.	Vac.	Total
1980.01.14	71	27	2	1	1	2	104
1979.12.14 *(Dissolution)*	71	28	2	1	1	1	104
1979.10.03	71	28	2	1	1	1	104

1979.09.27	71	24	2	1	1	5	104
1979.09.13	71	21	2	1	1	8	104
1979.08.08	71	18	2	1	1	11	104
1979.07.11	72	18	2	1	1	10	104
1979.06.05	72	19	2	1	1	9	104
1979.05.29	72	18	2	1	1	10	104
1979.05.22 *(Election)*	73	18	2	1	1	9	104

Changes to party standings

30TH PARLIAMENT (1974.09.30 - 1979.03.26)

Date	Lib.	P.C.	Ind.	S.C.	Ind. Lib.	Vac.	Total
1979.05.14	73	18	2	1	1	9	104
1979.03.29	72	18	2	1	1	10	104
1979.03.27	74	18	2	1	1	8	104
1979.03.26 *(Dissolution)*	73	18	2	1	1	9	104
1978.10.23	71	17	2	1	1	12	104
1978.07.30	72	17	2	1	1	11	104
1978.06.05	73	17	2	1	1	10	104
1978.04.21	74	17	2	1	1	9	104
1978.04.20	74	16	2	1	1	10	104
1978.03.26	75	16	2	1	1	9	104
1978.03.23	76	16	2	1	1	8	104
1978.02.28	71	14	2	1	1	15	104
1977.12.29	72	14	2	1	1	14	104
1977.08.19	72	15	2	1	1	13	104
1977.07.28	73	15	2	1	1	12	104
1977.04.05	74	15	2	1	1	11	104
1976.12.23	70	15	2	1	1	15	104
1976.12.17	69	15	2	1	1	16	104
1976.12.09	68	15	2	1	1	17	104
1976.11.18	66	15	2	1	1	19	104
1976.11.05	67	15	2	1	1	18	104
1976.10.12	68	15	2	1	1	17	104
1976.09.27	68	16	2	1	1	16	104
1976.06.23	69	16	2	1	1	15	104
1976.04.07	70	16	2	1	1	14	104
1976.03.18	70	17	2	1	1	13	104
1975.12.10	71	17	2	1	1	12	104
1975.10.23	72	17	2	1	1	11	104
1975.08.19	71	17	2	1	1	12	104
1975.08.07	70	17	2	1	1	13	104
1975.07.14	70	16	2	1	1	14	104
1975.05.23	70	18	2	1	1	10	102
1975.02.13	71	18	2	1	1	9	102
1974.12.01	72	18	2	1	1	8	102
1974.11.28	73	18	2	1	1	7	102
1974.10.30	74	18	2	1	1	6	102
1974.08.14	75	18	2	1	1	5	102
1974.07.08 *(Election)*	76	18	2	1	1	4	102

Changes to party standings

29TH PARLIAMENT (1973.01.04 - 1974.05.09)

Date	Lib.	P.C.	Ind.	Ind. Lib.	S.C.	Vac.	Total
1974.05.09 *(Dissolution)*	76	17	2	1	1	5	102
1972.10.30 *(Election)*	74	18	2	1	1	6	102

Changes to party standings

28TH PARLIAMENT (1968.09.12 - 1972.09.01)

Date	Lib.	P.C.	Ind. Lib.	Ind.	S.C.	Ind. Cons.	Vac.	Total

1972.09.01 *(Dissolution)*	74	18	1	2	1	0	6	102
1968.06.25 *(Election)*	64	27	3	1	0	1	6	102

Changes to party standings

27TH PARLIAMENT (1966.01.18 - 1968.04.23)

Date	Lib.	P.C.	Ind. Lib.	Ind.	Ind. Cons.	Vac.	Total
1968.04.23 *(Dissolution)*	65	28	3	1	1	4	102
1965.11.08 *(Election)*	57	30	2	1	1	11	102

Changes to party standings

26TH PARLIAMENT (1963.05.16 - 1965.09.08)

Date	Lib.	P.C.	Ind. Lib.	Ind.	Ind. Cons.	Vac.	Total
1965.09.08 *(Dissolution)*	58	31	2	1	1	9	102
1963.04.08 *(Election)*	59	36	2	1	1	3	102

Changes to party standings

25TH PARLIAMENT (1962.09.27 - 1963.02.06)

Date	Lib.	P.C.	Ind. Lib.	Ind.	Ind. Cons.	Vac.	Total
1963.02.06 *(Dissolution)*	59	36	2	1	1	3	102
1962.06.18 *(Election)*	64	25	2	1	1	9	102

Changes to party standings

24TH PARLIAMENT (1958.05.12 - 1962.04.19)

Date	Lib.	P.C.	Cons.	Ind. Lib.	Ind.	Ind. Cons.	Vac.	Total
1962.04.19 *(Dissolution)*	64	23	0	2	1	1	11	102
1958.03.31 *(Election)*	77	14	2	2	1	0	6	102

Changes to party standings

23RD PARLIAMENT (1957.10.14 - 1958.02.01)

Date	Lib.	P.C.	Cons.	Ind. Lib.	Ind.	Vac.	Total
1958.02.01 *(Dissolution)*	77	14	2	2	1	6	102
1957.06.10 *(Election)*	78	3	2	2	1	16	102

Changes to party standings

22ND PARLIAMENT (1953.11.12 - 1957.04.12)

Date	Lib.	P.C.	Cons.	Ind. Lib.	Ind.	Vac.	Total
1957.04.12 *(Dissolution)*	77	3	2	2	1	17	102
1953.08.10 *(Election)*	82	6	2	0	0	12	102

Changes to party standings

21ST PARLIAMENT (1949.09.15 - 1953.06.13)

Date	Lib.	P.C.	Cons.	Vac.	Total
1953.06.13 *(Dissolution)*	82	6	2	12	102
1949.06.27 *(Election)*	73	10	5	14	102

Changes to party standings

20TH PARLIAMENT (1945.09.06 - 1949.04.30)

Date	Lib.	Cons.	P.C.	Ind.	Vac.	Total
1949.04.30 *(Dissolution)*	67	5	10	0	20	102

1945.06.11 *(Election)*	45	36	12	1	2	96

Changes to party standings

19TH PARLIAMENT (1940.05.16 - 1945.04.16)

Date	Lib.	Cons.	P.C.	Ind.	Vac.	Total
1945.04.16 *(Dissolution)*	45	36	12	1	2	96
1940.03.26 *(Election)*	45	36	12	1	2	96

Changes to party standings

18TH PARLIAMENT (1936.02.06 - 1940.01.25)

Date	Cons.	Lib.	Ind.	Con. (Susp.)	Vac.	Total
1940.01.25 *(Dissolution)*	53	32	1	0	10	96
1935.10.14 *(Election)*	53	32	1	1	9	96

Changes to party standings

17TH PARLIAMENT (1930.09.08 - 1935.08.14)

Date	Cons.	Lib.	Lib.-Cons.	L.P.	Ind.	Con. (Susp.)	Un. (Lib.)	Vac.	Total
1935.08.14 *(Dissolution)*	53	32	0	0	1	1	0	9	96
1930.07.28 *(Election)*	53	32	3	1	1	0	1	5	96

Changes to party standings

16TH PARLIAMENT (1926.12.09 - 1930.05.30)

Date	Cons.	Lib.	Lib.-Cons.	L.P.	Ind.	Un. (Lib.)	Vac.	Total
1930.05.30 *(Dissolution)*	53	32	3	1	1	1	5	96
1926.09.14 *(Election)*	53	32	3	0	1	1	6	96

Changes to party standings

15TH PARLIAMENT (1926.01.07 - 1926.07.02)

Date	Cons.	Lib.	Lib.-Cons.	Ind.	Un. (Lib.)	Vac.	Total
1926.07.02 *(Dissolution)*	53	32	3	1	1	6	96
1925.10.29 *(Election)*	53	32	3	1	1	6	96

Changes to party standings

14TH PARLIAMENT (1922.03.08 - 1925.09.05)

Date	Cons.	Lib.	Lib.-Cons.	Un. (Lib.)	Nat. Cons.	Ind.	Vac.	Total
1925.09.05 *(Dissolution)*	53	32	3	1	0	1	6	96
1921.12.06 *(Election)*	53	32	3	2	1	1	4	96

Changes to party standings

13TH PARLIAMENT (1918.03.18 - 1921.10.04)

Date	Cons.	Lib.	Lib.-Cons.	Nat. Cons.	Ind. Cons.	Ind.	Vac.	Total
1921.10.04 *(Dissolution)*	53	32	3	2	0	1	5	96
1917.12.17 *(Election)*	46	38	3	2	1	0	6	96

Changes to party standings

12TH PARLIAMENT (1911.11.15 - 1917.10.06)

Date	Lib.	Cons.	Lib.-Cons.	Ind. Lib.	Ind. Cons.	Nat. Cons.	Vac.	Total
1917.10.06 *(Dissolution)*	38	42	3	1	1	1	10	96
1911.09.21 *(Election)*	56	18	8	1	0	1	3	87

Changes to party standings

11TH PARLIAMENT (1909.01.20 - 1911.07.29)

Date	Lib.	Cons.	Lib.-Cons.	Ind. Lib.	Nat. Cons.	Vac.	Total
1911.07.29 *(Dissolution)*	56	18	8	1	1	3	87
1908.10.26 *(Election)*	56	18	8	1	1	3	87

Changes to party standings

10TH PARLIAMENT (1905.01.11 - 1908.09.17)

Date	Lib.	Cons.	Lib.-Cons.	Nat. Cons.	Ind. Lib.	Vac.	Total
1908.09.17 *(Dissolution)*	56	18	8	1	1	3	87
1904.11.03 *(Election)*	50	24	10	1	0	2	87

Changes to party standings

9TH PARLIAMENT (1901.02.06 - 1904.09.29)

Date	Cons.	Lib.	Lib.-Cons.	Nat. Cons.	Vac.	Total
1904.09.29 *(Dissolution)*	23	44	9	1	6	83
1900.11.07 *(Election)*	47	10	19	1	4	81

Changes to party standings

8TH PARLIAMENT (1896.08.19 - 1900.10.09)

Date	Cons.	Lib.-Cons.	Lib.	Ind. Cons.	Nat. Cons.	Ind.	Vac.	Total
1900.10.09 *(Dissolution)*	47	19	10	0	1	0	4	81
1896.06.23 *(Election)*	46	19	10	1	1	1	3	81

Changes to party standings

7TH PARLIAMENT (1891.04.29 - 1896.04.24)

Date	Cons.	Lib.	Lib.-Cons.	Ind.	Con. (Susp.)	Ind. Cons.	Nat. Cons.	Vac.	Total
1896.04.24 *(Dissolution)*	39	20	13	1	1	1	1	4	80
1891.03.05 *(Election)*	39	20	13	1	0	1	1	5	80

Changes to party standings

6TH PARLIAMENT (1887.04.13 - 1891.02.03)

Date	Cons.	Lib.	Lib.-Cons.	Nat. Lib.	Ind.	Ind. Cons.	Nat. Cons.	Vac.	Total
1891.02.03 *(Dissolution)*	39	20	13	1	1	1	1	4	80
1887.02.22 *(Election)*	39	20	14	1	1	1	1	3	80

Changes to party standings

5TH PARLIAMENT (1883.02.08 - 1887.01.15)

Date	Cons.	Lib.	Lib.-Cons.	Nat.	Nat. Lib.	Ind.	Ind. Cons.	Nat. Cons.	Vac.	Total
1887.01.15 *(Dissolution)*	39	20	13	0	1	1	1	1	4	80
1882.06.20 *(Election)*	33	24	13	2	1	1	1	0	3	78

Changes to party standings

4TH PARLIAMENT (1879.02.13 - 1882.05.18)

Date	Cons.	Lib.	Lib.-Cons.	Nat.	Nat. Lib.	Ind.	Ind. Cons.	Ref.	Vac.	Total
1882.05.18 *(Dissolution)*	33	24	13	2	1	1	1	0	3	78
1878.09.17 *(Election)*	36	29	7	2	1	0	1	1	0	77

Changes to party standings

3RD PARLIAMENT (1874.03.26 - 1878.08.17)

Date	Cons.	Lib.	Lib.-Cons.	Nat.	Nat. Lib.	Ind. Cons.	Ref.	Vac.	Total

1878.08.16	36	29	7	2	1	1	1	0	77
1874.01.22 *(Election)*	46	20	8	0	2	1	0	0	77

Changes to party standings

2ND PARLIAMENT (1873.03.05 - 1874.01.02)

Date	Cons.	Lib.	Lib.-Cons.	Nat. Lib.	Ind. Cons.	Vac.	Total
1874.01.02 *(Dissolution)*	46	20	8	2	1	0	77
1872.10.12 *(Election)*	42	21	8	2	1	3	77

Changes to party standings

1ST PARLIAMENT (1867.11.06 - 1872.07.08)

Date	Cons.	Lib.	Lib.-Cons.	Nat. Lib.	Ind. Cons.	Vac.	Total
1872.07.08 *(Dissolution)*	42	22	9	2	1	1	77
1867.10.23	37	25	8	2	0	0	72

Changes to party standings

ADDRESS

MR. JUSTICE MARSHALL ROTHSTEIN, SUPREME COURT OF CANADA

TO THE AMERICAN BAR ASSOCIATION
SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE
AT THE ANNUAL SECTION DINNER,
TORONTO, ONTARIO
FRIDAY, AUGUST 5, 2011

Thank you, Jonathan Rusch,[1] for your generous introduction. And let me add my words of welcome to you and tell you that we are delighted that you chose Toronto for your annual meeting. And thank you for inviting me to address your Section. Although from what I can tell, this Section operates more like a family.

Like the Supreme Court of the United States, the Supreme Court of Canada is a generalist court. We don't decide too many administrative law cases each year, so I am only too mindful that I am speaking to an audience of experts in the field. It brings to mind the story of the Pope.

He had an engagement, so he came down to the car that was waiting for him. He decided that he wanted to drive, so he told the chauffeur to get in the back and he got in and started driving. Unfortunately, he was going too fast and he was stopped. The officer came to the car window. When he saw the Pope, he decided he had better call headquarters. He called headquarters and said, "We have an incident here." The desk sergeant said, "What's the problem?" The officer said, "Well I've stopped someone really important for speeding." The desk sergeant said, "Who is he?" The officer said, "I'm not sure, but the Pope is his chauffeur."

So today with this expert audience I feel like the guy sitting in the back seat with the Pope as my chauffeur.

1. *Editors' note:* Jonathan Rusch served as the 2011 Chair of the American Bar Association Section of Administrative Law and Regulatory Practice.

In view of your expertise, I'm going to have to be really careful. Like the story of the Old West. The farmer's wife had died, they put her in the casket, loaded the casket on the wagon for the trip to the cemetery. Along the way there was a hole in the road. The wagon hit the hole, the casket popped open and the farmer's wife revived. Well, they went back home. However, a year later she died again. They put her into the casket and loaded it on to the wagon. As they came to the place on the road where the hole was, the farmer said, "Now this is where we really have to be careful." So I'm going to have to be careful today.

Now, when I thought about the topic I should select for my presentation, I had to bear in mind that I certainly don't know very much about American administrative and regulatory law. And then coincidentally, I found in my sock drawer a little box and when I opened it I found a little document entitled, "2005 Chief Justice John Marshall Silver Dollar—Certificate of Authenticity." Unfortunately, the silver dollar wasn't there. However, it got me thinking about the only case I know that Chief Justice Marshall decided, which of course was the seminal *Marbury v. Madison*.[2]

And at the same time, I had just read a paper on the subject of justiciability by the most eminent scholar in administrative law in Canada today, Professor David Mullan, recently retired from Queen's University.[3]

So, today, I am going to speak to you about justiciability—what government decisions can be subject to review by the courts. In particular, the role of Canadian courts in reviewing the power exercised by the Executive Branch of government. And I am very confident in the accuracy of my remarks today because I have cribbed shamelessly from Professor Mullan's work.

The principle of the Judiciary having the power to review the actions of the Executive or Legislative Branches of government is well established in American, as well as Canadian, law. Where I'll start is with *Marbury v. Madison*. As you all know better than I do, there, in 1803, your Supreme Court established the basis for the exercise of judicial review in the United States. Chief Justice Marshall held that your courts could oversee and review the actions of other branches of the government and in doing so declare statutes unconstitutional.

Chief Justice Marshall also dealt with the question of justiciability. He wrote that "the question [of] whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend

2. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

3. David Mullan, *Judicial Review of the Executive—Principled Exasperation*, 8 N.Z. J. PUBLIC & INT'L L. 145 (2010).

on the nature of that act."[4] He indicated that for some acts, which are political in nature and do not concern individual rights, that the decision of the Executive is conclusive and, in his words "can never be examinable by the Courts."[5] While for other acts, again in his words, "where a specific duty is assigned by law, and individual rights depend upon the performance of that duty . . . the individual who considers himself injured, has a right to resort to the laws of his country for a remedy."[6]

There are interesting parallels between the American approach and the Canadian approach to justiciability, which I hope will become clear as I further discuss the Canadian attitude towards the subject.

First, I should give you some background about the authority of the Executive Branch of government in Canada. There are two sources of power that enable the Executive Branch to exercise some form of discretion. The first being power granted by statute; the second, a residual discretion known as the Crown prerogative.

Why Crown prerogative? Because we didn't have a revolution. Queen Elizabeth is still our Head of State, and in legal matters, the State is often referred to as the Crown or the Queen. But the Queen's role is generally formal or ceremonial only. In practice, the prerogative power is exercised in Canada by the Executive Branch of government.[7] Scholars have described the Crown prerogative as "the residue of discretionary or arbitrary authority, which at any time is left in the hands of the Crown."[8]

The modern exercise of the prerogative power includes, among other things:foreign affairs, the making of treaties, national defence, the prerogative of mercy, the grant of honours, the dissolution of Parliament, and the appointment of ministers.[9]

Traditionally, the power of the court to review the prerogative was limited. Courts could determine if a prerogative power existed, what its scope was, and whether the power had been restricted by statute. However, once a court determined that the prerogative power was in play, it would not review how that power was exercised.[10]

Canadian courts are still reluctant to find the review of certain exercises of the prerogative power justiciable. Recent examples of areas that

4. *Marbury*, 5 U.S. at 165.

5. *Id.* at 166.

6. *Id.*

7. *See* Black v. Canada (Prime Minister) (2001), 54 O.R. 3d 215 (Can. Ont. C.A.) para. 32.

8. ALBERT DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 424 (10th ed. 1959).

9. *Black*, 54 O.R. 3d 215 para. 36.

10. *Id.* para. 45.

Canadian courts have concluded are nonjusticiable include: a government decision to enter into a treaty with aboriginal groups, the validity of a treaty with another country, the recall of a diplomat, and the decision to send troops on a combat mission. Two assumptions form the basis for this reluctance.

First, there is a divide between law and politics. There is some sense of illegitimacy that arises when courts engage in political matters. Some conflicts in a democratic society are best left to the political process to resolve, and should not be the subject of litigation.

Second, there are practical and functional limitations with respect to the ability of courts to determine certain matters. For some questions of policy, courts do not have the institutional competency to evaluate the merits of decisions made by the Executive. Courts deal with the litigants before them, rather than carrying out widespread public consultations. They don't have the resources of other branches of government to fully research the public policy implications of decisions.

While these two arguments have merit, in some instances Canadian courts today are no longer as reluctant to engage in the review of decisions of the Executive as they once were. In part, this is because of the constitutionalization of our Bill of Rights, the *Charter of Rights and Freedoms*, that occurred in the 1980s. The rule of law and our Constitution require courts to engage in the judicial review of executive decisions when they conflict with the Constitution or impact on individual rights. Just as in *Marbury v. Madison.*

A starting point about the increased willingness of Canadian courts to engage in the review of decisions of the Executive is a case heard by the Supreme Court of Canada in the 1980s called *Operation Dismantle v. The Queen.*[11] In this case, a number of peace groups alleged that the Canadian government's decision to allow American cruise missile testing in Canada violated their rights to life, liberty, and security of the person under the Charter of Rights. They claimed it did so because it increased the risk of nuclear conflict.

The majority of the Court struck the peace groups' claim, and concluded that the claim did not disclose any facts which, if taken as true, would prove that the testing of cruise missiles would violate their Charter rights. While the majority did not base its approach on the concept of justicability, it agreed with the concurring judgment of Madam Justice Wilson, who wrote that some "disputes of a political or foreign policy nature may still be properly cognizable by the courts."[12]

11. [1985] 1 S.C.R. 411 (Can.).
12. *Id.* para. 38.

She found that the peace groups' claim was justiciable because, in her view, it did touch on the violation of rights protected by the Charter, despite the fact that it dealt with the subject of foreign affairs. However, like the majority, she ultimately concluded that the facts, if taken as true, could not establish a violation of the Charter and dismissed the peace groups' appeal.

The questions of justiciability dealt with by *Operation Dismantle* were elaborated upon by the Ontario Court of Appeal in the 2001 case of *Black v. Canada*.[13] At issue was the decision of the Canadian Prime Minister to advise the Queen not to appoint a Canadian citizen, Conrad Black, as a member of the House of Lords of the United Kingdom. Black sought judicial review of that advice. The question of appointments being a prerogative power, the Canadian government argued that matter was nonjusticiable and not subject to judicial review.

The Court of Appeal observed that the proper way of determining if a matter involving the prerogative power is justiciable is to examine the subject matter of the decision. If the subject matter is concerned with matters of high policy or moral and political considerations, then it would be nonjusticiable.[14] In contrast, if the matter involved questions of individual rights, then it would be justiciable.[15] Like *Marbury v. Madison*. You might ask why it took us two hundred years to get to this point. We're a very cautious nation.

The Court of Appeal ultimately concluded that the Prime Minister's advice to the Queen about Mr. Black's peerage was nonjusticiable. Perhaps surprisingly, it held that no important individual interests were at stake, and that no Canadian citizen could have a legitimate expectation of receiving a British honour.[16]

I now turn to two recent cases that touch on the concept of justiciability in the context of foreign affairs. These two cases again illustrate the increased willingness of Canadian courts to subject certain decisions made by the Executive to judicial review. But they also illustrate that there may be a restrained approach to remedies when dealing with the judicial review of complex policy decisions.

The first case is *Smith v. Canada*,[17] a 2009 trial-level decision of the Federal Court of Canada. In Canada the death penalty was abolished in 1976. When a Canadian is convicted and sentenced to death in another

13. *See Black*, 54 O.R. 3d 215.
14. *Id.* paras. 52, 62.
15. *See id.* para. 54.
16. *Id.* paras. 60–61.
17. Smith v. Canada (Att'y Gen.), [2009] F.C. 228 (Can. Fed. Ct.).

country, it had been the practice of the Canadian government to seek clemency and ask for commutation of the death sentence to a sentence of imprisonment. In *Smith*, the government of Canada decided not to seek clemency for Mr. Smith, a Canadian citizen sentenced to death in Montana. Mr. Smith was seeking a court order compelling the government to assist him in his attempts to obtain clemency. The government claimed that this decision was nonjusticiable, as it involved questions of foreign policy, and involved moral and political questions rather than legal questions.

Despite the matter involving questions of foreign policy, the trial judge concluded that Mr. Smith's complaint was justiciable. He held that this case involved specific individual rights. The government's decision not to seek clemency involved a change in the long-standing previous policy, and as a matter of due process Mr. Smith was entitled to be consulted and to make submissions about the change and how it might affect him.

The trial judge ordered the government to continue to apply the previous policy, and assist Mr. Smith in his attempts to obtain clemency. The government did not appeal. However, when the Canadian government requested clemency, the family of the victim retaliated by petitioning the Governor to proceed with the execution. Today Mr. Smith is still on death row awaiting execution pending resolution of a challenge he has raised in the U.S. courts about the constitutionality of the lethal injection method of execution. So it looks like the Governor rejected the Canadian government's request of clemency. Am I being too cynical if I observe that there aren't too many Montana voters in Canada?

What *Smith* illustrates is that even in matters involving foreign relations that courts will be willing to engage in judicial review when individual rights are at stake and order governments to engage in some sort of positive action. But, not always.

Which brings me to the final case that I want to discuss, *Khadr v. Canada*.[18] This case involved Omar Khadr, a Canadian citizen, who has been detained in Guantanamo Bay since 2002. He was accused of killing a U.S. army sergeant in combat in Afghanistan in 2001 when he was fifteen. Khadr's father was a follower of Osama Bin Laden and brought his son to Afghanistan to fight for Al Qaeda. During Khadr's detention in Guantanamo Bay, Canadian officials interrogated him knowing that he had been subjected to sleep deprivation and then shared the information they obtained with U.S. authorities. The Canadian government refused Khadr's requests to seek his repatriation. Khadr sought judicial review of the decision, claiming it violated his rights to liberty and security of the

18. Khadr v. Canada (Prime Minister), [2010] S.C.R. 44 (Can.).

person guaranteed under the Canadian Charter.

The trial and appeal courts concluded that Khadr's Charter rights had been violated. They ordered the Canadian government to request his repatriation. The Crown appealed to the Supreme Court of Canada.

Our Court agreed that the Canadian government had violated Khadr's Charter rights to liberty and security of the person.[19] Canadian officials interrogated him after knowing he had been subjected to sleep deprivation.[20] It was determined that Khadr's treatment in Guantanamo Bay offended Canadian standards about the treatment of detained youth suspects.[21]

But the Court also recognized that Khadr's situation involved the Crown's prerogative power over foreign affairs.[22] If the Court ordered the Canadian government to ask the U.S. government to repatriate Khadr, then it would be stepping into the area of foreign relations— an area clearly within the competence of the Executive as opposed to the courts. Nevertheless, the Court found that this case was justiciable.

It relied on *Operation Dismantle* and found that "courts clearly have the jurisdiction and the duty to determine whether a prerogative power asserted by the Crown does in fact exist and, if so, whether its exercise infringes the *Charter*."[23] Again, shades of *Marbury v. Madison*.

What is interesting about the *Khadr* case is that the Court recognized that it had a duty to review the exercise of the prerogative power for constitutionality, yet it had to give weight to the constitutional responsibility of the Executive to exercise that power. The Executive made such decisions in the context of "complex and ever-changing circumstances" and had to take into account Canada's broader national interests.[24] The Court also recognized the limitations on its institutional competence with respect to making foreign affairs decisions.[25]

The Court concluded that the appropriate remedy was to issue a declaration that Canada had infringed Khadr's Charter rights and "leave it to the government to decide how to best respond to [the] judgment in light of current information, its responsibility for foreign affairs, and in conformity with the *Charter*."[26] So no specific positive duty was imposed by the Court on the government. The government did not ask the U.S.

19. *Id.* para. 26.
20. *Id.* para. 20.
21. *Id.* para. 25.
22. *Id.* para. 35.
23. *Id.* para. 36.
24. *Id.* para. 39 (emphasis omitted).
25. *Id.* para. 46.
26. *Id.* para. 39.

government to repatriate Khadr. However, it did ask the United States not to use any information obtained by Canadian officials and transmitted to U.S. officials in Khadr's prosecution. Just to complete the story, Khadr pleaded guilty and was sentenced to eight years. There is some speculation he may return to Canada in a few months to serve the rest of his sentence here. But right now, he is in Guantanamo Bay.

So, in some cases, ordering the government to take positive action has been found to be warranted as a remedy—such as the order in *Smith* requiring the government to assist a prisoner in his attempts to obtain clemency. However, in other cases, the government decision under consideration may be such that courts ought not to order the government to take positive action. This was the case in *Khadr*, where the Court issued a declaration that the government's actions were unconstitutional, but left it to the government to determine how best to respond in light of the complex nature of foreign policy.

Even in quiet, sedate Canada those cases can bring out strong reaction. The civil liberties groups in Canada praised the Federal Court decision in *Smith*. But did they ever condemn the Supreme Court decision in *Khadr*! Some of the comments from the academic community: the decision was objectionable; a remedial abdication; rights without meaningful remedies; dangerous deference; excess of restraint; missed opportunity to send a powerful statement; inadequate; lacking in courage; disappointing; timid.

Although not as noisy, other segments of Canadian society found the Federal Court decision in *Smith* to constitute judicial activism at its worst and endorsed the cautious approach adopted by the Supreme Court in *Khadr*.

And it probably won't surprise you to know that hot debate took place in our Court when we were considering the remedy in *Khadr*. But this was a case where all of us felt the Court should speak with unanimity and so we all put a little water in our wine and ended up where I told you—telling the government that there had been a Charter breach, but leaving it to the government to select the appropriate remedy.

What if the government chose not to take any remedial action? What if Khadr thought the remedial relief the government provided was inadequate and asked for judicial review of that decision? What if the Court did order the government to carry out a special remedy, like asking the U.S. government to repatriate Khadr, and the government just didn't do it? It brings to mind President Jackson, who didn't like another of Chief Justice Marshall's decisions and is supposed to have said, "Well, John Marshall has made his decision, now let him enforce it." Fortunately for us, these are all questions that we haven't yet had to answer. We'll cross those bridges if we come to them.

It's time for me to conclude. Jonathan's introduction was very generous. But that is not the universal view. A couple of months ago I left home and went to the office. That morning my wife Sheila had asked me to remove the bed linen for washing which I thought I had done before I left.

> E-mail: Sheila Rothstein to Justice Rothstein—10:53 a.m.
>
> I told you to remove all the linen including the blanket cover. You did not listen to my instructions and only did half a job. I hope you do your legal opinions / judgments better than removal of linen from a bed. When you get home you will make the bed all by yourself! Washing all the linen and pillows is enough of a job for me. We need . . . the fluff for the dryer, and pads for the swiffer, that's the floor mop . . . the length should be as long as possible . . . 8 to 12 inches . . . 12 is preferable but I'll accept shorter if they don't have 12. We need Kraft cheese fat free, fruit, egg whites and peanuts. Get peanuts that don't have that gawd awful brown covering over them. What's wrong with shelled naked peanuts? Why do you buy gross peanuts? Time to wake up and smarten up.

I'm sure glad you didn't ask Sheila to introduce me this evening.

I wish you well in your deliberations and I thank you for coming to Canada and for your attention.

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BOUNDARIES OF JUDICIAL REVIEW

The Law of Justiciability in Canada
Second Edition

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Introducti

Chapter 1

Columbia because the claim at issue did not concern a specific statute or administrative scheme and was not justiciable.[20]

As justiciability is often raised in public interest standing challenges, much of the case-law relating to justiciability has emerged from the case-law on standing.[21] In *Finlay*, Le Dain J. elaborated upon the relationship between standing and justiciability in the following terms:

> The concern about the proper role of the courts and their constitutional relationship to the other branches of government is addressed by the requirement of justiciability, which Laskin, J., held in *Thorson* to be central to the exercise of the judicial discretion whether or not to recognize public interest standing. Of course, justiciability is always a matter of concern for the courts, but the implication of what was said by Laskin, J., in *Thorson* is that it is a matter of particular concern in the recognition of public interest standing.[22]

In this sense, both the law of standing and the law of justiciability may be said to be concerned with the appropriate boundaries of judicial intervention. This relationship is reviewed in greater detail in chapter six in the context of the procedural features of justiciability.

(b) Justiciability Distinguished from Enforceability

Occasionally, a court will refer to a matter as non-justiciable in the sense that a court will not or cannot enforce a remedy.[23] These are related concepts but it is important to distinguish between a non-justiciable matter and a matter unenforceable by the courts. The classic illustration of this distinction in Canadian law is the constitutional convention. Constitutional conventions are unwritten rules which governments are obliged to follow.[24] However, if these conventions are not followed, a court cannot enforce them. The violation of a convention, in other words, gives rise to political, not legal sanctions. Conventions are thus justiciable

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20 *Ibid.* at paras. 43-57. For a critique of this decision, see L. Sossin, "The Justice of Access: Who Should Have Standing to Challenge the Constitutional Adequacy of Legal Aid" (2007) 40 U.B.C. Law Rev. 727-44.

21 For a summary of this case law, see K. Roach, *Constitutional Remedies in Canada* (Toronto: Canada Law Book, 1996), 5.95.

22 *Finlay*, *supra* note 9 at 632.

23 See for example *O.E.C.T.A. v. Ontario (Attorney General)*, 1998 CarswellOnt 2932, [1998] O.J. No. 2939 (Ont. Gen. Div.), at paras. 162-64, reversed in part (1999), 172 D.L.R. (4th) 193 (Ont. C.A.), leave to appeal allowed [1999] 3 S.C.R. x (S.C.C.), affirmed [2001] 1 S.C.R. 470 (S.C.C.).

24 See P. Hogg, *Constitutional Law of Canada*, 4th edition (Toronto: Carswell, 1997), 1.10(a) and (b).

in the sense that a court could interpret the scope of a convention and declare whether a convention had been breached by government action. They are unenforceable, however, in the sense that a court cannot compel a government to act in accordance with a convention.

Even outside the sphere of Constitutional Conventions, courts may sometimes conclude that a right is justiciable but that it would be inappropriate in the circumstances for the court to enforce that right. In *Khadr v. Canada (Prime Minister)*[25], for example, the Supreme Court of Canada held that, even where it finds the government to have committed a *Charter* violation, it will retain the discretion not to order a remedy that will interfere in a political sphere (for example, where such a remedy would have an impact on foreign relations or some other area outside the purview of the Court).

(c) Justiciability in Private and Public Law Settings

It is clear that litigants are more likely to press ahead with moot, unripe, hypothetical or political cases in public law rather than private law settings. Public law settings more often attracts litigants seeking to vindicate abstract rights or establish principles of broad application. Litigants in private law areas are less unlikely to invest resources and time in litigation where their interests were no longer, or not yet affected by a dispute. Robert Sharpe (now Mr. Justice Sharpe of the Court of Appeal of Ontario) distinguished between justiciability in public and private settings in the following terms:

> Characteristic of traditional or private law litigation is its bi-polar nature, presenting two opposed interests concerned about a situation of immediate tangible harm. The focus tends to be retrospective, the attention of the court being drawn to what happened in the past and how best to repair that harm. The dispute tends to be a self-contained, one-shot, once-and-for-all affair. There is a concrete problem requiring a concrete remedy and a close link between the substantive claim and the relief sought. In constitutional litigation, on the other hand, issues are more diffuse in nature, and because they tend to implicate a wider range of interests, departure from the bi-polar model through liberalized standing and intervention rules is often called for. The focus in constitutional litigation tends to be prospective, and attention is directed more to future improvement than to reparation for past wrongs.

25 [2010] 1 S.C.R. 44 (S.C.C.) [hereinafter *Khadr*].

The Rule of Law and the Justiciability of Prerogative Powers: A Comment on Black *v.* Chrétien

Lorne Sossin*

In *Black* v. *Chrétien*, the Ontario Court of Appeal addressed the issue of the courts' ability to review the exercise of Crown prerogative powers. While the court held that the exercise of prerogative powers is subject to judicial review in general, it stipulated that certain categories of prerogative powers are not reviewable. The court reasoned that judicial review is limited to instances where the nature and subject matter of the prerogative powers are amenable to the judicial process. In Conrad Black's lawsuit against the prime minister, the court found that the communication between the prime minister and the Queen represented an exercise of the prerogative to grant honours and that such a prerogative was non-justiciable.

The author is critieal of the court's use of the doctrine of justiciability to shield executive officials from judicial review. He argues that the court adopted an undesirably formalistic approach to justiciability, with the consequence that a significant sphere of executive action lies beyond the reach of the rule of law. The author maintains that justiciability should solely depend on the legitimacy and capacity of the courts to adjudicate a matter. In his opinion, Black's claim against the prime minister was justiciable.

Dans l'arrêt *Black* c. *Chrétien*, la Cour d'appel d'Ontario soulève le problème du pouvoir qu'a la cour de réviser l'exercice des prérogatives de la Couronne. Alors que la cour a décrété que ces privilèges sont sujets à la révision judiciaire de façon générale, elle a stipulé que certaines catégories de ces prérogatives étaient intouchables. La cour a jugé que la révision judiciaire se limite aux instances où la nature et le contenu des prérogatives de la Couronne sont sujet à être entendus par le processus judiciaire. Dans cet arrêt, la cour a décidé que la communication entre le premier ministre et la Reine représentait un exereice de la prérogative d'octroyer des honneurs et que co privilège n'était pas sujet à la révision judiciaire.

L'auteur critique l'utilisation que fait la cour de la doctrine de justiciabilité pour protéger un officier exécutif contre la révision judiciaire. Il démontre que la cour a adopté une approche formaliste de la justiciabilité, approche indésirable, qui a pour conséquence d'extraire de la primauté du droit une sphère importante de l'action exécutive. L'auteur maintient que la justiciabilité ne devrait dépendre que de la légitimité et de la capacité de la cour de se prononcer. Selon lui, la demande de Black à l'égard du premier ministre était justiciable.

* Assistant Professor, Faculty of Law, University of Toronto. I should note that I had some minor involvement in this case as a consultant to counsel for the appellant, and prior to that, expressed some criticism of the judgment of LeSage J. in the motion before the Ontario Superior Court. See L. Sossin, "Hoist on his Own Petard" *The Globe and Mail* (23 March 2000) A17. I wish to thank David Dyzenhaus, Julia Hanigsberg, Peter W. Hogg, Hudson Janisch, Patrick J. Monahan, and Mark Walters for helpful comments on earlier drafts of this article.

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> *Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case ... Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude.*[1]

Introduction

The odd case of *Black* v. *Chrétien*[2] may have resulted in a happy ending for the parties involved, but the judgment of the Ontario Court of Appeal represents, in my view, a mixed blessing for Canadian law relating to the judicial review of Crown prerogative powers. On the bright side, the court has confirmed that the source of governmental authority, whether a prerogative or statutory power, should have no bearing on whether the exercise of that authority is reviewable. By upholding the dismissal of Black's claim, however, the court used the justiciability doctrine as a shield to immunize a category of prerogative powers from the reach of the rule of law. This is a disturbing development which merits closer examination.

The litigation arose in June of 1999 when the Queen decided not to bestow a peerage on Conrad Black. The Queen had apparently been informed by Prime Minister Jean Chrétien that Canadian law prevented Canadian citizens from being nominated as peers. Chrétien allegedly cited a 1919 Parliamentary resolution known as the "Nickle Resolution"[3] as the source of this legal impediment.[4] That resolution, which was neither a statute nor an instrument with any legal effect, requested the then King not to bestow honours and titular distinctions on subjects domiciled or ordinarily resident in Canada. Prior to that communication, in May of 1999, both Black and the British government had allegedly been assured by the Canadian government that, as long as Black obtained British as well as Canadian citizenship, there was no bar to his nomination. Within a matter of days, Black promptly became a citizen of the United Kingdom.

Black alleged that the prime minister's intervention on the eve of his nomination as a peer was politically motivated, and was undertaken in response to negative coverage of the prime minister in the Southam chain of newspapers owned by Black. Black sued the government of Canada for negligence and the prime minister personally for

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[1] *Hurtado* v. *California*, 110 U.S. 516 at 535-36, 4 S. Ct. 516 (1884).

[2] (2001), 54 O.R. (3d) 215, 199 D.L.R. (4th) 228 (C.A.) [hereinafter *Black*].

[3] The exact text of the resolution is reproduced in *Journals of the House of Commons of the Dominion of Canada*, vol. 55 (22 May 1919) at 295.

[4] *Black*, *supra* note 2 at para. 11.

negligence and abuse of power, and sought $25,000 in damages. The quantum of damages sought suggests Black's suit was motivated more by pride and principle than by a desire for compensation (although, to be sure, quantifying the value of a lost peerage is an esoteric undertaking).[5]

The government of Canada and the prime minister brought a motion to have all the claims dismissed on the grounds they disclosed no reasonable cause of action.[6] LeSage J. granted the motion in part, and dismissed the claim against the prime minister for negligence and abuse of power on grounds that his exercise of the Crown prerogative relating to foreign affairs was non-justiciable.[7] The negligence claim against the government (for misrepresenting that there was no bar to Black's nomination) was allowed to proceed.[8]

The Ontario Court of Appeal unanimously upheld the ruling of LeSage J.[9] While concluding that a claim against a government decision was not non-justiciable simply because the decision was an exercise of a Crown prerogative, the court nonetheless held that the communication between the prime minister and the Queen represented an exercise of the prerogative of granting honours, and that such decisions were non-justiciable. Laskin J.A. explained this holding in the following terms:

> The conferral of the honour at issue in this case, a British peerage, is a discretionary favour bestowed by the Queen. It engages no liberty, no property, no

---

[5] That Black sought damages through a civil suit indicates, however, that his concern was for having been harmed in some way. If public accountability had been Black's concern, presumably he would have initiated an application for judicial review instead of launching a civil suit. Judicial review might have resulted in a declaration or an order compelling the government to undertake some action but would not have resulted in damages.

[6] For the purposes of such a motion, the test is whether, based on the pleadings alone, it is "plain and obvious" that there is no cause of action, assuming all the facts alleged to be proven, and reading the pleadings in their most generous light. Further, where the law is not fully settled in a given area, the action should be permitted to continue. See *Hunt* v. *Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980, 74 D.L.R. (4th) 321.

[7] LeSage J. concluded:

> The PM's conduct here complained of is not within the reach of the court because it was not a justiciable order or decision regulating conduct. It is not within the power of the court to decide whether or not the advice of the PM about the prerogative honour to be conferred or denied upon Black was right or wrong. It is not for the court to give its opinion on the advice tendered by the PM to another country. These are non-justiciable decisions for which the PM is politically accountable to Parliament and the electorate, not the courts. Similarly, any question about the propriety of the PM's motivation is for Parliament and the electorate, not for the courts.

Black v. *Chrétien* (2000), 47 O.R. (3d) 532 at para. 27, 184 D.L.R. (4th) 755 (Sup. Ct.).

[8] *Ibid.* at para. 10.

[9] *Black*, *supra* note 2 at para. 77.

> economic interests. It enjoys no procedural protection. It does not have a sufficient legal component to warrant the court's intervention. Instead, it involves "moral and political considerations which it is not within the province of the courts to assess".
>
> In other words, the discretion to confer or refuse to confer an honour is the kind of discretion that is not reviewable by the court. In this case, the court has even less reason to intervene because the decision whether to confer a British peerage on Mr. Black rests not with Prime Minister Chrétien, but with the Queen. At its highest, all the Prime Minister could do was give the Queen advice not to confer a peerage on Mr. Black.
>
> For these reasons, I agree with the motions judge that Prime Minister Chrétien's exercise of the honours prerogative by giving advice to the Queen about granting Mr. Black's peerage is not justiciable and therefore not judicially reviewable.[10]

While his claim against Prime Minister Chrétien was dismissed, Black was able to become eligible for a peerage by renouncing his Canadian citizenship, which he did. On 31 October 2001 he took his seat in the House of Lords as Lord Black of Crossharbour.[11] Prime Minister Chrétien presumably is happy as well. He has had his dubious championing of the 1919 Nickle Resolution validated, and more to the point, will not have to endure the indignity of the disclosures and media scrutiny of a civil suit. The British government and Crown have avoided an embarrassing entanglement in Canadian affairs. Finally, the Canadian taxpayers will be spared funding an expensive defence against a litigant with near-bottomless resources.

Black represents, at first glance, a significant and positive watershed in Canadian public law. The Ontario Court of Appeal has confirmed that the Crown may be civilly liable for the misuse of a prerogative power. This judgment has helped to eliminate an obsolete vestige of Canada's monarchial past. However, as I argue below, by finding Black's claim against Prime Minister Chrétien to be non-justiciable, the court left intact a sphere of executive authority that is effectively immune from the rule of law. This is not an acceptable or a justifiable immunity, even for (and, perhaps, especially for) a constitutional monarchy rooted in the common law.

This comment is divided into three parts. In Part I, I outline the scope of judicial review of the Crown prerogative power and its application in *Black*. In Part II, I examine more specifically the justiciability of prerogative powers and the rationale adopted by the Ontario Court of Appeal in *Black*. Finally, in Part III, I analyze the im-

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[10] *Ibid.* at paras. 62-64 [reference omitted].

[11] See K. Makin & J. Saunders, "Black Set to Give Up Canadian Citizenship" *The Globe and Mail* (19 May 2001) A1; R. Furness, "Black Suit vs. PM Turfed by OCA" *The Lawyers Weekly* (1 June 2001) 8; "Lord Black of Crossharbour" *The Globe and Mail* (1 November 2001) A1. For this reason, Black also has decided not to appeal the case further to the Supreme Court of Canada.

plications of *Black* and situate this decision within a broader jurisprudence on the rule of law in Canada.

I. Judicial Review and the Crown Prerogative

The very nature of a Crown prerogative is that it is discretionary. Dicey famously described this common law set of powers as "the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown."[12] The Crown prerogative once constituted the central source of executive authority in England and its colonial holdings. Today, it remains the source for a disparate set of executive powers, including foreign affairs (*e.g.* treaty-making and diplomatic appointments); defence and the armed forces (*e.g.* sending peacekeepers abroad); passports, pardons, and the prerogative of mercy; the hiring and dismissal of certain public officials; honours and titles; copyright over government publications; the law of heraldry; incorporating companies by royal charter; collecting tolls from bridges and ferries; and the right to proclaim holidays.[13] This list is by no means exhaustive.

The scope of the Crown prerogative, over time, has been diminished. Since the House of Lords' landmark ruling in *A.G.* v. *De Keyser's Royal Hotel*,[14] it has been well settled that the prerogative power of the Crown could be displaced by statute. Hogg and Monahan set out six areas where the Crown prerogative power remains meaningful: powers relating to the legislature; powers relating to foreign affairs; powers relating to the armed forces; appointments and honours; immunities and privileges; and the emergency prerogative.[15]

The Crown prerogative has always been part of the common law, and because it is the function of the courts to declare what the law is, courts have accepted that judicial review is an appropriate means by which to define the existence and scope of pre-

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[12] A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan, 1959) at 424. This definition was cited by Laskin J.A. in *Black*, *supra* note 2 at para. 25, in turn citing the earlier adoption of this approach by the Supreme Court of Canada in *Reference as to the Effect of the Exercise by his Excellency the Governor General of the Royal Prerogative of Mercy upon Deportation Proceedings*, [1933] S.C.R. 269, (*sub nom. Re Royal Prerogative of Mercy Upon Deportation Proceedings)* [1933] 2 D.L.R. 348. More recently, the idea of the prerogative power representing a "residue of miscellaneous powers" was accepted in *Vancouver Island Peace Society* v. *Canada*, [1994] 1 F.C. 102, 64 F.T.R. 127 (T.D.), aff'd (1995), 16 C.E.L.R. (N.S.) 24, 179 N.R. 106 (F.C.A.). See generally P.W. Hogg & P.J. Monahan, *Liability of the Crown*, 3d ed. (Toronto: Carswell, 2000); S. Payne, "The Royal Prerogative" in M. Sunkin & S. Payne, eds., *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press, 1999) 77.

[13] For a description of each of these prerogatives, see H. Olson & P. Lordon, "Crown Prerogatives" in P. Lordon, ed., *Crown Law* (Toronto: Butterworths, 1991) at 61.

[14] [1920] A.C. 508 (H.L.).

[15] Hogg & Monahan, *supra* note 12 at 18-19.

rogative powers.[16] Reviewing the exercise of those powers, however, was another story. Historically, these powers were understood as the unfettered terrain of the monarch and outside the province of the courts. This doctrine has been described in the following terms:

> If it is claimed that the authority for the exercise of discretiou derives from the royal prerogative, the courts have traditionally limited review to questions of vires in the narrowest sense of the term. They can determine whether the prerogative power exists, what is its extent, whether it has been exercised in the appropriate form and how far it has been superseded by statute; they have not normally been prepared to examine the appropriateness or adequacy of the grounds for exercising the power, or the fairness of the procedure followed before the power is exercised, and they will not allow bad faith to be attributed to the Crown.[17]

This approach largely has been discarded in the United Kingdom through a series of recent judgments which have held that the exercise of prerogative powers, including those exercised by ministers, will be generally subject to judieial review (a conclusion based on the plausible premise that prerogative powers can be abused or misused just as any other governmental authority).[18] Since the landmark ruling of the House of Lords in *Council of Civil Service Unions* v. *Minister for the Civil Service*,[19] courts in the United Kingdom have accepted that there is now no principled distinction that flows from whether the source of governmental authority is statutory or prerogative in nature.

In the context of the prerogative of mercy, for example, courts have been willing to intervene to hold that a decision on whether to grant mercy was invalid because the minister failed to consider other forms of pardon.[20] In *R.* v. *Ministry of Defence, ex parte Smith*, the Queen's Bench Division reviewed a defence policy prohibiting gays and lesbians from serving in the military.[21] The government argued that the defence of the realm was a prerogative power. Brown L.J. held that the matter was justiciable and concluded, "To my mind only the rarest cases will today be ruled strictly beyond the

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[16] For an early confirmation of this approach, see *Case of Proclamations* (1611), 12 Co. Rep. 74, 77 E.R. 1352 (K.B.). See also R. Brazier, "Constitutional Reform and the Crown" in Sunkin & Payne, *supra* uote 12, 337 at 359.

[17] S.A. de Smith, *de Smith's Judicial Review of Administrative Action*, 4th ed. by J.M. Evans (London: Stevens & Sons, 1980) at 286-87 [footnotes omitted].

[18] For a review of this case law, see B. Hadfield, "Judicial Review and the Prerogative Powers of the Crown" in Sunkin & Payne, *supra* note 12, 197.

[19] [1985] 1 A.C. 374, [1984] 3 All E.R. 935 (H.L.) [hereinafter *Civil Service Unions* cited to A.C.].

[20] See *R.* v. *Secretary of State for the Home Department, ex parte Bentley* (1993), [1994] Q.B. 349, [1993] 4 All E.R. 442.

[21] [1995] 4 All E.R. 427 (Q.B.D.) [hereinafter *Smith*], aff'd (1995), [1996] Q.B. 517, [1996] 1 All E.R. 257 (C.A.).

court's purview."[22] As there were no national security interests at stake in *Smith*, the court held that the challenge to the policy on human rights and irrationality grounds could proceed.[23] In *Burmah Oil* v. *Lord Advocate*, the House of Lords concluded that the Crown was required to pay compensation to a party that had suffered damages as a result of the exercise of a Crown prerogative.[24]

Until recently in Canada, however, the traditional approach held sway and the exercise of a Crown prerogative generally was held to be immune from judicial review.[25] While the Canadian view was modified to accommodate judicial review of the exercise of the prerogative power under the *Canadian Charter of Rights and Freedoms*,[26] whether or not these powers are subject to judicial review on non-*Charter* grounds remained an open and somewhat murky question.[27]

Laskin J.A. adopted a similar approach in *Black*, acknowledging that "[t]he court has the responsibility to determine whether a prerogative power exists and, if so, its scope and whether it has been superseded by statute."[28] Laskin J.A. found that the prime minister's communication was an exercise of the prerogative power related to granting honours, and concluded:

> In my view, in advising the Queen about the conferral of an honour on a Canadian citizen, the Prime Minister was exercising his honours prerogative, a prerogative power that is beyond the review of the courts.[29]

The Ontario Court of Appeal's conclusion that the prime minister was in fact exercising the prerogative power relating to the conferral of honours seems open to challenge. The prime minister has no authority over the Queen's choice of whom to nominate for a peerage, nor was the prime minister in fact expressing any opinion on

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[22] *Ibid.* at 446.

[23] *Ibid.*

[24] [1965] A.C. 75 (H.L.).

[25] See *e.g. Re Doctors Hospital and Minister of Health* (1976), 12 O.R. (2d) 164, 68 D.L.R. (3d) 220 (Div. Ct.), Cory J.

[26] Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*]. In *Operation Dismantle* v. *The Queen*, [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481 [hereinafter *Operation Dismantle* cited to S.C.R.], the Supreme Court confirmed that the exercise of a prerogative power, such as a decision relating to foreign affairs, was subject to review for consistency with the *Charter*.

[27] In *Operation Dismantle*, *ibid.* at 471, Wilson J. highlighted the words of Lord Devlin in *Chandler* v. *Director of Public Prosecutions*, [1962] 3 All E.R. 142 at 159: "It is the duty of the courts to be as alert now as they have always been to prevent abuse of the prerogative."

[28] *Black*, *supra* note 2 at para. 29.

[29] *Ibid.* at para. 5. It is worth noting that Laskin J.A. did not comment on whether the communication additionally was an exercise of the prerogative power over foreign affairs, as LeSage J. had held in the court below.

whether Black was a worthy nominee. Similarly, the conclusion of the motions judge that the prime minister's communication was an exercise of the prerogative relating to foreign affairs seems to lack an air of reality. The communication in question in no way related to Canadian-British affairs. Plainly, what the prime minister communicated to the Queen was a legal opinion which had the intent and effect of barring Conrad Black from eligibility for a peerage. There is no need to categorize this communication abstractly. Any act of a prime minister in his or her official capacity that is not authorized by statute and not *ultra vires* must by definition be authorized by another kind of authority, whether a common law or a prerogative power of some kind. The rationale for the Ontario Court of Appeal's desire to attach the label of a particular prerogative power to the prime minister's conduct in *Black* is analyzed below.

Certainly, the more significant aspect of the judgment from the perspective of Canadian public law is the affirmation that the exercise of Crown prerogative powers properly may be the subject of judicial review on substantive grounds. Laskin J.A. stated this bluntly: "I agree with Mr. Black that the source of the power—statute or prerogative—should not determine whether the action complained of is reviewable."[30] Subsequently, he expressly adopted the House of Lords' expanded approach to reviewing the exercise of prerogative powers:

> [T]he expanding scope of judicial review and of Crown liability make it no longer tenable to hold that the exercise of a prerogative power is insulated from judicial review merely because it is a prerogative and not a statutory power. The preferable approach is that adopted by the House of Lords in the *Civil Service Unions* case. There, the House of Lords emphasized that the controlling consideration in determining whether the exercise of a prerogative power is judicially reviewable is its subject matter, not its source. If, in the words of Lord Roskill, the subject matter of the prerogative power is "amenable to the judicial process", it is reviewable; if not, it is not reviewable. Lord Roskill provided content to this subject matter test of reviewability by explaining that the exercise of the prerogative will be amenable to the judicial process if it affects the rights of individuals.[31]

Lord Roskill's embrace of judicial review over the exercise of prerogative powers in the United Kingdom, however, had some limitations. Lord Roskill saw the scope of this review power as limited to contexts where an individual's legal rights, obligations, or legitimate expectations are affected by the exercise of a prerogative power.[32] In

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[30] *Ibid.* at para. 44.

[31] *Ibid.* at para. 47 [reference omitted].

[32] *Civil Service Unions*, *supra* note 19 at 417:

> If the executive in pursuance of the statutory power does an act affecting the rights of the citizen, it is beyond question that in principle the manner of the exercise of that power may today be challenged on one or more of the three grounds which I have mentioned earlier in this speech. If the executive instead of acting under a statutory

Black, Laskin J.A. adopts this limitation as well.[33] Since Conrad Black had neither a right to nor an expectation of receipt of a peerage, the court concluded that not even the expanded scope for judicial review over the prerogative power applied in this case. Specifically, Laskin J.A. adopted what he referred to as the "subject matter" test from Lord Roskill's reasons in *Civil Service Unions*, under which, Laskin J.A. explained, in a somewhat circular fashion, that "[o]nly those exercises of the prerogative that are justiciable are reviewable."[34] In the passage from *Civil Service Unions* adopted in *Black*, Lord Roskill stated:

> Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament, and the appointment of ministers as well as others are not, I think, susceptible to judicial review *because their nature and subject matter are such as not to be amenable to the judicial process.* The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another.[35]

Laskin J.A. cited these remarks as support for his conclusion that the prerogative of granting of honours, as a category of prerogative powers, cannot support a justiciable, legal challenge.[36] In my view, Laskin J.A. has misapprehended the meaning of this passage. I do not believe Lord Roskill intended to categorize a set of powers that, in and of themselves, were immune from judicial review because they did not affect an individual's rights, obligations, or legitimate expectations. Indeed, if this was his intent, it seems odd to include the prerogative of mercy with the granting of honours. An exercise of the prerogative of mercy typically *will* affect an individual's rights, obligations, and legitimate expectations,[37] as Laskin J.A. himself observed elsewhere in

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> power acts under a prerogative power and in particular a prerogative power delegated to the respondent under article 4 of the Order in Council of 1982, so as to affect the rights of the citizen, I am unable to see, subject to what I shall say later, that there is any logical reason why the fact that the source of the power is the prerogative and not statute should today deprive the citizen of that right of challenge to the manner of its exercise which he would possess were the source of the power statutory. In either case the act in question is the act of the executive.

[33] *Black*, *supra* note 2 at para. 49.

[34] *Ibid.* at para. 50.

[35] *Civil Service Unions*, *supra* note 19 at 418 [emphasis added].

[36] *Black*, *supra* note 2 at para. 58.

[37] This point is echoed by Hadfield, *supra* note 18 at 217. Also, as mentioned above, U.K. courts post-*Civil Service Unions* have accepted the justiciability of decisions relating to the prerogative of mercy. See *Smith*, *supra* note 21.

his reasons.[38] Rather, I believe Lord Roskill was making the point that where a public decision calls for a delicate balance of competing policy, ideological, political, social, moral, and historical concerns, judicial resolution may be inappropriate. Some prerogative powers such as the granting of honours will often require such balancing. The exercise of other prerogative powers, such as the granting of a passport, will rarely involve such balancing. In *Black*, however, there was no delicate political or moral decision-making at issue. It should be reiterated that the prime minister was not deciding whether Black was *worthy* of an honour, but rather whether he was *legally entitled* to the honour.[39] In this sense, the prime minister's communication was no different than the communication of a transportation department official as to whether an individual is legally entitled to a driver's license. Why should one public official's legal opinion be reviewable while another public official's legal opinion be immune from judicial accountability?

The troubling aspect of the Ontario Court of Appeal's reasoning is that it simply exchanges one type of formalism for another. Now, the question is no longer "Is the exercise of authority based on a Crown prerogative?" but rather "Is the exercise of authority related to the conferral of honours?" For Laskin J.A., prerogative powers fall into specific subject-matter categories (for example, the prerogative of honours, the prerogative of foreign affairs), and these categories in turn fall along a spectrum of reviewability. In his reasons, he distinguished non-justiciable prerogative powers such as the granting of honours from those prerogative powers at the other end of the spectrum, such as granting passports and, significantly, the prerogative of mercy, which he observed are no longer viewed as "royal favours", and would presumably give rise to justiciable claims if exercised wrongfully.[40]

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[38] *Black*, *supra* note 2 at para. 55.

[39] Whether the prime minister expressed a legal opinion, or merely expressed Canadian policy, is open to interpretation. However, on a motion to strike a claim, all the facts as alleged must be accepted as true. Black alleged that the prime minister had informed the Queen that conferring a peerage on Black would represent a "contravention of Canadian law" (*ibid.* at para. 11). Laskin J.A. subsequently characterized the distinction between expressing a law or a policy as missing "what this case is about" (*ibid.* at para. 57). In that same passage, he stated that the prime minister was engaged in advising the Queen about Canadian policy (*ibid.*).

[40] Laskin J.A. explained this distinction with respect to the prerogative of mercy as follows:

> Though on one view mercy begins where legal rights end, I think the prerogative of mercy should be looked at as more than a royal favour. The existence of this prerogative is the ultimate safeguard against mistakes in the criminal justice system and thus in some cases the Government's refusal to exercise it may be judicially reviewable. That was the view taken by the English Queen's Bench Division in *Re Secretary of State for the Home Department, Ex p. Bentley*. There, the court held that the Home Secretary's decision not to grant a posthumous conditional pardon was judicially reviewable.

Ibid. at para. 55 [reference omitted].

Because Laskin J.A. adopted what he termed the "subject matter" approach, the question of how to characterize the prime minister's communication becomes crucially important. In this regard, he concluded as follows:

> Focusing on wrong legal advice or the improper interpretation of a policy misses what this case is about. As I see it the action of Prime Minister Chrétien complained of by Mr. Black is his giving advice to the Queen about the conferral of an honour on a Canadian citizen. The Prime Minister communicated Canada's policy on honours to the Queen and advised her against conferring an honour on Mr. Black.[41]

This characterization of the prime minister's action in *Black* is one-dimensional and difficult to sustain. Whether the prime minister communicated Canada's policy on honours to the Queen, or legal advice to the Queen, he made what could be characterized as an administrative decision pertaining to Mr. Black.[42]

In *Liability of the Crown*, which was written before the Ontario Court of Appeal's decision, Hogg and Monahan make a similar point in criticizing LeSage J.'s dismissal of Black's claim on justiciability grounds.[43] They are highly skeptical of immunizing a category of prerogative powers from judicial review (and emphasize that if the prime minister's actions had been taken pursuant to a statute, there would have been no suggestion that those actions were not reviewable).[44] In a variation of the *Civil Service Unions* approach, a key distinction for Hogg and Monahan is whether the power exercised relates to a particular, named individual. They view this distinction as analogous to the scope of procedural fairness in administrative law, where the duty of fairness will apply where the rights, interests, and privileges of a particular individual are affected. Since the action in *Black* was targeted at a specific, named individual, Hogg and Monahan conclude that it should have been considered justiciable.[45]

This approach, while overcoming the problem of formalism highlighted above, sidesteps the problem of justiciability. There may be prerogative decisions (for example, upon whom to bestow the Order of Canada) that are not matters capable of adjudication in a court even though they affect named individuals. The government may consider a range of partisan, social, and cultural factors in selecting individuals to honour that do not lend themselves to objective evidence or judicial resolution. On the other hand, certain legislative or policy decisions (for example, the decision to adhere

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[41] *Ibid.* at para. 57.

[42] It should be noted that the prime minister's advice was not binding on the Queen, either in law or convention. In practice, however, it would be hard to imagine circumstances in which the Queen would confer an honour on a Canadian citizen where the prime minister had advised against her doing so.

[43] Hogg & Monahan, *supra* note 12 at 19-21.

[44] *Ibid.* at 20.

[45] *Ibid.*

to a particular international treaty) may be well documented and turn on judicially cognizable questions of international and domestic law. Hogg and Monahan acknowledge the importance of a case by case approach, concluding: "In short, it seems preferable in each case to determine whether the particular issues raised in the litigation are amenable to judicial review, rather than to apply a blanket immunity for any and all exercises of the prerogative which fall within a particular category."[46] Therefore, it is neither the source nor the target of government action that should determine justiciability; rather, justiciability should turn solely on questions of legitimacy and capacity of the courts to adjudicate a matter.

II. Justiciability and the Crown Prerogative

In *Black*, Laskin J.A. linked his understanding of the "subject-matter" of the prerogative power (that is, which category or prerogative power it falls into) with the justiciability of the challenged government action:

> At the core of the subject matter test is the notion of justiciability. The notion of justiciability is concerned with the appropriateness of courts deciding a particular issue, or instead deferring to other decision-making institutions like Parliament. Ouly those exercises of the prerogative that are justiciable are reviewable. The court must decide "whether the question is purely political in nature and should, therefore, be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch".
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> Under the test set out by the House of Lords, *the exercise of the prerogative will be justiciable, or amenable to the judicial process, if its subject matter affects the rights or legitimate expectations of an individual. Where the rights or legitimate expectations of an individual are affected, the court is both competent and qualified to judicially review the exercise of the prerogative.*[47]

Justiciability is an elusive concept, but generally is held to refer both to the capacity and legitimacy of courts to undertake the adjudication of a matter.[48] There are two germane questions before any court making a determination of justiciability. First, can the matter be determined according to objective, judicially cognizable standards and evidence? Second, is the matter appropriate for adjudication given the constitutional, political, and legal systems in Canada? In other words, does the court have the capacity and legitimacy to decide the case?

The Ontario Court of Appeal, in adopting Lord Roskill's finding in *Civil Service Unions* that the source of governmental authority (whether based on prerogative or

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[46] *Ibid.*

[47] *Black*, *supra* note 2 at paras. 50-51 [references omitted, emphasis added].

[48] See generally L. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Scarborough, Ont.: Carswell, 1999) at 1-26 [hereinafter Sossin, *Boundaries*].

statute) should have no bearing on the question of judicial review, has resolved (in my view, correctly) the question of legitimacy. The court has held that the exercise of a prerogative power by the prime minister (or, presumably, by cabinet or by any individual minister) is not a "purely political" question, and that judicial review over the exercise of prerogative powers per se is not inappropriate.[49] This is in keeping with the recent trend in the Supreme Court, summarized succinctly by Lamer C.J.C. in the *Re Provincial Judges Remuneration* as follows: "[T]he exercise of all public power must find its ultimate source in a legal rule."[50] It follows that it is the duty of the courts to resolve claims that these legal rules have been violated.

It is problematic to suggest that some prerogative powers will give rise to justiciable claims while others will not, just as it would be problematic to suggest that some statutes give rise to justiciable rights and obligations but others are beyond the province of the courts. It is important to emphasize here that if the government wishes to immunize a public power from judicial review, it may attempt to do so through statutory means. Privative clauses in statutes that authorize executive action have been upheld as severely restricting the scope of judicial review.[51] Further, if the government wishes to subject a particular power to political rather than legal remedies, this also may be accomplished through legislative means. In *Canada (Auditor General)* v. *Canada (Minister of Energy, Mines, and Resources)*,[52] the Court declined to intervene in a dispute between the auditor general and a minister over disclosure of documents because the statute empowering the auditor general contained a reporting requirement in response to non-compliance. In other words, since a mechanism was put in the statute for resolving (or at least airing) disputes, the Court held that it would be inappropriate to intervene.

While Canadian courts have yet to embrace a formal "political questions" doctrine of the kind that characterizes the American constitutional jurisprudence,[53] they

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[49] Even if the exercise of some prerogative powers has political dimensions, the Supreme Court held that it is incumbent on courts to disentangle the legal from the political dimensions of such decisions, and proceed to adjudicate the legal aspects where possible. *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217 at paras. 26-28, 161 D.L.R. (4th) 385 [hereinafter *Secession Reference*].

[50] [1997] 3 S.C.R. 3 at para. 10, 150 D.L.R. (4th) 577.

[51] Statutes cannot, however, entirely preclude judicial review of executive action. As a constitutional standard, review will always remain for executive authority taken without jurisdiction, or for executive action that is patently unreasonable. See *Crevier* v. *Quebec (A.G.)*, [1981] 2 S.C.R. 220, 127 D.L.R. (3d) 1.

[52] [1989] 2 S.C.R. 49, 97 N.R. 241.

[53] See *Baker* v. *Carr*, 369 U.S. 186 at 208-37, 82 S. Ct. 691 (1962). The origin of the "political questions" doctrine is the U.S. Constitution, which provides, *inter alia*, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution ...; to Controversies ..." (U.S. Const. art. III, § 2, cl. 1). This has been interpreted as limiting the power of judicial review in the U.S. to "cases and controversies", which exclude, for example, reference questions posed by the executive.

have found disputes non-justiciable that raise a purely political matter, or that impugn the wisdom of government action, or for which Parliament has provided, by statute, a political rather than legal remedy.[54] None of these are applicable to the *Black* case. Because the effect of *Black* is to allege an abuse of process on the part of the prime minister, this raises a prima facie legal issue. As Wilson J. affirmed in *Operation Dismantle*, once a legal issue is raised, the courts have no discretion to decline to adjudicate the matter simply because it also happens to raise issues of political sensitivity.[55]

Once the question of appropriateness has been resolved, the focus of the justiciability analysis turns to the capacity of the court to adjudicate the particular matter before it. Canadian courts have held that where a matter is hypothetical, abstract, premature, moot, of a purely political, spiritual or moral matter, or not susceptible to proof, the judicial process lacks the capacity to resolve the matter.[56] The action at issue in *Black* would appear to be a matter for which a court would have sufficient capacity to determine. The evidence that Mr. Black sought to proffer was not of a kind unsusceptible to proof or incapable of being weighed by the court. Indeed, much of the factual evidence is uncontested. The prime minister did not dispute providing the legal advice to the Queen regarding Black's nomination. The correctness of that legal advice, and the prime minister's motivations for offering it, are not beyond judicial understanding or expertise; indeed, the contrary appears to be the case.

According to Black's account of the facts, which must be accepted as true for the purposes of the motion to dismiss the claim based on the pleadings alone, the prime minister chose to intercede in an effort to exact retribution against Courad Black for his Southam newspapers' coverage of the prime minister. This is a serious allegation of abuse of power. As to whether Black's evidence could bear out his claims if tested at trial, this is another question, and one which now is unlikely ever to be resolved.[57]

Judicial review is also excluded where a non-judicial forum is provided by the Constitution for the resolution of disputes, such as the power given to the Senate to adjudicate impeachment claims. See *Nixon* v. *U.S.*, 506 U.S. 224, 113 S. Ct. 732 (1993).

[54] See Sossin, *Boundaries*, *supra* note 48, c. 4.

[55] *Operation Dismantle*, *supra* note 26 at 472. Wilson J. was referring to the review of prerogative powers under the *Charter*, but there is no principled reason to adopt a different view to claims which go to the heart of the rule of law, as discussed in more detail below.

[56] It was on these grounds that the claim in *Operation Dismantle* was dismissed. In that case, proving the claim against the government would have required evidence that Canada had become a more likely target for nuclear destruction by the Soviet Union as a result of permitting the U.S. to test cruise missiles on Canadian soil. For further discussion, see Sossin, *Boundaries*, *supra* note 48 at 48-55.

[57] While much of the damaging evidence consisted of remarks made during private conversations between Black and Chrétien, which cannot be corroborated, the prime minister's eleventh-hour intervention, reversing Canada's stated position on Black's nomination, is suspicious. Black's allegation that the Nickle Resolution was a mere pretext for an ulterior agenda is at least credible. As Black pointed out in his factum, the Nickle Resolution applied only to persons resident or domiciled in Canada, which Black was not. Further, according to Black's claim, this resolution has been routinely ig-

Rather than consider the issue of the court's capacity in the context of the particular facts and circumstances of the case, the Court of Appeal in *Black* simply emphasized the discretion implicit in the prime minister's prerogative authority. Laskin J.A. asserted that "[e]ven if the advice was wrong or careless or negligent, even if his motives were questionable, they cannot be challenged by judicial review."[58] In my view, the Ontario Court of Appeal has used the doctrine of justiciability in an undesirably formalistic fashion, so as to remove a significant sphere of executive action from the reach of the rule of law. In the following section, I consider the implications of this holding for the rule of law, and for its cardinal principle that no discretion is absolute.

III. The Implications of *Black* and the Rule of Law

The rule of law is a contested notion.[59] In the *Secession Reference*, the Court described the importance of the rule of law in the following terms:

> The principles of constitutionalism and the rule of law lie at the root of our system of government. The rule of law, as observed in *Roncarelli v. Duplessis* is "a fundamental postulate of our constitutional structure". As we noted in the *Patriation Reference*, "[t]he 'rule of law' is a highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority". At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action.[60]

Following *Roncarelli* v. *Duplessis*, the rule of law has come to embrace the principle that no discretion is "untrammelled".[61] No matter how wide a grant of statutory authority (or how broad a prerogative power), all government decision-making must conform to certain basic tenets, such as being rendered in good faith and not for ulterior or improper motives.

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nored in numerous instances over the years, including the cases of Sir Conrad Swan and Sir Neil Shaw, who had received titles during the tenure of Chrétien's government. Whatever one makes of the Nickle Resolution, it does not appear to constitute an enforceable, legal barrier to a Canadian citizen's nomination for a titular honour. See plaintiff's Amended Statement of Claim, *Black* v. *Jean Chrétien and the Attorney General for Canada*, Court File No. C33887 at para. 16.

[58] *Black*, *supra* note 2 at para. 65.

[59] For recent appraisals, see A. Hutchinson, "The Rule of Law Revisited: Democracy and Courts" in D. Dyzenhaus, ed., *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford: Hart, 1999) 196; J. Jowell, Q.C., "Beyond the Rule of Law: Towards Constitutional Judicial Review" [2000] Pub. L. 671; T.R.S. Allen, "The Rule of Law as the Rule of Reason: Consent and Constitutionalism" (1999) 115 L.Q. Rev. 221.

[60] *Supra* note 49 at para. 70 [references omitted].

[61] [1959] S.C.R. 121 at 140, 16 D.L.R. (2d) 689 [hereinafter *Roncarelli* cited to S.C.R.].

The rule of law has little meaning if it cannot be meaningfully enforced. Is there a principled basis on which to say that certain categories of executive action should be entirely immune from judicial review for breach of the rule of law? While justiciability concerns will sometimes render specific decisions inappropriate for adjudication (that is, courts may lack the legitimacy or capacity to adjudicate them), this must be considered on a case by case rather than a categorical basis. As a general point, I would contend that any allegation of a breach of the rule of law by the prime minister in the exercise of an executive power (whether statutory or prerogative in origin) raises a prima facie justiciable claim. As Professor Wade stated:

> The powers of public authorities are ... essentially different from those of private persons. A man making his will may, subject to any rights of his dependants, dispose of his property just as he may wish. [...] This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest ... The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good.[62]

A similar notion has been adopted by the Supreme Court of Canada in *Roncarelli*,[63] and elevated in the *Secession Reference* to the status of part of Canada's unwritten constitution.[64] Nonetheless, as several observers have emphasized, notwithstanding the *Roncarelli* case and a handful of others,[65] the rule of law has rarely been the basis for a judicial remedy in Canada.[66] Indeed, the post-*Roncarelli* Supreme Court of Canada

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[62] W. Wade, *Administrative Law*, 6th ed. (New York: Oxford University Press, 1988) at 399-400, cited with approval by Laws J. in *R. v. Somerset County Council, ex parte Fewings*, [1995] 1 All E.R. 513 at 524.

[63] In *Roncarelli*, *supra* note 61 at 140, Rand J. stated: "there is no such thing as absolute and untrammelled 'discretion', that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator." This principle has been affirmed by the Supreme Court on many occasions, most recently in *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281 at para. 16, 200 D.L.R. (4th) 193, 2001 SCC 41.

[64] *Supra* note 49. See also *Reference Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at 748-50, 19 D.L.R. (4th) 1, in which the Supreme Court held that the rule of law had constitutional status by virtue of the preamble to the *Constitution Act, 1867*.

[65] In *Roncarelli*, *supra* note 61, Premier Duplessis of Quebec, acting through the Manager of the Liquor Commission, revoked the liquor license of a tavern owner who had been actively supporting Jehovah's Witnesses. The Supreme Court quashed the revocation based on the premier's disregard for the rule of law. For examples of applications of *Roncarelli* in civil cases, see *Gershman v. Manitoba Vegetable Producers' Marketing Board* (1976), 69 D.L.R. (3d) 114, [1976] 4 W.W.R. 406 (Man. C.A.); *Alberta (Minister of Public Works, Supply & Services) v. Nilsson* (1999), 246 A.R. 201, [1999] 9 W.W.R. 203 (Q.B.), leave to appeal granted (1999), 181 D.L.R. (4th) 380 (Alta. C.A.).

[66] See H.W. Arthurs, "'Mechanical Arts and Merchandise': Canadian Public Administration in the New Economy" (1997) 42 McGill L.J. 29 at 49, n. 31; D. Mullan, "The Role of the Judiciary in the Review of Administrative Policy Decisions: Issues of Legality" in M.J. Mossman & G. Otis, eds., *The*

case law has made it less likely, from a practical perspective, that the rule of law will provide a meaningful restraint on government action in the future.

In *Thorne's Hardware* v. *Canada*,[67] a case cited by Laskin J.A. as authority for the non-justiciability of the prime minister's action in *Black*, a federal Order in Council that altered the boundaries of the port of St. John was challenged. The applicant claimed that the cabinet decision had been motivated by the ulterior and improper purpose of expanding the revenue base of the National Harbours Board. While conceding that there could be review in "an egregious case" of the cabinet's failing to observe jurisdictional limits or "other compelling grounds",[68] Dickson J. (as he was then), writing for the Court, held that "[d]ecisions made by the Governor in Council in matters of public convenience and general policy are final and not reviewable in legal proceedings."[69] Dickson J. was unwilling even to review the evidence that alleged that the cabinet had acted in bad faith, contrary to the rule of law. He found that it was "neither our duty nor our right to investigate the motives which impelled the federal Cabinet to pass the Order in Council"[70] and observed that "governments may be moved by any number of political, economic, social or partisan considerations."[71] Somewhat ironically, Dickson J. was prepared to examine the evidence to "show that the issue of harbour extension was one of economic policy and politics; and not one of jurisdiction or jurisprudence."[72]

In *Consortium Developments (Clearwater) Ltd.* v. *Sarnia (City of)*,[73] the Supreme Court applied the *Thorne's Hardware* principle in the context of a municipal corporation's appointment of a board of inquiry under Ontario's municipal legislation. Writing for the Court, Binnie J. held that the applicants had no right to examine municipal councillors with a view to establishing that they had improper motives in voting for the creation of a board of inquiry, holding that the "motives of a legislative body composed of numerous individuals are 'unknowable' except by what it enacts."[74] As David Mullan observed in his analysis of *Consortium Developments*,

> In other words, provided there are no jurisdictional infirmities on the *face* of the text of the resolution appointing the board of inquiry, it may not matter whether all of the councillors acted on the basis of the most outrageous motivations or, put more accurately, it is not for the courts to assist the applicant in any way in

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Judiciary as Third Branch of Government: Manifestations and Challenges to Legitimacy (Montreal: Thémis, 2000) 313 at 321.

[67] [1983] 1 S.C.R. 106, 143 D.L.R. (3d) 577 [hereinafter *Thorne's Hardware* cited to S.C.R.].

[68] *Ibid.* at 111.

[69] *Ibid.*

[70] *Ibid.* at 112.

[71] *Ibid.* at 112-13.

[72] *Ibid.* at 115.

[73] [1998] 3 S.C.R. 3, 165 D.L.R. (4th) 25 [hereinafter *Consortium Developments*].

[74] *Ibid.* at para. 45.

> an attempt to build an evidential record establishing that that was the case. Only if the information is volunteered explicitly and that information goes as far as establishing that all members of council voting for the resolution were acting in "bad faith" will there be any possibility of success on an application to enjoin the continuation of such an inquiry or, presumably, any other form of legislative or executive action.[75]

Also in 1999, the Supreme Court of Canada decided the case of *Wells* v. *Newfoundland*.[76] Wells was a controversial consumer representative member of the Newfoundland Public Utilities Board, whose position was eliminated under the terms of a statutory restructuring of the board. His litigation concerned whether he was entitled to compensation for this constructive dismissal (at the time, Wells was six months short of having his pension vest). Writing for the Court, Major J. concluded that, while Wells' position could be terminated by statute, absent express statutory provisions to the contrary, contract law and contract remedies governed the employment relationship. Consequently, as the Crown was in breach of its contract with Wells, he was entitled to compensation by way of damages. Major J. framed the issue of the obligation upon governments to respect the rights of individuals in the following terms:

> In a nation governed by the rule of law, we assume that the government will houour its obligations unless it explicitly exercises its power not to. In the absence of a clear express inteut to abrogate rights and obligations—rights of the highest importance to the individual—those rights remain in force. To argue the opposite is to say that the government is bound only by its whim, not its word. In Canada this is unacceptable, and does not accord with the nation's understanding of the relationship betweeu the state and its citizens.[77]

In the spirit of this comment, Major J. discussed, in *obiter*, whether the rule of law could apply to legislative action, which in this case might have entitled Wells to an administrative law remedy in addition to civil damages. Brushing aside "anecdotal" suggestions that the statutory restructuring was specifically intended to remove Wells from the Board, Major J. found no "evidence" of bad faith and on this basis, distinguished *Wells* from *Roncarelli*.[78] What Major J. could have stated but chose not to, is simply that the principle in *Roncarelli* had no application in the legislative context.[79]

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[75] Mullan, *supra* note 66 at 327 [emphasis added]. I also drew this conclusion in L. Sossin, "Developments in Administrative Law: The 1997-98 and 1998-99 Terms" (2000) 11 Supreme Court L.R. (2d) 37 at 87-88.

[76] [1999] 3 S.C.R. 199, 177 D.L.R. (4th) 73 [hereinafter *Wells*].

[77] *Ibid.* at para. 46.

[78] *Ibid.* at para. 58.

[79] Major J. did reaffirm that the duty of procedural fairness has no application to the legislative realm (*ibid.* at 222 [references omitted]):

> Both the decision to restructure the Board, and the subsequent decision uot to reappoint the respondent, were *bona fide* decisions. The decision to restructure the Board

As I have suggested elsewhere,[80] Major J. appeared to imply in *Wells* that if the evidence had established that "personal animus" motivated the enactment of the statute at issue, it could have been nullified as a breach of the rule of law and therefore *ultra vires* legitimate legislative power.[81]

The Supreme Court has emphasized that the *Charter* should not provide a right that has no remedy.[82] There is no reason that this same principle should not apply to the rule of law doctrine in Canada's unwritten constitution as well.[83] The Supreme Court's decisions in *Thorne's Hardware* and *Consortium Developments* appear at odds with this principle. While these decisions admittedly leave open a remedy for egregious violations in circumstances where executive officials publicly announce that they have acted in bad faith, the Court has removed most potential abuses of power from any judicial remedy.

The Ontario Court of Appeal in *Black* appears to have confirmed that the prime minister, in exercising the Crown prerogative relating to the granting of honours, has absolute discretion (although presumably subject, following *Operation Dismantle*, to judicial scrutiny under the *Charter*). This means that even if the prime minister's communication had been made in bad faith, it could not give rise to a judicial remedy.

> was deliberated and enacted by the elected legislature of the Province of Newfoundland. This is fatal to the respondent's argument on bad faith, as legislative decision making is not subject to any known duty of fairness. Legislatures are subject to constitutional requirements for valid law-making, but within their constitutional boundaries, they can do as they see fit. The wisdom and value of legislative decisions are subject only to review by the electorate. The judgment in *Reference re Canada Assistance Plan* was conclusive on this point in stating that: "the rules governing procedural fairness do not apply to a body exercising purely legislative functions".

[80] L. Sossin, "Developments in Administrative Law: The 1999-2000 Term" (2000) 13 Supreme Court L.R. (2d) 45 at 67.

[81] For an intriguing example of this approach, see *Bacon* v. *Saskatchewan Crop Insurance Corp.*, [1997] 9 W.W.R. 258, 157 Sask. R. 199 (Q.B.) (holding that a legislative scheme that was "arbitrary" could offend the rule of law although the agriculture scheme at issue in the case could not be so characterized), aff'd [1999] 11 W.W.R. 51, 157 Sask. R. 199 (C.A.) (upholding the trial judge's finding that the legislation was valid, but expressly reversing the trial judge's reasoning on the rule of law issue).

[82] See *e.g. Nelles* v. *Ontario*, [1989] 2 S.C.R. 170 at para. 50, 69 O.R. (2d) 448, Lamer J. (as he was then).

[83] It is clear, however, that some aspects of the constitution, such as constitutional conventions, only provide for declaratory legal remedies, not substantive ones. See the *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, (*sub nom Reference re Amendment of the Constitution of Canada*) 125 D.L.R. (3d) 1. On the renewed emphasis in Canada on the unwritten constitution, see M. Walters, "The Common Law Constitution of Canada: Return of *Lex non Scripta* as Fundamental Law" (2001) 51 U.T.L.J. 91; D. Dyzenhaus, "*Baker* and the 'Unwritten' Constitution" (2001) [unpublished, archived at McGill Law Journal].

Even if the prime minister, in communicating Canadian policy regarding honours to the Queen, had simply made up a legal rule that did not exist at all, no legal consequences would follow. While it is difficult to generate heartfelt sympathy for Black's plight, the target of a prerogative power could as easily have been a more vulnerable individual, and the basis for intervention could as easily have been that individual's ethnic, ideological, or social affiliations. To allow such abuses of power to remain immune from judicial scrutiny appears on its face to eviscerate the supremacy of the rule of law. Can *Roncarelli* and *Black* be reconciled?

Some have pointed to the fact that *Roncarelli* involved the revocation of a license, an administrative decision toward the judicial end of the decision-making spectrum, and thus attracts closer scrutiny than discretionary decisions at the legislative or policy end.[84] Once again, however, this approach tempts a return to formalism. The duty of fairness no longer turns on the categorization of a particular decision (unless, that is, it is a truly legislative decision to which no duty of fairness applies). Resurrecting such distinctions to justify immunizing certain governmental decisions from the reach of the rule of law is unjustified and potentially dangerous. An alternative approach would be to impose greater scrutiny on government decisions based on the authority vested in, and integrity expected of, the decision-maker. On this basis, where a premier and attorney general (as in *Roncarelli*) or a prime minister (as in *Black*) has his or her actions challenged, a higher standard is appropriate.

The better view is to err on the side of allowing rule of law claims to go forward. While Black's claim was framed in abuse of power, and sought damages rather than an administrative law remedy against arbitrary action, the principle at stake is analogous. It will be rare where evidence can be proffered that demonstrates decision-makers acted in bad faith, or for ulterior or arbitrary motives. *Roncarelli*, where Premier Duplessis testified as to his ulterior motives, was surely exceptional in this regard.[85] Other claimants, however, must be permitted to gather evidence to make their case. In *Consortium Developments*, this may well have meant compelling municipal councillors to testify, but limiting the questions they could be asked, or the use that could be made of the answers. The judicial regulation of discovery, however, can mitigate the potential for abuse or malicious civil suits. Fishing expeditions and open-ended attempts to harass governments can be filtered out.

As indicated above, it is unclear whether the facts as alleged by Black in this case could have been proven. What is clear, at least to me, is that the doctrine of justiciability should not be used as a shield to protect executive officials from the reach of the rule of law. This is equally important in claims raising the tort of abuse of process against a public official. As the Ontario Court of Appeal itself pointed out in *Odhavji*

[84] See Mullan, *supra* note 66 at 324.
[85] *Supra* note 61 at 134-37.

Estate v. *Woodhouse*,[86] the concern for the rule of law lies at the core of the tort of misfeasance in public office.[87]

In *Black*, Laskin J.A. is certainly correct that no Canadian has an entitlement to an honour, and that the interest at stake in this decision was trivial at best (except, of course, to Mr. Black).[88] I would argue, however, that the court's vigilance regarding alleged breaches of the rule of law should not depend on the gravity of a particular decision.

Conclusion

Any arbitrary decision for which a public official cannot be held accountable represents an important erosion of some of the most basic and fundamental tenets of our legal and political systems. Where such a decision emanates from the prime minister, careful scrutiny is justified. There is no clear basis in an enlightened, constitutional monarchy for "royal favours" of any kind, and certainly no justification to insulate such favours from judicial accountability. Any alleged breach of the rule of law raises an important and justiciable legal issue (subject to the concerns outlined above regarding judicially cognizable standards).

The Ontario Court of Appeal's decision in *Black* has significantly diminished the vestiges of monarchial power in Canada. By the same token, however, the court has given its imprimatur to the untrammelled discretion of the prime minister in exercising certain Crown prerogatives, such as the granting of honours. For these reasons, *Black* represents both one important step forward, and one disturbing step back, on the road to reconciling the exercise of prerogative powers with the rule of law.

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[86] (2000), 52 O.R. (3d) 181 at para. 22, 194 D.L.R. (4th) 577 (C.A.), leave to appeal to S.C.C. granted 7 September 2001.

[87] Borins J.A., writing for the majority, adopted the following remarks of Lord Steyn in *Three Rivers District Council* v. *Bank of England (No. 3)*, [2000] 2 W.L.R. 1220 at 1230 (H.L.): "The rationale of the tort is that in a legal system based on the rule of law executive or administrative power 'may be exercised only for the public good' and not for ulterior and improper purposes."

[88] *Black*, *supra* note 2 at para. 62.

The Law behind the Conventions of the Constitution: Reassessing the Prorogation Debate

Mark D. Walters[*]

In December of 2008 and again in December of 2009, Prime Minister Stephen Harper obtained from Governor General Michaëlle Jean orders proroguing the Parliament of Canada in circumstances that were deeply controversial. The topic of constitutional conventions, which does not generally attract much public attention, suddenly became the subject of considerable interest. The Governor General, as the Queen's representative in Canada, has the legal power under the royal prerogative to make key decisions about parliamentary government, including the appointment and dismissal of prime ministers and other ministers who form the government, the summoning of parliaments, the making of legislation by assenting to bills passed by the upper and lower chambers, the proroguing or ending of parliamentary sessions, and the dissolving of parliaments and the calling of elections. However, by constitutional convention the royal prerogative is almost always exercised on the advice of ministers of the Crown, in particular prime ministers, who are responsible to the elected members of Parliament. Through this principle of responsible government, royal authority is exercised in a democratic fashion. But what if a Prime Minister uses the Governor General's powers to shut down Parliament in a bid to *avoid* responsibility to elected representatives? Was this Prime Minister Harper's intent when he sought to prorogue Parliament on the above-mentioned occasions? Did he violate any constitutional conventions when advising the Governor General? Did the Governor General violate any conventions by accepting his advice? In the debate that has raged on how to answer these questions there are, of course, serious differences of opinion.[1] But most protagonists in this debate seem to agree on at

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1 See, for example, "Forum: The 2008 Prorogation Question" (2009) 2 J.P.P.L. 207–215; Guy Tremblay, "Les dimensions constitutionnelles de la crise politique fédérale de 2008-2009" (2009) 3 J.P.P.L. 179; Kenneth Munro, "The Turmoil Surrounding the Prorogation of Canada's 40th Parliament & the Crown" (2009) 18 Const. F. 13; Bruce M. Hicks, "British and Canadian Experience with the Royal Prerogative" (2010) 33 Can. Parlia. Rev. 18; Andrew Heard, "The Governor General's Decision to Prorogue Parliament: Parliamentary Democracy Defended or Endangered?", *Points of View*, Discussion Paper No. 7 (Edmonton: Centre for Constitutional Studies, January, 2009); Andrew Heard, "The Governor General's Decision to Prorogue Parliament: A Chronology & Assessment" (2009) 18 Const. F. 1; Eric Adams, "The Constitutionality of Prorogation" (2009) 18 Const. F. 17; Frédéric Boily, "La 'crise de la prorogation' vue du Qué-

least one point: whatever we think about the actions of the Prime Minister and the Governor General in terms of constitutional convention, there cannot be any ground for questioning their actions in terms of constitutional *law*.

The assumption that the two Harper prorogation crises raise questions of convention but not law is based on established views about constitutionalism derived from the British tradition and affirmed by the Supreme Court of Canada in the 1981 *Patriation Refererence*.[2] However, this assumption has not gone unchallenged. Indeed, the prorogation crises have prompted several legal scholars to reassess those views and to argue that prerogative decisions affecting parliamentary democracy must be subject to *some* sort of legal limitation. Different arguments are made in this respect, but they share a common premise, namely, that established views on constitutional law and convention are in need of revision in light of the judicial narrative in Canada on unwritten constitutional principles that culminates with the Supreme Court of Canada's opinion in the 1998 *Quebec Secession Reference*.[3] For example, Lorne Sossin and Adam Dodek argue that a sharp distinction between law and convention is no longer possible, and legal principles of fairness should now be seen to overwhelm conventions on confidentiality that shield the reasons for decisions about such things as prorogation from public view.[4] Jean Leclair and Jean-François Gaudreault-Desbiens argue that unwritten principles of constitutional law relating to democracy may not be judicially enforceable in relation to decisions like prorogation, but these principles do empower the Governor General to inquire more closely into the propriety of prime ministerial advice on how prerogative powers are used.[5] More recently, Dean Sossin has gone a step further, arguing that the constitutional imperative of upholding the rule of law may sometimes require the judicial review of prerogative decisions like those on prorogation.[6] The basic idea underlying each of these arguments, that law disciplines prerogative power relating to parliamentary democracy in Canada, is easy to state in abstract but difficult to reconcile with practice and precedent. In arguing against the idea, Warren Newman

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bec" (2009) 18 Const. F. 21; Melissa Bonga, "The Coalition Crisis and Competing Visions of Canadian Democracy" (2010) 33 Can. Parlia. Rev. 8; Edward McWhinney, "The Constitutional and Political Aspects of the Office of the Governor General" (2009) 32 Can. Parlia. Rev. 2; Bradley W. Miller, "Proroguing Parliament: A Matter of Convention" (2009) 20 Public L. Rev. 100; Hon. Edward Roberts, "Ensuring Constitutional Wisdom During Unconventional Times" (2009) 32 Can. Parlia. Rev. 13.

2 *Reference re Resolution to amend the Constitution* (*sub nom. Constitutional Amendment References 1981, Re*) (*sub nom. Manitoba (Attorney General) v. Canada (Attorney General)*, [1981] 1 S.C.R. 753.

3 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

4 Lorne Sossin & Adam Dodek, "When Silence Isn't Golden: Constitutional Conventions, Constitutional Culture, and the Governor General", in Peter H. Russell & Lorne Sossin, eds., *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009) at 91–104.

5 Jean Leclair & Jean-François Gaudreault-Desbiens, "Of Representation, Democracy, and Legal Principles: Thinking about the *Impensé*", in Russell & Sossin, *ibid*. at 105–120.

6 Lorne Sossin, "The Unfinished Project of Roncarelli v. Duplessis: Justiciability, Discretion, and the Limits of the Rule of Law" (2010) 55:3 McGill L.J. 661.

reminds us that the Supreme Court of Canada has recently reaffirmed the traditional understanding of constitutional conventions — and, in his view, rightly so, for the decisions about the formation of governments and the convening of parliaments are intensely and inherently *political* and are therefore properly left to political actors and extra-legal rules and principles. "[C]onstitutional lawyers," Newman writes (and we may note that he is one), "should not attempt to turn everything into law. . . ."[7]

It would therefore appear that the dispute about whether law controls prerogative power in relation to parliamentary democracy sets two visions of Canadian constitutionalism against each other — the more traditional and restrained vision of the *Patriation Reference* against the more dynamic and engaged vision of the *Quebec Secession Reference*. These cases certainly manifest different judicial methods and assumptions, which may in turn reflect changes in Canada's legal culture that emerged between the early 1980s and the late 1990s. However, in my view, the theoretical differences between them are not as profound as they first appear. While the *Patriation Reference* emphasizes ideas of political authority and pragmatism and the *Quebec Secession Reference* emphasizes ideas of moral legitimacy and integrity, both sets of ideas will be part of any compelling interpretation of constitutional order in Canada. The judicial narrative on unwritten constitutional principles represents an achievement that is as impressive as it is challenging, but it is a narrative that builds upon rather than deviates from traditional ideas about constitutionalism in the common law tradition.[8]

If we keep this general approach to Canadian constitutionalism in mind, certain conclusions follow in relation to the question of the royal prerogative and parliamentary democracy. In this essay, I will argue that we should acknowledge that the prerogative powers relating to parliamentary institutions are embedded within a fabric of law woven from written and unwritten sources that include principles of democracy and the rule of law that together shape the legal contours of political decisions. But I will also accept that courts will rarely, if ever, have occasion to intervene to enforce this law directly against prime ministers or governors general, and that there will remain considerable room for political actors to develop their own sense of what the extra-legal conventions surrounding the principle of responsible government mean in specific contexts. Engagement by political actors with constitutional conventions through public debate and discussion unencumbered by direct judicial oversight represents a distinctive "discourse of statecraft" that is an invaluable aspect of normative ordering in Canada, but one that must ultimately yield to the ideal of legality.

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7 Warren J. Newman, "Of Dissolution, Prorogation, and Constitutional Law, Principle and Convention: Maintaining Fundamental Distinctions during a Parliamentary Crisis" (2010) 27 N.J.C.L. 217 at 229.

8 I have explored this point in greater detail in "Written Constitutions and Unwritten Constitutionalism" in Grant Huscroft, ed., *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge: Cambridge University Press, 2008) at 245–276; "The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law" (2001) 51 U.T.L.J. 91; and, "Nationalism and the Pathology of Legal Systems: Considering the *Quebec Secession Reference* and Its Lessons for the United Kingdom" (1999) 62 Mod. L. Rev. 371.

In developing this argument, I will begin by reviewing the prorogation crises of 2008 and 2009, and I will identify more precisely the problems associated with the orthodox view of law and convention. I will then examine the legal character of the political advice given by prime ministers and the political decisions made by governors general under the royal prerogative in Canada. Finally, I will conclude by suggesting how we might rethink law and convention in a way that permits the practice of statecraft to be reconciled with the rule of law in Canada.

I.

On December 4, 2008, just several weeks after an election that left a minority Conservative government under Stephen Harper in power, a majority of the members of the House of Commons petitioned the Governor General indicating that they opposed the government's economic policies and would vote in favour of a motion of non-confidence in the government scheduled for December 8th, and they insisted as well that an alternative government — a Liberal-led coalition — could be formed that would command the confidence of the House. That same day, Prime Minister Harper requested and obtained from Governor General Jean an order proroguing Parliament until January 26, 2009, thus preventing the scheduled non-confidence vote. By the time Parliament reconvened, the government had changed its economic policies and the opposition coalition had unravelled. The Harper government survived.[9]

Just over one year later, on December 30, 2009, Prime Minister Harper again requested and obtained from the Governor General an order proroguing Parliament, this time for a period of two months. Although the legislative business of the parliamentary session was far from complete, the session was ended so that the government could, according to the Prime Minister, consult Canadians and recalibrate its economic policies.[10] But many observers concluded that the session was ended prematurely for other reasons.[11] Ten days earlier, the House of Commons had passed a motion stating that the government had violated the rights and privileges of Parliament by refusing to disclose documents concerning the treatment of detainees by Canadian forces in Afghanistan, and it ordered the documents to be produced forthwith.[12] The government disputed the right of the House of Commons to see these documents; but, many observers concluded, it wished to avoid a potentially embarrassing confrontation with the House on this issue, at least until the 2010 Vancouver Winter Olympics were over and until new Conservative senators were appointed, and that was why Parliament was prorogued.[13]

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9 Michael Valpy, "The 'Crisis': A Narrative" in Russell & Sossin, *supra* note 4 at 3–18.

10 Gloria Galloway, "Harper's prorogation retort? 'We need the time'" *The Globe and Mail* (8 January 2010).

11 Jeffrey Simpson, "The budget will expose the absurdity of 'recalibration'" *The Globe and Mail* (3 March 2010) A19.

12 Order of the House of Commons, *Journals of the House of Commons Canada*, December 10, 2009, 2d Session, 40th Parliament (Ottawa: Queen's Printer for Canada, 2009), item 6.

13 "Harper goes prorogue; Canada's Parliament" and "Halted in mid-debate; Canada without Parliament" *The Economist* (9 January 2010) 10, 45.

The actions of the Prime Minister just described were certainly unusual and arguably contrary to democratic values and the conventions that help secure those values. The decisions of the Governor General, in contrast, followed the general convention that prime ministerial advice governs on these matters, though perhaps the unusual nature of the advice might have justified different responses. But what of the *lawfulness* of the advice and the decisions?

The orthodox legal assessment of these events, already sketched above, is based on the British constitutional tradition, and it is worth pausing to consider that tradition first. As noted, the royal prerogative clothes the Crown with vast power over the functioning of parliamentary institutions.[14] Of course, the Queen rarely acts on her own initiative. The issuing of formal prerogative instruments by the "Queen in Council", i.e., by the Queen with the advice of her Privy Council, is a reminder of the fact that by convention the Crown almost always acts on advice, and that the advice always come from a small subset of the Privy Council, the Prime Minister and other cabinet ministers who form the government of the day.[15] In his book, *Law of the Constitution*, A.V. Dicey called the royal prerogative "the residue of discretionary or arbitrary authority . . . left in the hands of the Crown", and he also said that because it contains rules that are "enforced by the Courts" the royal prerogative is part of the "law of the constitution"; in contrast, the rules that require the prerogative to be exercised on the advice of ministers responsible to elected representatives are "not enforced by the Courts" and so Dicey insisted that they are "not in reality laws at all" but "conventions of the constitution" that ensure that laws are applied consistently with "constitutional morality."[16] Thus, the rules that secure a meaningful sense of democracy in Britain are not rules of law. How ministers advise the Crown on the operation of parliamentary government and whether or not the Crown acts on that advice are, in law, matters of unfettered or arbitrary ministerial and royal discretion respectively. Turning to the specific issue of prorogation, Dicey posited this hypothetical question: what if Parliament was prorogued for more than one year? "Here we have a distinct breach of a constitutiional practice or understanding," he wrote, "but we have no violation of law."[17] Not just the Crown but also the ministers who "sanctioned or tolerated" this undemocratic use of the power of prorogation would have violated constitutional convention, but they would not have acted unlawfully.[18]

It is important to make several observations about this account of the British

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14 Stanley de Smith & Rodney Brazier, *Constitutional and Administrative Law*, 8th ed. (London: Penguin Books, 1998) 117–145.

15 *Ibid.* 159–165.

16 A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (London: Macmillan, 1915) at 420, 23.

17 *Ibid.* at 442. Dicey was of course addressing the situation in the United Kingdom in the early twentieth century. Today in Canada the rule that Parliament must convene at least once each year is legally entrenched by section 5 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

18 *Ibid.* Dicey did say, however, that in this example appropriation and army statutes would expire and so the law would likely be violated indirectly.

tradition before turning to its application in Canada. First, drawing a crisp distinction between law and convention based on what courts do and do not enforce may be commonplace now, but it is worth recalling that it was acceptance of Dicey's argument over time that made it so. At first, *Law of the Constitution* was seen as a novelty, with one reviewer going so far as to describe Dicey as "an iconoclast" whose ideas were "heretical eccentricities . . ."[19] This point should remind us that the distinction between law and convention should be accepted today not because Dicey said it exists, but only if there is some compelling reason for it, and that reason, if there is one, may offer better grounds for explaining the distinction than Dicey offered.

Second, it is important to recall that in Dicey's day an exalted view of the royal prerogative still prevailed. In the exercise of his prerogative power the King was, as Blackstone had written, "irresistible and absolute", and courts would not review how the power was used.[20] For Dicey, prerogative power was therefore "arbitrary" power, and arbitrary power was in his view totally inconsistent with the rule of law.[21] At the centre of British constitutional law, then, was a legal power with qualities that offended democracy *and* the rule of law. These related problems are theoretically distinct. Prerogative powers are unconstrained by democracy insofar as they can be legally exercised without regard to the will of the people as expressed through their elected representatives. But aside from this problem, prerogative powers are unconstrained by the rule of law insofar as they can be legally exercised in an arbitrary manner, i.e., unconstrained by any general norms, standards, purposes, or principles that may be interpreted through impartial legal analysis and (ideally) upheld by independent judges. The traditional British view will therefore be problematic for any legal system that purports to embrace democracy and the rule of law.

Third, although the British Constitution may appear in the Diceyan account to be static, it is in fact dynamic. Medieval Kings made decisions of state personally within the *curia regis*, but customs (or conventions) emerged whereby judicial power came to be exercised only by judges and legislative power only upon the advice and consent of lords and commons in Parliament. These two limits on prerogative power were so well-established by the early seventeenth century that Chief Justice Sir Edward Coke was able to assert that they were points of *law*.[22] In other words, the common law of prerogative power was capable of reinterpretation over time. More recently, courts have ruled that at least some prerogative powers may be

19 Review of *Lectures Introductory to the Study of the Law of the Constitution, Athenaeum*, no. 3043 (20 February 1886), 259-260. See also "Dicey's Law of the English Constitution. — I." *Nation*, 41 (24 December 1885), 537-538 (books on the constitution exist but Dicey "has aimed at a different thing" in focusing on "*the law* of the Constitution . . ."); F.H., Review of *Lectures on the Law of the Constitution* (1885) 1 L.Q.R. 502 at 503 (previous works on the constitution consider its historical, political, and legal aspects mixed together, but Dicey's book "for the first time" analyses these aspects separately from a legal perspective).

20 Sir William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765–69), vol. 1, at 244.

21 Dicey, *supra* note 16 at 420, 183.

22 *Prohibitions del Roy* (1607), 12 Co. Rep. 63; *Proclamations* (1611), 12 Co. Rep. 74.

judicially reviewed to ensure they are exercised consistently with general standards of legality, rationality and procedural fairness, much as statutory powers of ministerial discretion are reviewed.[23] The House of Lords has concluded, however, that prerogative powers relating to matters of general politics or policy, like decisions on the formation of governments and the dissolving of parliaments, are not "amenable to judicial process" and so remain beyond judicial review[24] — though over time there has been a gradual "rolling back" of the excluded categories and an expansion of judicial review of prerogative power.[25] Looking at common law developments as a whole, however, it may be said that of the two problems with prerogative power identified above, that it offends democracy and the rule of law, it has been judicial concern with the rule of law that has shaped these developments. Supremacy of law over royal will rather than democracy as such seems to have been Coke's objective. As for more recent developments, the concern has been to check arbitrary power where it affects individual rights, interests or expectations rather than to address broader issues of democratic process. Whether concerns about the rule of law and democracy can be separated in this way is an important question to which we shall return. For now, however, we can conclude that, as things stand, in the orthodox view of the British constitutional tradition, ministerial advice and royal decisions on the prerogative powers relating to parliamentary democracy are as "irresistible and absolute" as ever.

According to the Diceyan account of British constitutionalism, then, there seems to be a legal-democratic hole at the very heart of constitutional law, one that is mended only by aid of an *extra*-legal cure. Dicey himself did not emphasize this point — on the contrary he asserted in *Law of the Constitution* that the two basic principles of British constitutional law are parliamentary sovereignty and the rule of law, an assertion at odds with the character of prerogative power. The inconsistency did not go unnoticed at the time. "The exact legal position of the powers of the Crown in England is not quite satisfactorily dealt with in the book," wrote Henry Jenkyns, for although "[i]t may be true in a political and practical sense" that prerogative powers are subject to statute and therefore to parliamentary sovereignty and the rule of law, "in a legal sense they are independent powers" and may only be limited or abrogated by statute if the Crown agrees "to surrender them . . ."[26] Dicey saw this flaw in the British Constitution, but, ever the pragmatist, he became concerned only after it became apparent that with the rise of "partisanship" and the "party machine" the combination of law and convention left prime ministers and cabinets with immense powers that could be used to subvert fundamental aspects of

23 *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] A.C. 374.

24 *Ibid.* at 418. See, in general, Brigid Hadfield, "Judicial Review and the Prerogative Powers of the Crown" in Maurice Sunkin & Sebastian Payne, eds., *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press, 1999) at 197–232.

25 Thomas Poole, "Judicial Review at the Margins: Law, Power, and Prerogative" (2010) 60 U.T.L.J. 81 at 102.

26 H. Jenkyns, "Remarks on Certain Points in Mr. Dicey's 'Law of the Constitution'" (1887) 3 L.Q.R. 204 at 209.

the Constitution.[27] In the democratic age, an unelected King or Queen would never dare to use the royal prerogative in an undemocratic or arbitrary manner — but a Prime Minister might.

Turning now to Canada, the influence of the British tradition of parliamentary democracy is evidenced in the national institutions established by the *British North America Act, 1867*, now *Constitution Act, 1867*: section 9 of the Act states that the "Executive Government" of Canada is vested "in the Queen"; section 10 recognizes that there will be a Governor General whose functions include "carrying on the Government of Canada on behalf and in the Name of the Queen"; section 11 provides for a Queen's Privy Council for Canada to "aid and advise" in the Government of Canada; and section 17 vests legislative authority for Canada in a Parliament consisting of the Queen, an appointed Senate, and an elected House of Commons.[28] These provisions do not provide a full statement of the laws let alone the conventions that combine to constitute the British model of parliamentary democracy, but of course that was the model the framers of the Act had in mind. The Quebec Resolutions of 1864, upon which the Act was based, provided in article 3 that "[i]n framing a Constitution for the General Government" it was desired "to follow the model of the British Constitution", and article 4 provided that "[t]he Executive authority or government shall be vested in the Sovereign of the United Kingdom of Great Britain and Ireland, and be administered according to the well understood principles of the British Constitution . . ."[29] In the parliamentary debates on confederation in 1865, John A. Macdonald, then Attorney General for the province of Canada, defended the proposed Constitution by reference to weaknesses in the American system. In the United States, he said, the President is "perfectly uncontrolled by responsible advisers", for his cabinet ministers are departmental officers "whom he is not obliged by the Constitution to consult with, unless he chooses to do so."[30] "With us," Macdonald continued, "the Sovereign, or in this country the Representative of the Sovereign, can act only on the advice of his ministers, those ministers being responsible to the people through Parliament."[31] This idea was hardly new in Canada. "In the Constitution we propose," Macdonald concluded, there would "continue the system of Responsible Government, which has existed in this province since 1841 . . ."[32]

One might be forgiven, after reading the Quebec Resolutions and Macdonald's statements, for thinking that the framers intended to give the principle of responsible government a firmer constitutional foundation in Canada than convention secured for it in Britain. However, in the Act the reference to the "well understood

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27 Dicey, "Introduction" to the 8th ed. of *Law of the Constitution* published in 1915, *supra* note 16 at xcviii, c.

28 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

29 Quebec Resolutions, 10 October 1864, in W.P.M. Kennedy, *Statutes, Treaties and Documents of the Canadian Constitution, 1713–1929* (Toronto: Oxford University Press, 1930) at 541–547.

30 *Parliamentary Debates on the subject of the Confederation* (Quebec: Hunter, Rose & Co., 1865) at 33.

31 *Ibid.*

32 *Ibid.*

principles of the British Constitution" were removed from the provisions that identify the Queen as the executive authority and the Governor General as her representative, and the commitment to British principles was instead expressed in the preamble, which states that Canada has a Constitution "similar in Principle to that of the United Kingdom . . ." That Macdonald, who was so absolute in his assertion that responsible government was secured by the new Constituion, would accept a legal text that, when read literally, was silent in this respect, is a testament to the incredible power of unwritten practice and tradition at that time. But whether Macdonald and the other framers of the Act even distinguished between law and convention in the rigid way that Dicey would later make famous is, of course, a good question.

One thing that is clear, however, is that Dicey's *Law of the Constitution* gave early writers on the Canadian Constitution a convenient statement of both the unwritten law of the royal prerogative and the unwritten conventions governing how the prerogative was to be exercised.[33] It was hardly surprising, then, that, when forced to consider the nature of constitutional law and convention in Canada in the 1981 *Patriation Reference*, a majority of the justices of the Supreme Court of Canada also turned to Dicey.[34] The justices echoed Dicey and observed that the primary purpose of conventions is "to ensure that the legal framework of the constitution will be operated in accordance with the prevailing constitutional values or principles of the period", so that, in particular, the Crown's prerogative powers are exercised consistently with "the democratic principle."[35] The conventions on responsible government may be essential to democracy in Canada, they said, but "none of these essential rules of the constitution can be said to be a law of the constitution", and indeed their function in modifying existing laws prevents their ever "crystallizing into laws".[36] There is, we may say, little of Coke's judicial spirit evident here — though the Court did take at least one adventurous step, ruling that it could settle a dispute about whether a contested convention exists, even if the convention could not be judicially enforced once identified.

If the analysis were to stop here, we would have to accept that decisions on prorogation may be questioned in light of convention, but not law. Although Canadian judges now accept that prerogative acts may be judicially reviewed on administrative and constitutional law grounds where individual rights, interests or expectations are concerned, like their British counterparts they have assumed that politically sensitive prerogative decisions, including those relating to the formation of governments and the holding of parliaments, are not justiciable.[37] The orthodox

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33 J.A. Bourinot, *A Manual of the Constitutional History of Canada* (Toronto: Copp, Clark Co., 1901) at 48, 159–165; W.H.P. Clement, *The Law of the Canadian Constitution*, 2d ed. (Toronto: Carswell, 1904) at 16, 20, 23-24; A.H.F. Lefroy, *A Short Treatise on Canadian Constitutional Law* (Toronto: Carswell, 1918) at 40.

34 *Ref. re Resolution to amend the Constitution*, *supra* note 2.

35 *Ibid.* at 880.

36 *Ibid.* at 878, 882.

37 *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441; *Black v. Canada (Prime Minister)* (2001), *(*sub nom. *Black v. Chrétien)* 54 O.R. (3d) 215 (C.A.); *Conacher v. Canada (Prime Minister)* (2009), 352 F.T.R. 162, 2009 FC 920; aff'd (2010), 320 D.L.R. (4th)

view of things therefore leaves us with a system of constitutional law that, when stripped of the ameliorating influence of convention, is, as Robert MacGregor Dawson once observed, "a dictatorship".[38]

II.

The orthodox view of the matter just described cannot be right. It is possibly incorrect in relation to British law (though we shall not pursue that possibility here), and it is certainly incorrect in relation to Canadian law. The problem is that it fails to account for a long line of cases in which Canadian judges have slowly worked out the implications of Canada's commitment to the British sense of parliamentary democracy within a constitutional system dominated but not exhausted by entrenched written constitutional texts. From this judicial narrative, which may be said to begin with the 1938 *Alberta Press Case* and culminate with the 1998 *Quebec Secession Reference*, a distinctive sense of Canadian constitutionalism emerges which is differentiated from traditional views of British constitutionalism in at least three ways: first, the structure or fabric of Canadian constitutional law consists of written texts and underlying unwritten principles both of which have a durability or rigidity — a legal supremacy with respect to ordinary legal norms — that the British constitution lacks; second, this durable legal fabric stretches across the entire domain of governance in Canada preventing the possibility of legal gaps or holes, with unwritten principles supplying legal substance where the written texts seem threadbare; and, third, this durable and complete legal fabric is woven from strands of political theory that claim for law moral legitimacy, and therefore integrate into the very fabric of constitutional law unwritten principles of democracy and the rule of law that are complex, rich and textured.[39] In the orthodox view of the Britain tradition, law's illegitimate features are cured by extra-legal remedies. Legality and legitimacy are separated. This proposition is rejected in Canada. "In our constitutional tradition," states the Supreme Court of Canada in the *Quebec Secession Reference*, "legality and legitimacy are linked."[40] Once it finds its place in the fabric of Canadian constitutional law, the unwritten democratic principle derived from the British tradition obtains a *legal* durability and completeness that it does not have under traditional interpretations of British constitutional law. "[T]he preamble's recognition of the democratic nature of Parliamentary governance", states Chief Justice Antonio Lamer in the 1997 *Provincial Judges Reference*, reflects the fact

530, 2010 FCA 131; David Mullan, "Judicial Review of the Executive — Principled Exasperation", The Lord Cooke of Thorndon Lecture, 2009, University of Victoria at Wellington, New Zealand.

38 R. MacGregor Dawson, *The Government of Canada*, 4th ed. (Toronto: University of Toronto Press, 1963) at 62.

39 *Reference re Alberta Statutes*, [1938] S.C.R. 100; *Saumur v. Quebec (City)*, [1953] 2 S.C.R. 299; *Switzman v. Elbling*, [1957] S.C.R. 285; *Ontario (Attorney General) v. O.P.S.E.U.*, [1987] 2 S.C.R. 2; *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, (sub nom. *R. v. Campbell)* [1997] 3 S.C.R. 3; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217. See, in general, Walters, "Written Constitutions and Unwritten Constitutionalism", *supra* note 8.

40 *Quebec Secession Reference*, *ibid*. at para. 33.

that democratic institutions are "fundamental to the 'basic structure of our Constitution' . . . and for that reason governments cannot undermine the mechanisms of political accountability which give those institutions definition, direction and legitimacy."[41] If it was ever possible to say that in Canada the democratic principle was not part of the country's constitutional *law*, that point in time has long since past.

We must concede right away, however, that while these general principles are easily stated, they are difficult to apply. Their implications have not yet been fully explored in terms of the Governor General's prerogative powers relating to Parliament. In working out those implications, there are two very important points to keep in mind. First, as Warren Newman rightly reminds us, the Supreme Court of Canada did not intend by its exposition of unwritten constitutional principles in the *Quebec Secession Reference* to overrule its observation in the *Patriation Reference* that the conventions on responsible government are not law.[42] We must leave open the possibility, then, that sometimes the democratic principle will be expressed through unwritten *extra*-legal conventions. Second, the Court in the *Quebec Secession Reference* insisted that unwritten constitutional principles may be manifested in binding legal norms that may or may not be judicially enforceable — the "legal framework" for secession being an example of a judicially unenforceable legal norm.[43] Taking these two points together, we may say that the Court wishes to retain the distinction between law and convention, at least for some purposes, but that it has cast us adrift from the positivist moorings that Dicey gave us for defining the difference between law and convention, for no longer can we simply assume that laws are rules enforced by courts and conventions are rules enforced politically. How do we now draw the line between these types of normative principle, and how do we know which type of norm serves to ensure that prerogative powers relating to parliamentary institutions are exercised in democratic ways? And, finally, how can the democratic principle sometimes be left to the protection of extra-legal norms without threatening the general idea that legality and legitmacy are linked?

The answers to these questions must build upon a general theory of how law and politics interact in Canada. To understand the ways in which unwritten constitutional law may be seen to discipline the exercise of intensely political decisions, it is important, first, to examine more closely the legal character of ministerial advice and decisions relating to prerogative powers affecting parliamentary government to determine if they are as intensely political as is often assumed, and, second, to develop a theory of law and convention that replaces the positivist understanding of these two types of normative order that has dominated for so long. The last two sections of this essay address these two points in turn.

III.

Before we can understand the sense in which law discplines the political discretion exercised by governors general and prime ministers in relation to Parlia-

41 *Reference re Remuneration of Judges of the Provincial Court*, *supra* note 39 at para. 103.

42 Newman, *supra* note 7 at 228.

43 *Quebec Secession Reference*, *supra* note 39 at paras. 98–102.

ment, it is important to be clear about the legal character of their roles, powers, and responsibilities.

Looking first to the Governor General, it is essential to recall that he or she is not, in law, in the same position as the Queen. Whatever special attributes may still be attached to the Crown by virtue of its ancient origins and to the royal prerogative by virtue of its inherent as opposed to delegated character, those attributes are not shared by the Queen's representative or by his or her exercise of the royal prerogative in Canada. The office of Governor General is created by the Crown by prerogative instrument, and the person holding the office enjoys powers that are defined by that instrument. Under British imperial law, colonial governors — including governors general in Canada after 1867 — were not viceroys and therefore did not enjoy prerogative power merely by virtue of their office; rather they possessed only those powers delegated to them by letters patent or commission.[44] A colonial governor was "an officer, merely with a limited authority from the Crown", and so the "assumption of an act of sovereign power, out of the limits of the authority so given to him, would be purely void, and the Courts of the Colony over which he presided could not give it any legal effect."[45] As a practical matter, this distinction between the Crown and the Governor General in Canada may not be significant today because the Letters Patent constituting the present office of the Governor General, issued in 1947, confer *all* prerogative powers of the Crown relating to Canada on the Governor General — including, it may be noted, the power of "summoning, proroguing or dissolving the Parliament of Canada."[46] As a legal matter, however, the distinction remains important. The 1947 Letters Patent define the terms upon which the prerogative is delegated to the Governor General, and so prerogative acts violating those terms may be legally challenged in court.[47] Although one former Governor General has said that the Letters Patent "transferred" royal prerogatives from the Crown to the Governor General,[48] in fact the Queen enjoys her prerogative powers in relation to Canada concurrently with the Governor General[49] and she may revoke the delegation altogether.[50] In other words, the basic legal character of the office of the Governor General has not changed. W.P.M. Kennedy concluded that despite the breadth of authority conferred by the 1947 Letters Patent, the Governor General is "still under legal liabilities and all the older judgements

44 *Windsor & Annapolis Railway Co. v. Canada* (1885), 10 S.C.R. 335, per Strong J., citing *Musgrave v. Pulido* (1879), 5 App. Cas. 102.

45 *Cameron v. Kyte* (1835), 3 Knapp 332, per Baron Parke at 344.

46 Letters Patent Constituting the Office of Governor General of Canada (October 1, 1947; reprinted at R.S.C. 1985, App. II, No. 31), articles 2 and 6.

47 E.g., *Tunda v. Canada (Minister of Citizenship & Immigration)*, [1999] F.C.J. No. 902, 190 F.T.R. 1 (Fed. T.D.); aff'd [2001] F.C.J. No. 835 (Fed. C.A.) (the Governor General's appointment of Supreme Court of Canada justices as Deputy Governors was challenged, unsuccessfully).

48 Rt. Hon. Adrienne Clarkson, "Foreword", in Russell & Sossin, *supra* note 4 at x.

49 *Singh v. Canada* (1991), *(*sub nom. *Leblanc v. Canada)* 3 O.R. (3d) 429 (C.A.).

50 Letters Patent 1947, *supra* note 46 at article 15.

and case-law in relation to 'colonial' governors are of authority. . . ."[51]

The grant of power to the Governor General is found in article 2 of the 1947 Letters Patent, which states:

> And We do hereby authorize and empower Our Governor General, with the advice of Our Privy Council for Canada or of any members thereof or individually, as the case requires, to exercise all powers and authorities lawfully belonging to Us in respect of Canada, and for greater certainty but not so as to restrict the generality of the foregoing to do and execute, in the manner aforesaid, all things that may belong to his office and to the trust We have reposed in him according to the several powers and authorities granted or appointed him by virtue of the *Constitution Acts, 1867 to 1940* and the powers and authorities hereinafter conferred in these Letters Patent and in such Commission as may be issued to him under Our Great Seal of Canada and under such laws as are or may hereinafter be in force in Canada.

Although the Governor General thus acquires the authority to exercise the Queen's prerogative discretion relating to Canada, according to general principles of public law in the common law tradition there is "no such thing as absolute and untrammelled 'discretion'", for no delegation of power will "be taken to contemplate an unlimited arbitrary power, exercisable for any purpose, however capricious or irrelevant"; there is "always a perspective" within which the power granted is intended to operate, a perspective that is judicially presumed to include the "rule of law" and other unwritten constitutional principles.[52] Article 2 is clear about the "perspective" within which powers conferred are to be exercised. Its purpose is to clothe the Governor General with the necessary authority to perform the office established by the *Constitution Acts*, in particular the role identified in section 10 of the *Constitution Act, 1867* of carrying on the government of Canada on behalf of the Queen, and we have already seen how the deep structure of the *Constitution Acts* embraces the principles of democracy and the rule of law. A prerogative act by the Governor General that is blatantly irrational or undemocratic — the appointment of a Prime Minister on the basis of his or her hair colour or religious persuasion, for example, or the proroguing of Parliament upon the flip of a coin or to assist a friend in cabinet — could not be lawful under the terms of article 2 of the Letters Patent. It would, according to the old cases on colonial governors, be "out of the limits of the authority so given" and therefore "purely void".

There is nothing mystical about the Governor General's powers. Like other officials, the Governor General exercises powers that are, in constitutional theory, delegated and circumscribed by law, and, barring special concerns about justiciability to be addressed below, it falls to the ordinary courts in upholding the rule

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51 W.P.M. Kennedy, "The Office of the Governor-General in Canada" (1947-48) 7 U.T.L.J. 474 at 474.

52 *Roncarelli v. Duplessis*, [1959] S.C.R. 121, per Rand J. at 140. See also *Lalonde v. Ontario (Commission de restructuration des services de santé* (2001), 56 O.R. (3d) 505 (C.A.). These cases involved statutory delegations of discretionary power rather than the delegation of prerogative powers by prerogative instrument — but the argument here is that there is, or should be, no difference in constitutional principle as to how the two forms of delegation are treated. Lorne Sossin makes a similar argument: "The Unfinished Project of *Roncarelli*", *supra* note 6.

of law to determine whether those legal limits have been honoured or not in any given case. Of course, we should not push the argument about the delegated character of the prerogative too far. One would expect that a patently irrational and undemocratic decision by the Queen herself would also be unlawful in Canada, for although her prerogative powers are inherent not delegated, they are, like the Governor General's powers, embedded in a constitutional structure dominated by legality and democracy. This is not a newfangled idea, but rather it is one that lies at the heart of Lord Mansfield's classic judgment in the 1774 case of *Campbell v. Hall*, which held an act of the royal prerogative issued by King George III in relation to Grenada void as contrary to the system of representative government established for that colony.[53] But even if the conclusions are similar in relation to the Queen and her representative in Canada, it is worth being precise about the different legal arguments for why prerogative power is legally embedded, if only as a way of seeing that these arguments are not as fantastical as one might think.

The legal status of the Governor General's prerogative powers are clear, but the legal status of ministerial advice as to how those powers should be exercised is not. In most cases, convention means that advice on how a prerogative decision should be made *is* the prerogative decision itself, with the Crown or Governor General providing a mere rubber stamp. As a result the legal status of advice *as advice* is largely ignored. Vernon Bogdanor rightly states that ministerial advice to the Crown is "distinct" in that it is not at all like, for example, the advice given by one friend to another, but he attributes its distinctiveness to convention rather than law.[54] What is needed, however, is a *legal* theory of ministerial advice.

In articulating a legal theory of ministerial advice in Canada, attention must be given to the Queen's Privy Council for Canada established by section 11 of the *Constitution Act, 1867*. That ministers are advisors is purely a matter of convention; it is only through their membership in the Privy Council that the ministerial role as advisor gains a *legal* aspect. Written constitutional provisions addressing the status of Privy Council advice are admittedly confusing. The *Constitution Act, 1867* vests certain powers in the "Governor General in Council" and others in the "Governor General". Section 13 defines Governor General in Council as meaning "the Governor General acting by and with the Advice of the Queen's Privy Council for Canada", thus suggesting that Council advice is legally necessary in some cases but not others. Of course, many of the important prerogative powers are exercised by the Governor General by virtue of the 1947 Letters Patent rather than the Act, and here too we find a complication. Article 2 of that instrument appears to provide that prerogative powers must *always* be exercised "with the advice of Our Privy Council for Canada or of any members thereof or individually . . . ." So the *Constitution Act, 1867* and the Letters Patent of 1947 create some interesting interpretive problems about when advice is legally required and when it is only required by convention. No doubt the original point of these provisions had to do more with affirming the identity of the relevant advisors as Canadian as opposed to British than with legally entrenching the requirement of advice as such. But the task of

53 *Campbell v. Hall* (1774), 1 Cowp. 204.

54 Vernon Bogdanor, *The Monarchy and the Constitution* (Oxford: Clarendon Press, 1995) at 66.

resolving these interpretive problems need not detain us here. It is sufficient simply to note that the Privy Council exists and that its advice is expressly recognized in written constitutional instruments, and this fact should affect our view of the legal status of ministerial advice when it is given, whether it given as a result of a legal or a conventional requirement. These written provisions are one important way by which the concept of "advice" to the Crown or Governor General relating to prerogative power is woven into the fabric of constitutional law.

Understanding the legal status of ministerial advice to the Crown or Governor General in Canada is greatly illuminated by considering *Black v. Canada*, in which Conrad Black claimed that Prime Minister Jean Chrétien acted unlawfully when advising the Queen not to exercise the honours prerogative and make Black a peer in the House of Lords in Britain.[55] In his judgment, Laskin J.A. concluded that the Prime Minister was not advising the Queen in his personal capacity, since "[p]rivate citizens cannot ordinarily communicate private advice to the Queen."[56] But if the decision to intervene was taken in his official capacity as Prime Minister and it was not the exercise of a statutory power (there being no statute applicable), then, Laskin J.A. observed, it must have been the exercise of a "prerogative power".[57] Laskin J.A. therefore concluded: "In communicating Canada's policy to the Queen, in giving her advice on it, right or wrong, in advising against granting a title to one of Canada's citizens, the Prime Minister was exercising the Crown prerogative relating to honours."[58] Focusing on this part of the judgment, it might be said that ministerial advice on how a particular prerogative power should be exercised is therefore itself an exercise of the prerogative power. Indeed, this was how the case was interpreted by Shore J. in *Conacher v. Canada*, in which Prime Minister Harper's advice to the Governor General to dissolve Parliament and call elections in 2008 was challenged as violating statutory fixed-date election rules.[59] Faced with the argument that the Prime Minister's advice was not a decision and so could not be the subject of judicial review, Shore J. applied *Black v. Canada* and concluded that the Prime Minister's advice on how the prerogative of dissolution should be exercised was an exercise of the prerogative power itself and was therefore (subject to concerns about justiciability) judicially reviewable.

With respect, this conclusion is mistaken. While ministerial advice to the Crown or Governor General on how a prerogative power should be exercised has a status in law and therefore *may* be the subject of judicial review, advice in these circumstances cannot be said to be, in law, the exercise of the power itself, unless we collapse the concepts of law and convention. It is true that where, by convention, the Crown exercises a prerogative power on ministerial advice, the giving of the advice may be the *de facto* exercise of the power — at least in cases where the Crown accepts the advice without reflection or the exercise of any judgment. For

55 *Black v. Canada (Prime Minister)* (2001), (sub nom. *Black v. Chrétien)* 54 O.R. (3d) 215 (C.A.).

56 *Ibid.* at para. 40.

57 *Ibid.* at paras. 39, 41.

58 *Ibid.* at para. 38.

59 *Conacher v. Canada (Prime Minister)* (2009), 352 F.T.R. 1, 2009 FC 920 (T.D.); aff'd (2010), 320 D.L.R. (4th) 530, 2010 FCA 131 (C.A.).

this reason, Rodney Brazier uses the expression "*Ministerial* prerogative powers" rather than Crown or royal prerogative powers.[60] Certainly, when courts review decisions made under statute by the "Governor in Council", decisions in which the Governor General invariably plays no effective part at all, it is appropriate for judges to acknowledge convention and focus upon the legality of the acts of the ministers who are the *de facto* decision makers.[61] But we should not lose sight of the fact that on certain occasions it will be very important for constitutional reasons to be precise about where *de facto* and *de jure* power lies. Two reasons immediately come to mind why this is so.

First, we should not obscure from view instances where ministers of the Crown really do exercise the royal prerogative themselves, without even the formality of Crown participation. When the Canadian Embassy in Washington issued a diplomatic note to the American Government concerning Omar Khadr, to take one recent example that was the subject of litigation, the legal authority for the decision embodied in the note was the prerogative over foreign affairs, yet the note bore no outward or formal manifestation of having been approved by either the Queen or the Governor General.[62] This is just one example of what must be an almost countless number of decisions made regularly by government that derive legal authority from the prerogative but which do not require the promulgation of a formal prerogative instrument by the Crown or Governor General and so do not involve "advice". However, the legal status of these decisions, which *are* accurately described in law as direct exercises of prerogative power, must be different from the legal status of ministerial decisions to advise the Crown or Governor General as to how a prerogative power should be exercised. In these latter cases, advice is only the exercise of power, if at all, by convention, not law.

Second, in relation to the constitutionally important decisions about the formation of governments and the proroguing and dissolving of parliaments, the possibility always exists for the Governor General to exercise meaningful judgment upon receiving advice from a prime minister. In these cases, convention may still dictate that the decision should follow the advice, but it is misleading to say that the advice is even the *de facto* let alone the *de jure* exercise of the power. To take the 2008 prorogation decision as an example, Governor General Jean has revealed that she took two hours to consider Prime Minister Harper's request because the decision "warranted reflection" and that she might have asserted a "reserve power" — the right, by convention, to act against or without advice.[63] The decision to prorogue Parliament in December of 2008 was made on the advice of Prime Minister Harper and it is a decision for which he was responsible to Parliament, but, at the same time, it would not be inaccurate to say that it was the Governor General's decision as a matter of both fact and law. In these cases, muddling the concepts of advice and power will only produce deep misunderstandings about constitutional roles and responsibilities.

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60 Rodney Brazier, *Ministers of the Crown* (Oxford: Clarendon Press, 1997) at 203-204.

61 E.g., *Thorne's Hardware Ltd. v. Canada*, [1983] 1 S.C.R. 106.

62 *Khadr v. Canada (Prime Minister)*, [2010] F.C.J. No. 818.

63 Alexander Panetta, "Jean had hidden message in the prorogation crisis" *The Globe and Mail* (29 September 2010) A11.

So, in short, advice on a prerogative power cannot be, in law, an exercise of that power. In fact, Laskin J.A. in *Black v. Canada* did not say that it is. Although he might have been clearer on this point, he proceeded upon the assumption that the prime ministerial advice in that case was advice to a "foreign head of state."[64] In other words, Prime Minister Chrétien, in advising the Queen not to give Black a peerage, was not advising her on how to exercise a prerogative power relating to Canada, and she did not receive his advice in her capacity as Queen of Canada; rather he was advising the Queen as a foreign head of state in her capacity as the Queen of the United Kingdom of Great Britain and Northern Ireland as to Canada's policy regarding the conferral of foreign honours on its citizens, an act he could have done for *any* foreign head of state. In short, he was exercising a prerogative power directly rather than through "advice" in the constitutionally meaningful sense.[65]

The confusion surrounding *Black v. Canada* should remind us of the importance of defining with precision who, in any given case, is exercising prerogative power, and what sort of advice may inform the exercise of that power — and that *ministerial* advice has a very particular legal status. To say that ministerial advice is different from the prerogative decision made is not to deny the inherent link between the two. There is an important constitutional truth underlying the conclusion of Stratas J.A. in the Federal Court of Appeal in *Conacher v. Canada*, that the status of the "Prime Minister's advice-giving role" is so important and integral to the Crown's prerogative that it is implicitly protected by the statutory affirmation of prerogative powers.[66] Indeed, it is that integral link that forces us to distinguish constitutionally relevant advice from other forms of advice. As *Black v. Canada* confirms, ministerial advice is legally different from personal or private advice that the Governor General may receive from friends. It is different as well from non-ministerial advice on matters of state, such as, for example, advice from a constitutional law professor as to the proper exercise of the power of prorogation. To identify constitutionally relevant advice, we must keep two separate points in mind. First, the identity of the person giving the advice is relevant — the advisor must be a member of the Privy Council for their advice to be constitutionally relevant. Second, the legal character of the advice given by a Privy Councillor is important, since not all advice from Privy Council members to the Crown or Governor General is constitutionally relevant. *Black v. Canada*, once properly interpreted, offers an excellent example of this second point, showing how even prime ministerial "advice" to the Queen on how to exercise a prerogative power may not be *advice* in the constitutionally relevant sense that concerns us here.

These observations suggest that what is needed is a full theory of *constitutionally relevant ministerial advice*. On this point, as in so many others, we must go behind the written text of the Constitution of Canada to common law context for guidance. The "Privy Council" established for Canada by section 11 of the *Consti-*

64 *Black v. Canada*, *supra* note 55 at para. 41.

65 For a different view of the characterization of the Prime Minister's actions in this case, see Lorne Sossin, "The Rule of Law and the Justiciability of Prerogative Powers: A Comment on *Black v. Chrétien"* (2002), 47 McGill L.J. 435 at 442-443.

66 *Conacher v. Canada (Prime Minister)*, 2010 FCA 131, ¶5.

tution Act, 1867 does not exist in the air but rather exists against an historical narrative that helps us to understand its role within the modern Canadian Constitution. The legal status of the Privy Council derives originally from the feudal origins of the English constitution. The legal relationship between a feudal lord and his tenants was based on the relationship of tenure. Tenants who held land from a lord owed various incidents, services and duties, one of which was attending the lord's manorial court to give counsel. The common law came to see it as "incident to the manor" that the lord held the right to hold an assembly or court of his tenants for this purpose.[67] The right of the medieval King as lord paramount to gather his tenants in chief in a *curia regis*, or royal court, may be seen as this legal right writ large.[68] As Dicey states in his study of the Privy Council, "the interchange of advice between the King and his nobles" was an inherent part of every feudal monarchy, something demanded of nobles as a show of submission and allegiance to their sovereign lord.[69] From this feudal *curia regis* there emerged a Common Council, or Parliament, and a smaller permanent body of advisors, the Privy Council.[70] We may say, then, that historically it was the Crown's prerogative or common law right to summon advisors to gather in the Privy Council. It follows that the act of attending upon the Crown to give advice in the Privy Council was not itself a *power* or a *right*, but is better described in law as either a *privilege* derived from the Crown's prerogative act of summoning the advisor, or, more accurately, as a form of common law *duty*.

What do the feudal origins of the Privy Council have to do with Canadian constitutional law today? Section 11 of the *Constitution Act, 1867* empowers the Governor General to "summon" a Privy Council to "aid and advise" in the Government of Canada. As J.A. Bourinot observed, in deciding to make provision for a Privy Council rather than a prime minister or a cabinet it was "the desire of the Canadian people to adapt as far as possible to their own circumstances the ancient institutions of the parent state."[71] In constructing a constitutional theory of ministerial advice as to exercises of prerogative power, we do well to recall the ancient origins of the Privy Council — not because of sentimental attachment to the past, but because legal continuity may be justified by normative constitutional theory today. From the history of the Privy Council we may, I think, derive two very basic principles that we can accept as justifiable aspects of a sound theory of modern Canadian constitutionalism. First, advice given to the Crown by members of the Council has a very distinct constitutional status *in law* not just in convention, and,

67 *The King v. Stanton* (1606), Cro. Jac. 260, 79 E.R. 223 (K.B.). See also *Dominus Rex v. Staverton* (1606), Yelv. 190, 80 E.R. 126, 1 Bulst. 54, 80 E.R. 756.

68 J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge: Cambridge University Press, 1957, reissue 1987) at 107–109; Theodore Plucknett, *A Concise History of the Common Law*, 4th ed. (London: Butterworth & Co., 1948) at 137, 479.

69 A.V. Dicey, *The Privy Council* (London: Macmillan and Co., 1887) at 2-3.

70 *Ibid.* at 5-6. See also F.W. Maitland, *The Constitutional History of England* (Cambridge: Cambridge University Press, 1911) at 62–64.

71 J.A. Bourinot, *A Manual of the Constitutional History of Canada* (Toronto: Copp, Clark Co., 1901) at 164.

second, one aspect of that distinct legal status is that the act of rendering advice is not the exercise of a constitutional power or right, but the performance of a constitutional duty. When a member of the Queen's Privy Council for Canada aids and advises in the Government of Canada by counselling the Crown or Governor General on how to exercise the royal prerogative relating to Parliament, he or she performs a constitutional duty recognized in law by section 11 and also in the common law that still shapes our understanding of what the Privy Council is. It is a duty to advise on matters of state and so the bounds for constitutionally appropriate advice are extremely broad. However, because the act of giving advice is the performance of a *duty* in constitutional *law*, it is an act that arises from and is conditioned by the general legal framework that defines the Constitution of Canada, including the unwritten principles of legality and democracy inherent in the very structure of the Constitution, and so it follows that there are *legal* limits to the advice that can be given. For a Prime Minister of Canada to advise the prorogation of Parliament because he or she has been bribed, for example, would be unlawful not just because it would be fraudulent, but also because it could not constitute a lawful performance of the duty to aid and advise in the Government of Canada under section 11 of the *Constitution Act, 1867*, as interpreted in light of the common law of the Privy Council and the unwritten principles of legality and democracy that are woven into the durable and complete fabric of law that provides the normative backdrop for the performance of all governmental acts in Canada.

IV.

It should be clear, then, that advice and decisions involving the royal prerogative, while obviously political, cannot be absolutely or purely political. They are decisions made in the course of performing constitutional duties and exercising constitutional powers that are embedded in a structure or fabric of law. This conclusion does, however, leave two unanswered questions. First, does it follow that the decisions of prime ministers and governors general on matters central to parliamentary democracy must be policed by the courts? And, second, what happens to the rules surrounding responsible government that were assumed to be conventions rather than laws? These are, in fact, closely related questions. Answering them requires a consideration of the general idea of justiciability and the way in which that concept applies to laws and conventions. These considerations will in turn force us to confront the question with which we started: how can the *Patriation Reference* and the *Quebec Secession Reference* be reconciled — or, in other words, how can the idea of statecraft be reconciled with the ideal of legality?

When it comes to the justiciability of political questions in Canada, courts in the past assumed, first, that either a matter was justiciable, in which case they would adjudicate the dispute and enforce the relevant laws, or it was not, in which case they would refuse to do anything; and, second, that in assessing whether a matter was justiciable judges would weigh such factors as the legal and political aspects of the case, whether evidence could be gathered and considered in a judicial way, and whether judicial intervention would be consistent with the constitutional

role of the courts in relation to other branches of state.[72] The *Quebec Secession Reference* forces us to reconsider the idea of justiciability in fundamental ways, for three reasons. First, the Court separated more clearly than before the question of whether a matter is legal from whether it is justiciable. Although it accepted that for a matter to be justiciable it must be legal rather than purely political, it also emphasized that just because a matter is legal rather than purely political it does not necessarily follow that it is justiciable, for there may be other considerations relating to the role of courts within a democratic system that make judicial intervention inappropriate. Second, whereas courts previously assumed that the decision about justiciability was a choice between holding the case to be a legal one, in which case the court would determine, apply and enforce relevant laws, and holding the case to be a political one, in which case the court would refuse to do anything, the *Quebec Secession Reference* suggests an intermediary option: where a case is intensely political in character and full judicial oversight of political behaviour is deemed inappropriate, the court may still take steps to articulate principles of law according to which political behaviour is expected to be structured — a "legal framework" for political actors — even if that framework cannot be applied and enforced when specific disputes arise about its interpretation. And, finally, third, reading the *Quebec Secession Reference* and the *Patriation Reference* together, it may be said that, in the Court's view, unwritten principles of constitutional law may sometimes be manifested in unwritten extra-legal conventions that are not judicially enforceable and they may sometimes be manifested in unwritten legal norms that may or may not be judicially enforceable.

In short, what is law, what is justiciable, and what is judicially enforceable are three separate questions. Indeed, it is possible to identify a range of ways in which answers to these three questions may affect how judges respond to intensely political cases. First, judges may decide the case in the regular way, by identifying the law, applying it to the specific issues of the case, and rendering a judgment that enforces the law. Second, judges may identify the law, apply it to the specific issues of the case, but, due to political sensitivies, like concern about interfering with a prerogative power, refuse to issue a specific remedy and instead offer only a "legal framework" to guide political actors in their resolution of the matter — as in the case of *Khadr*.[73] Third, judges may identify legal norms at a general level only, again as a "legal framework" for political action, but then refuse to apply it to specific claims that might arise or to enforce it — as in the *Quebec Secession Reference*. Fourth, judges may conclude that the norms governing intensely political matters are not laws at all but conventions, but they may nevertheless identify what those conventions are at a general level, and then refuse to apply them to specific facts or to enforce them — as in the *Patriation Reference*. And, fifth, judges may simply regard the matter as wholly non-justiciable and refuse to get involved at all — as in, for example, the case of *Operation Dismantle*.[74] It is perhaps not a coincidence that the cases cited as examples of the third and fourth approaches,

72 Lorne Sossin, *The Boundaries of Judicial Review: The Law of Justiciability in Canada* (Toronto: Carswell, 1999).

73 *Canada (Prime Minister) v. Khadr*, [2010] 1 S.C.R. 44 at 47.

74 *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441.

where judges offer only general statements of principle without attempting to apply them to specific facts or to enforce them, were references from government rather than litigation in the usual sense. It is possible that in regular litigation involving an intensely political matter, judges may conclude that if it is inappropriate for them to apply general legal principles to specific facts or to enforce those principles, then the fifth option, refusing to intervene at all, may be better than the third option. But even if this route is taken, it does not follow that there is no "legal framework" at all to guide political behaviour; it simply means that under the circumstances judicial involvement, even if limited to general statements about that legal framework, is considered to be inappropriate.

We may now return to the question of prerogative powers and parliamentary democracy. It should be clear at this point that to say that law discplines prerogative power relating to the operation of parliamentary institutions is not to say that judges will enforce that law, or even make determinations on how that law applies in specific cases; judges may decide to address the legal framework for prerogative power at a general level, or they may decide not to address it at all. We have, in other words, left Dicey's jurisprudential world where law is what courts enforce. But what jurisprudential world are we in? What, for example, is the difference between the third and fourth approaches identified above? What, in other words, is the difference between unwritten laws that are not judicially enforceable and unwritten conventions that are not judicially enforceable? In answering these questions we can begin to build a theory of law and politics in Canada that reconciles the practice of statecraft with the ideal of legality.

In the jurisprudential world in which we find ourselves, it will be helpful to consider "law" not as fact or a thing but as a method or process of reasoning. We may say that law is "law" because it represents the sort of normative order that is susceptible to a distinctive legal analysis, interpretation or discourse. What makes an interpretive discourse "legal" as opposed to political or moral? To engage in legal discourse concerning an issue or problem, one must adopt what Dicey called a "legal turn of mind"[75] with respect to that issue or problem. The legal turn of mind is an interpretive attitude in which the interpreter endeavours sincerely to apply a set of general normative standards to a specific problem in an impartial and independent manner on the assumption that answers to the problem are dictated by interpretations of those standards rather than personal or partisan preferences, and that the best interpretation in any given case will be the one that shows the general body of normative standards to be unified, coherent and justified in light of the underlying principles of political morality that they are supposed to instantiate.[76] Dicey's focus on judicial enforceability as a definition for law is too simple, but it does serve as a rough proxy for the idea that law is a distinctive form of interpretive discourse, since the most public and authoritative manifestation of this form of dis-

75 Dicey, *supra* note 16 at 183.

76 I have tried to explore this conception of law more fully in "Written Constitutions and Unwritten Constitutionalism", *supra* note 8. The approach is, of course, roughly Dworkinian: Ronald Dworkin, *Law's Empire* (Cambridge: The Belknap Press of Harvard University Press, 1986); Ronald Dworkin, *Justice in Robes* (Cambridge: Belknap Press of Harvard University Press, 2006).

course is the judicial judgment. But judges do not hold a monopoly over legal discourse. The role that judges play in upholding the rule of law means that the courts should generally be open to considering any legal problem. Prudential considerations or political sensitivities alone should not exclude legal issues from judicial consideration. However, there may be times when, due to political sensitivities, the very idea of the rule of law will be hindered rather than helped by judicial intervention. In these cases, it may be right to say that a legal norm exists but is not judicially enforceable, or even justiciable.[77]

With this general sense of what makes law "law", we can now turn to conventions. Conventions, like some laws, are not judicially enforceable due to the political contexts or sensitivities involved, but conventions are not judicially enforceable for another reason too: namely, they are not laws. Legal problems or questions can be approached and solved if we adopt the "legal turn of mind." The question of whether a convention exists or is properly respected, in contrast, cannot be answered in that way. While it is true that conventions are normative and uphold principles that are constitutionally and legally fundamental, they are operative within a discourse that is distinctively political, not legal. Like law, conventions compel political actors to have regard to reasons for action that, given their centrality to constitutional principle, transcend personal, partisan or purely political motivations or calculations; but unlike legal interpretation, the application of convention in any given case will never require the political actor to exclude totally these distinctively political reasons for action. Indeed, the real value and purpose of conventions is to inject the politics of principle into the politics of power so that an equilibrium emerges between the two. Political respect for constitutional conventions requires what used to be called statesmanship — or what we may now call (to borrow a term that John Whyte often uses) "statecraft."[78] Decisions of statecraft must always be, in some sense at least, principled decisions; but they may also be intensely political, even partisan at times, in ways that legal decisions should never be.

In light of the dynamics of political ordering, especially in a complex country like Canada, it is often preferable to allow an equilibrium between the politics of power and the politics of principle to emerge organicially through the interaction of political actors and citizens, rather than through adjudication on points of law. The brilliance of conventions is that they give rise to the possibility of this equilibrium between power and principle — the possibility for statecraft — to develop through political debate and discussion. Let us return to the first Harper prorogation crisis as an example. In the midst of a sudden and severe economic crisis, when political stability and the material well-being of citizens are so closely connected, would it be "right" for a new government, just weeks after an election, to be replaced immediately upon the formation of an alternative coalition government whose leader planned to resign within several months of appointment to be replaced by an as-yet unknown successor as Prime Minister? Or would calling another election immedi-

77 *Cf.* David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006), 17–65.

78 E.g., John D. Whyte, "Federalism Dreams" (2008) 34 Queen's L.J. 1 at 1-2. I may, however, be using this term in a slightly different way that Whyte does.

ately be "right"? Or, finally, would it be "right" for all political actors involved to have several weeks breathing space, so to speak, to respond to these unprecedented events before a decision one way or the other was made? The answer to the question of what is "right" in these circumstances cannot be determined solely on partisan political considerations or on impartial legal considerations. The "right" answer will involve reconciling political strategy, judgment, and calculation with constitutional practice, principle and morality, or convention, to reflect, ideally at least, an exercise of "statecraft" that will show Canadian democracy in the best light possible in difficult circumstances.

The conventions of responsible government in Canada are not laws because they form part of the discourse of statecraft rather than the distinctive discourse of law. But these conventions are manifestions of unwritten principles of constitutional law in political form, and they therefore operate against the normative backdrop of that law and not in a legal vacuum. In a constitutional system committed to the rule of law there is always a legal limit to political decisions, even decisions of statecraft. If the advice of a Prime Minister on how the prerogative relating to Parliament should be exercised, or even the decision of a Governor General about whether to accept that advice or not, is sufficiently undemocratic as to enable judgments to be made that respect the unique demands and constraints of legal discourse, then it may be possible to conclude that the advice and/or the decision is or are unlawful. Even where a decision may be unlawful, however, it will not necessarily follow that the courts will take full ownership of the issue. Depending on the circumstances, it may be true that the exercise of prerogative power relating to the formation of governments or the holding of parliaments is simply not "amenable to the judicial process." Judicial process and legal analysis are different things. There will always be a "legal framework" disciplining state power, even if the application of that framework to specific cases or the granting of specific judicial remedies for breaches of law may not be possible given the sensitivities associated with some exercises of prerogative authority and the effect that judicial intervention may have on the values associated with the rule of law. Indeed, we may say that, in the end, it is the rule of law that makes a political problem a legal one, and it is the rule of law that may lead us to conclude that the legal problem is not a justiciable one.

As noted above, the concern with prerogative power relating to parliamentary government is that it may be exercised inconsistently with democracy and the rule of law. Leaving problems of democracy to the operation of conventions is generally appropriate, because democracy means working towards acceptable and principled forms of communal life through public participation, debate and discussion, rather than through adjudication. However, a prerogative decision may be so deeply offensive to the democratic principle that we may begin to analyze its character not just within the normative discourse of statecraft, but also within the distinctive normative discourse of law. It may be said, then, that law will be engaged at the point when it is clear that the decision is not just undemocratic but also arbitrary — when it offends not just democracy but also the rule of law. In such cases, we should never rule out the possibility of judicial intervention, even where nobody's individual rights, interests or expectations are affected differently from anyone else's, because the superior courts have an inherent constitutional role to play in upholding the rule of law. But if the courts conclude that the values associated with the rule of law would be hindered rather than helped by judicial intervention, they may decline

to intervene. In that case, however, the character of the problem as a *legal* problem is unaffected. It simply falls to other political actors and citizens to make the legal case.

It is beyond the scope of this essay to determine whether in 2008 and 2009 Prime Minister Harper and Governor General Jean exceeded the legal bounds of the duty to advise and the power to decide on the prorogation of Parliament. But the question is a real one. An arbitrary violation of the democratic principle by a Prime Minister or a Governor General in relation to the prerogative powers on parliamentary governance will be a violation of the rule of law and will therefore be susceptible to legal analysis even if not necessarily susceptible to judicial process. This conclusion follows from the existence in Canada of a durable and complete fabric of democratic legality behind the conventional norms that shape the practice of statecraft in this country. Rather than finding a legal-democratic hole at the heart of our system of constitutional law, we find a dynamic, pervasive, and rich reserve of democratic legality which forms the normative context for all governmental decisions, including advice and decisions about the exercise of prerogative powers affecting the integrity of parliamentary democracy in Canada.

1853

12

The Committee of the Privy Council, on the recommendation of the Honourable Sir Charles Tupper, Bart., G.C.M.G., submit the following Memorandum regarding certain of the functions of the Prime Minister:

1. A meeting of a Committee of the Privy Council is at the call of the Prime Minister and, in his absence, of that of the senior Privy Councillor present.

2. The quorum of the Council being four, no submission for approval to the Governor General, can be made with a less number than the quorum.

3. A minister cannot make recommendations to Council affecting the discipline and other Department

To Secretary of State, 12 May, 1896.

Department.

4. The following recommendations are the special prerogatives of the Prime Ministers:—

Dissolution and Convocation of Parliament

Appointment of Privy Councillors,

" Cabinet Ministers

" Lieutenant Governors

(including Lieut. Governor absent 6)

" Provincial Administrators

" Speaker of the Senate

" Chief Justices of all Courts +

" Senators.

" Sub Committees of Council

" Treasury Board

" Committee of Internal Economy, House of Commons

" Railway Committee

" Deputy Heads of Departments

Librarians

17

Appointment of Librarians of Parliament

" Crown Appointments in both Houses of Parliament.

" Governor General's Secretary's Staff.

Recommendations in any Department.

The Committee advise that this Minute be issued under the Privy Seal, and that a certified copy thereof be attached, under the Great Seal of Canada, to the Commission of each Minister.

All which is respectfully sub- [illegible] Sir John Macdonald's approval.

Charles Tupper

Approved

Aberdeen

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The Committee of the Privy Council, on the recommendation of the Honourable Wilfred Laurier, the Prime Minister, submit the following Memorandum regarding certain of the functions of the Prime Minister.

1. A meeting of a committee of the Privy Council is at the call of the Prime Minister and, in his absence, of that of the senior Privy Councillor, if the President of the Council be absent.

2. The quorum of the Council being four, no submission, approval to the Governor General, can be made with a less number than the quorum.

3.

Secretary of State 14 July 1896.
" " 21 August 1897.
" Executive Council 6 Sept 1897

3. A minister cannot make recommendations to Council, affecting the discipline of another Department.

4. The following recommendations are the special prerogative of the Prime Minister:

Dissolution and Convocation of Parliament.

Appointment of Privy Councillors

" Cabinet Ministers

" Lieutenant-Governors

(including leave of absence to same)

" Provincial Administrators

" Speaker of the Senate

" Chief Justice of all Courts

" Senators

" Sub-Committees of Council.

" Treasury Board

" Committee of Internal Economy

Economy House of Commons

Appointment of (Railway Committee)

" Deputy Heads of Departments

" Librarians of Parliament

" Crown Appointments in both Houses of Parliament

" Governor General's Secretary's Staff

Recommendations in any Department

The Committee advise That this Minute be issued under the Privy Seal, and that a certified copy thereof be attached, under the Great Seal of Canada, to the Commissions of each [illegible].

All which is respectfully submitted for Excellency's approval.

Wilfrid Laurier

Approved
13 July, 1896

Aberdeen

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The Right Honourable Sir Lyman Poore Duff, P.C., G.C.M.G.
Chief Justice of Canada,
ADMINISTRATOR OF THE GOVERNMENT OF CANADA.

Report *of a Committee of the Privy Council* ON MATTERS OF STATE.

PRESENT:

The RIGHT HONOURABLE

W. L. MACKENZIE KING

THE HONOURABLE

RAOUL DANDURAND
T. A. CRERAR
ERNEST LAPOINTE
P. J. A. CARDIN
C. A. DUNNING
J. C. ELLIOTT
W. D. EULER
F. RINFRET
I. A. MACKENZIE
C. G. POWER
J. L. ILSLEY
J. E. MICHAUD
N. McL. ROGERS
C. D. HOWE

APPROVED
25 OCTOBER 1935

The Committee of the Privy Council, on the recommendation of the Right Honourable W. L. Mackenzie KING, the Prime Minister, submit the following memorandum regarding certain of the functions of the Prime Minister:-

1. A Meeting of a Committee of the Privy Council is at the call of the Prime Minister and, in his absence, of that of the senior Privy Councillor, if the President of the Council be absent;

5. The quorum of the Council being four, no submission, for approval to the Governor General, can be made with a less number than the quorum;

2. A Minister cannot make recommendations to Council affecting the discipline of the Department of another Minister;

4. The following recommendations are the special prerogative of the Prime Minister:

Dissolution and convocation of Parliament;

Appointment of -

Privy Councillors;
Cabinet Ministers;
Lieutenant Governors;
Provincial Administrators;
(including leave of absence to same);
Chief Justices of all Courts;
Speaker of the Senate;
Senators;
Sub-Committees of Council;
Treasury Board;
Deputy Heads of Departments;
Committee of Imperial Economy, House of Commons;
Liveries of Parliament;
Crown Appointments in both Houses of Parliament;
Governor General's Secretary's Staff;
Recommendations in any Department.

The

- 2 -

The Committee advise that this minute be issued under the Privy Seal, and that a certified copy thereof be attached, under the Great Seal of Canada, to the Commission of each Minister.

All which is respectfully submitted for Your Excellency's approval.

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DOMINION OF CANADA

OFFICIAL REPORT

OF

DEBATES

HOUSE OF COMMONS

SECOND SESSION—TWENTIETH PARLIAMENT

10 GEORGE VI, 1946

VOLUME I, 1946

COMPRISING THE PERIOD FROM THE FOURTEENTH DAY OF MARCH, 1946,
TO THE SECOND DAY OF MAY, 1946, INCLUSIVE

BEING

VOLUME CCXLIX FOR THE PERIOD 1875-1946

INDEX ISSUED IN A SEPARATE VOLUME

OTTAWA
EDMOND CLOUTIER, C.M.G., B.A., L.Ph.,
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY
CONTROLLER OF STATIONERY
1947

CANADIAN CORPS OF FIREFIGHTERS

Mr. LENNARD:

For a copy of all correspondence exchanged between the Minister of National War Services and the Minister of National Defence (Army), from January, 1942, to September, 1945, respecting the Canadian corps of firefighters.

Mr. McCANN: I will have to oppose this order on the ground that this is correspondence between ministers and is therefore privileged. I would ask the hon. gentleman if he would be good enough to withdraw it.

Some hon. MEMBERS: Dropped.

Mr. SPEAKER: Dropped.

VETERANS LAND ACT—OLIVER FARM

Mr. LENNARD:

For a copy of all correspondence, reports and other documents in the possession of the Department of Veterans Affairs, in connection with the enquiry made by Mr. D. M. Brodie, of Windsor, Ontario, regarding the price paid by Veterans Land Administration for the Oliver farm.

Mr. MACKENZIE: I understand from discussion with the hon. member that he has received the information he seeks.

Mr. LENNARD: Yes.

Mr. SPEAKER: Dropped.

ST. SIMEON, QUE., POST OFFICE BUILDING

Mr. DORION:

For a copy of all correspondence, telegrams, reports and other documents, from 1936 to March 15, 1946, in the possession of the Post Office Department and the Department of Public Works, relative to the erection of a post office at St. Simeon, Charlevoix county.

DEPARTMENT OF MUNITIONS AND SUPPLY ACT—ORDERS IN COUNCIL

Mr. DESMOND:

For a copy of all orders in council approved since September 6, 1945, under the authority of the Department of Munitions and Supply Act.

Mr. McILRAITH: I have discussed this motion with the hon. member for Kent (Mr. Desmond) and he has arranged to examine the index of the orders in council asked for. Until he has an opportunity of doing so I suggest that the motion be permitted to stand.

Mr. SPEAKER: Stands.

HOUSING ACT, 1944—ORDERS IN COUNCIL

Mr. FRASER:

For a copy of all orders in council and regulations passed under the National Housing Act, 1944.

VETERANS' INSURANCE ACT—REGULATIONS

Mr. FRASER:

For a copy of all regulations made by the governor in council under the authority of the Veterans' Insurance Act.

Mr. MACKENZIE: Return tabled.

FARM IMPROVEMENT LOANS ACT—REGULATIONS

Mr. HENDERSON:

For a copy of all regulations made by the governor in council pursuant to the Farm Improvement Loans Act.

PRAIRIE FARM ASSISTANCE ACT—ORDERS IN COUNCIL

Mr. HENDERSON:

For a copy of all orders in council approved since July 1, 1945, under the authority of the Prairie Farm Assistance Act.

FISHERIES PRICES SUPPORT ACT—REGULATIONS

Mr. BROOKS:

For a copy of all regulations made by the governor in council pursuant to the Fisheries Prices Support Act.

INDUSTRIAL DEVELOPMENT BANK—BY-LAWS

Mr. FRASER:

For a copy of all by-laws of the Industrial Development Bank.

*PRIME MINISTER'S SPECIAL PREROGATIVES

Mr. DESMOND:

For a copy of all orders in council prescribing the special prerogatives of the Prime Minister.

Mr. MACKENZIE KING: The motion is for a copy of all orders in council prescribing the special prerogatives of the Prime Minister. I may say there is nothing unusual about this particular order. It is one that was first adopted by Sir Charles Tupper when he came into office. It has been part of the normal procedure as each new administration came into office to enact similar orders. I have here the various orders that have been passed. The first by Sir Charles Tupper was passed on May 1, 1896. Then there was one by Sir Wilfrid Laurier on July 13, 1896, one by Sir Robert Borden, on October 10, 1911, and another by Sir Robert Borden when he was head of the Union government. Then there is one by the Right Hon. Arthur Meighen, approved on July 19, 1920, and one by Mr. Bennett, approved on August 7, 1930. Then there is one by myself, approved on October 25, 1935.

I seem to have overlooked passing a similar order between 1921 and 1926. Mr. Meighen also overlooked his opportunity from June to September of 1926. Again I recommended

no order from 1926 to 1930. I am told that the clerk of the privy council has assumed that where a prime minister has been in office on a previous occasion, and is returned and continues in office, the old order still has force.

The only variation in the orders passed by myself and by my predecessors since the time of Sir Charles Tupper has been that in the original recommendation of Sir Charles the railway committee was included in the list of appointments designated as the prerogative of the Prime Minister in section 4 of the first two orders in council. This committee was deleted for obvious reasons from the list of appointments, under P.C. 2437 of October 10, 1911, and from subsequent orders in council.

Then in the case of the last two orders in council, namely P.C. 1930 of 1930 and P.C. 3374 of 1935, the original wording of section 3 has been slightly altered to read "recommendations affecting the discipline of the department of another minister" instead of "the discipline of another department".

That is the extent of the changes made. I have been told to be sure to inform the house that this list does not include all the prerogatives of the Prime Minister.

Mr. COLDWELL: Is the list being tabled?

Mr. MACKENZIE KING: I am tabling all the orders.

Motion agreed to.

WAR ASSETS—ESTEVAN AIRPORT BUILDINGS AND EQUIPMENT

Mr. McCULLOUGH (Assiniboia):

For a copy of all correspondence, since July 1, 1944, in the possession of War Assets Corporation or any department of the government with reference to the disposition of Estevan airport buildings and equipment.

R.C.A.F. BUILDINGS AT NORTH BATTLEFORD

Mr. CAMPBELL:

For a copy of all correspondence and telegrams exchanged between any department of the government and the city council of North Battleford or any other person or persons, from July 1, 1945, to date, regarding the sale of R.C.A.F. buildings at North Battleford.

CURRIE MEMORIAL AND SOLDIERS' CONVALESCENT HOSPITAL, MONTREAL

Mr. DIEFENBAKER:

For a copy of all correspondence between Mr. David, of Montreal, Quebec, an architect, and any of his employees with the Department of National Defence, and/or the Department of Public Works, and/or the Department of Veterans Affairs, regarding plans for the prospective erection (including the cancellation of such plans, if any) of the Currie Memorial hospital and/or the Soldiers' Convalescent hospital in the city of Montreal.

[Mr. Mackenzie King.]

PEACE RIVER DISTRICT

RAILWAY OUTLET TO PACIFIC COAST

Mr. WILLIAM IRVINE (Cariboo) moved:

That, in the opinion of this house, the government should give immediate consideration to the building of a railway outlet from the Peace River country to the Pacific coast.

He said: Mr. Speaker, I need hardly say that the resolution which I now rise to discuss is not worded as forcefully and as specifically as I should like it to be. But for certain restrictions imposed upon me by the rules of the house I should have the resolution read: "That this parliament endorse the building of the Peace River outlet, forthwith." However, members know full well that private members are not permitted to offer motions which might involve the expenditure of public moneys. I do not see why such motions should not be made by private members. We represent the people who are taxed; we should have some say in how much they are taxed, and how their taxes are to be expended. However, I shall not stop now to discuss amendments to the rules of the house. I merely say in passing that we are compelled by the limitations of the rules to restrict our expressions in matters of this kind. So that the resolution can only ask that the government give consideration to the building of the line, as desired.

I wish to express the hope that hon. members will not talk the resolution out. It is a practice sometimes indulged in. I should like in that connection to say that a long-deferred hope has saddened the hearts of the people in the area which will be directly affected by the proposed railway. I am asking that the house pass the resolution, and thus give them at least some basis for encouragement. But if we cannot see our way clear to pass the resolution, I think it would be better to face it squarely and fairly and vote it down, thereby putting out the *ignis fatuus*, that dazzling, sparkling, phosphorescent light of political promises which, in the past, has been leading the people toward futility. It would be better for us to put out forever these tantalizing, false beacon-lights which mark the road to nowhere.

The proposal which I would ask the government to consider, and which I would ask hon. members to authorize the government to consider, is to build a railroad line to connect the Pacific Great Eastern with the Northern Alberta railroad, which would incorporate both lines into the Canadian National railway system, and would connect the two branch lines mentioned.

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CANADA

Debates of the Senate

2nd SESSION • 39th PARLIAMENT • VOLUME 144 • NUMBER 59

OFFICIAL REPORT
(HANSARD)

Tuesday, May 13, 2008

THE HONOURABLE NOËL A. KINSELLA
SPEAKER

The Prime Minister's indication is that there is still more work to be done before the forms can be signed. There is already an Atlantic committee in place under the aegis of ACOA.

Senator Cowan: Did the Prime Minister make any public comment on this yesterday? Is there a press release or some form of circular?

Senator Oliver: No, Senator Cowan, it was a private meeting.

Hon. Tommy Banks: Honourable senators, I have a question for Senator Oliver.

On the Pacific Coast, there is particular anxiety with respect to the Vancouver Fraser Port Authority having to do, among other things, with the onshore generation of power that the honourable senators talked about, as well as the Olympic Games, and so on.

I presume that this bill will go to the Standing Senate Committee on Transport and Communication for study. I assume it will be fast-tracked, studied and passed. It will then receive Royal Assent. The coming-into-force provision of this bill is one that delegates the authority, as many bills do, to the Governor-in-Council to decide when to bring it into force.

Does the honourable senator think that the processes he has been talking about would be an impediment to bringing the bill into force so as to allow ports, such as the amalgamated Vancouver Fraser Port Authority, to gain access to the programs?

Senator Oliver: Not at all. A number of potential witnesses have indeed phoned my office and said: We would love to come and appear as witnesses before you, but we like the bill as it is. We are very anxious that this bill be passed, because once it is passed and receives Royal Assent and is proclaimed, it can help us a great deal. We in the industry urgently want this bill.

Therefore, I cannot see this bill being held up by the government at all after it receives Royal Assent.

On motion of Senator Tardif, debate adjourned.

PARLIAMENT OF CANADA ACT

BILL TO AMEND—THIRD READING—
DEBATE ADJOURNED

Hon. Wilfred P. Moore moved third reading of Bill S-224, An Act to amend the Parliament of Canada Act (vacancies). —(*Honourable Senator Moore*)

He said: Honourable senators, today we begin debate on the final stage of consideration of Bill S-224. The bill would limit the discretion of prime ministers with respect to vacancies in both Houses of Parliament. It would establish a time frame for filling Senate vacancies similar to the six-month rule already in place for the House of Commons. In addition, it would put an end to the selective calling of by-elections, eliminating the capacity of prime ministers to manipulate by-elections for partisan ends.

There are three aspects to the rationale behind Bill S-224. The first, and most important, is the right of the people and of the provinces and territories to a full and timely representation in both Houses of Parliament. Second is the independence of the legislative branch from control or influence by the executive and the concern about increasing concentration of power in the Office of the Prime Minister. Third is the capacity of each House to function without the impairment caused by too many vacancies.

Honourable senators, the Constitution of this country is the result of a compromise among former British colonies. Compromise is at the very essence of our country, and the Constitution protects the provinces by guaranteeing the rights they negotiated on entering Confederation. As part of the elaborate compromise of Confederation, the provinces were entitled to representation in two federal Houses. The sitting arrangements in both Houses were the result of negotiation and compromise.

I am not saying that we can never change those provisions and I acknowledge the initiative of Senator Murray, who proposes to change the allocation of Senate seats. All I am saying is that paying lip service to democracy and the rights of provinces means nothing if we do not respect the rule of law. So long as the current arrangement is the rule of the land, it must be respected. To do otherwise is to deny citizens, provinces and territories their rights under the Constitution.

When it comes to the House of Commons, a prime minister should not be able to call by-elections in Quebec because he thinks he can win, while leaving vacancies in Ontario to languish for fear that the opposition will win them. In one recent case, citizens in Toronto Centre had to wait over eight months for a by-election, while citizens in another part of the country were, by the grace of the Prime Minister, allowed to have a new representative in less than two months. This is not merely partisan manipulation; it is a repudiation of the constitutional rights of every citizen to be represented in Parliament.

What is more, the current government argued that the excessive discretion of the Prime Minister needed to be curtailed when it proposed to establish fixed dates for elections. However, it failed to address by-elections when it took that initiative. As Professor Ned Franks of Queen's University noted in his appearance before the Standing Senate Committee on Legal and Constitutional Affairs:

> Australian by-elections are governed by the principle that electors should not be left without representation any longer than necessary. Unfortunately, the same principle does not govern by-elections in Canada. The current government established fixed election dates so that prime ministers could not fiddle with the timing of general elections to their party's advantage. However, that has left the timing of by-elections open to prime ministerial machinations.

As for the Senate, I have said it before and I will say it again: The Constitution requires that vacancies be filled. By convention, this is achieved when the Prime Minister advises the Governor General to make an appointment, but this does not mean that the Prime Minister has the option of leaving seats vacant. Let me quote the well-known author on the Crown in Canada, Professor David Smith of the University of Saskatchewan. When he appeared in committee, he made the following remarks:

> Is it possible for the chief adviser of the Crown not to give advice when in fact it is only on advice that you have democratized our system of government? How then can you

> not give advice? I do not think discretion extends to not doing something. It has a breadth of range of things that you may do, but I do not think it includes doing nothing.

Regrettably, the current government seems to have a different view.

Honourable senators, the discretion of this Prime Minister, or any other, does not permit the unilateral altering of the Constitution without the consent of Parliament or of the provinces. What if a prime minister thought that some provinces have more seats than they deserve and decided to reduce their numbers by refusing to fill vacancies? What if a prime minister wanted to impose Senate elections on provinces like Ontario, Quebec, New Brunswick and Nova Scotia, which have made it clear they do not want them? These are not acceptable actions for the government of a modern democracy like Canada, founded on constitutionalism and the rule of law. The Prime Minister must pursue his objectives through constitutional means. If the Prime Minister wants to reduce the number of Senate seats for some provinces, or if he wants the provinces to elect senators, he must proceed by way of a constitutional initiative after negotiating for the support of the governments and legislatures of the provinces. He cannot abuse his discretion by refusing to fill vacancies that he is constitutionally mandated to fill, as a way of pressuring Parliament and the provinces into accepting his proposals.

• (1540)

Let me quote from Jennifer Smith, a Professor of Political Science at Dalhousie University. In her evidence before the committee, she agreed that the right of the people to have their representation in Parliament is paramount. She said:

> The Government of Canada certainly is not supposed to sabotage the Constitution by undermining existing national government institutions like the Senate. The Senate is a foundational institution that if it "belongs" to anyone, it belongs to the people of Canada. It is not the play thing of political elites and until the people are consulted about the proposed change, then they have every right to expect that it serve them in the way that it is designed to do.

The current war of attrition against the Senate shows a blatant disregard for the rule of law and the Constitution. Bill S-224 would remove the discretion that empowers a prime minister to ignore the rights of citizens, provinces and territories to be represented and would put an end to the abusive manipulations we have witnessed in the past.

In Canada, in the 21st century, 160 years after responsible government began in Nova Scotia, we still tolerate a situation where the executive has significant control and broad discretion over filling vacancies that occur in both Houses of Parliament. That situation is unworthy of a democracy like ours. We cannot effectively promote democratic values in places like Afghanistan if we fail to observe them at home. This anachronistic discretion in the hands of a prime minister has no principled basis, and it is time we reined it in.

The bill we are considering at third reading today, honourable senators, is also designed to address in some measure a shared concern by most observers of, participants in and commentators on our political system. The concentration of power in the office of the Prime Minister has been criticized even by its current occupant, and it is a threat to the balance of institutions that makes our democracy work properly. Bill S-224 will curtail the excess of discretion that currently lies in the hands of the Prime Minister and remove the improper influence of the executive branch over the legislative branch.

Honourable senators, no one in this house doubts that vacancies impair our ability to perform our collective constitutional duties. If the Prime Minister persists in his current policy, the Senate will reach 30 vacancies by the end of next year. That number is nearly one third of the membership. For the Senate to function properly, and bear in mind that it is already a much smaller house than the House of Commons, we need a certain critical mass to take on the various activities. Let me quote Professor Franks on this point. He said:

> I do have a concern that, over time, we cannot let the Senate atrophy. It either has to be abolished or it has to be a functioning part of Parliament. Death by 100 cuts is not the way to go.

The problem is most glaring in our committees, where the bulk of our work is done. The government in this place is already struggling to staff 17 standing committees, two special committees and three subcommittees. The Senate has 22 committees in total. The government bench has only 21 members if we do not include the Speaker. The implications are obvious. Let us be honest: The government can barely manage to staff half its committee seats, often functioning with only one or two members present at meetings.

The House of Commons could not function well, either, if it had many vacancies. That is why Parliament established a time frame of six months to ensure that the membership of the elected House would not atrophy. The six-month time frame is a good measure for the House of Commons, and it is a good measure for the Senate of Canada. Bill S-224 will put the Senate on par with the House of Commons and ensure that its membership cannot be reduced to the point where it becomes dysfunctional.

Let me turn now to some of the issues raised in the Standing Senate Committee on Legal and Constitutional Affairs when it examined Bill S-224.

Honourable senators, when the Leader of the Government in the other place appeared in committee, he talked a lot about the government's proposals for Senate reform, and attempted to equate my initiative with the status quo. He seemed to want to create a false choice between my bill and an elected Senate. First, I state clearly that Bill S-224 has nothing to do with Senate reform. Vacancies affect both Houses. In addition, no matter what the future brings for the Senate, there will be vacancies. Several provinces have clearly rejected the Prime Minister's current reform initiative, not least because of his unilateralist approach to federalism. Even if the Prime Minister were to succeed with his proposals, the Senate he envisions will have vacancies. Regardless of the Senate we have today or in the future, the Prime Minister should not be allowed to let vacancies pile up for years. My bill is a remedy that works both for the status quo and for the Senate in the future.

Honourable senators, a concern was raised that my bill could result in by-elections being called with a voting day close to the fixed date of a general election. The existing provisions of the Elections Act address this concern and make provisions for it. Moreover, Bill S-224 does not change the existing timelines for by-elections; the bill merely prohibits the selective calling of by-elections to the detriment of the democratic rights of citizens who are without a representative in the House of Commons.

Some discussion in the committee focused on what could happen if a Senate vacancy were due to be filled immediately after a government is defeated in the House of Commons, or defeated in a general election. Obviously, such a government will have lost legitimacy under our constitutional conventions to tender binding advice to the Governor General. Senator Murray expressed concern that a Governor General in such a situation could be intimidated into making appointments. He raised the spectre of an overbearing prime minister arguing that the law requires the Governor General to accept the advice. Honourable senators, I submit that this concern is not valid. It is important to focus on how the bill has been crafted. The bill does not attempt to constrain the Governor General at all. It creates a statutory obligation on the prime minister to tender advice, but it does nothing to disturb the settled convention that a Governor General will refuse to act on such advice when it is tendered by a defeated government. That convention was firmly established in 1896 when Lord Aberdeen refused to make appointments on advice by from Sir Charles Tupper, who had been defeated in a general election. Bill S-224 does not affect that convention.

In our committee deliberations, Senator Andreychuk raised the theme of legal sanctions on several occasions. If I understood her correctly, she regards the provisions of Bill S-224 as unenforceable in court. I have two responses to that concern.

First, witnesses agreed that the main consequences of failure to respect the law would be political, but they did not all agree with the view that Bill S-224 would be unenforceable. In fact, Professor Errol Mendes of the University of Ottawa Faculty of Law stated clearly that it is enforceable, particularly because it addresses the powers of the prime minister, not those of the Governor General. He addressed this subject in more than one response to questions. Let me quote from one:

> If a statute has been duly passed by Parliament and mandates the Prime Minister to fill vacancies, as section 32 says, on a vacancy arising, just as if he disobeyed the equivalent provision in the House of Commons, anyone could go to court, under the public interest standing rules, and ask for either a declaration or one of the administrative remedies to force the Prime Minister to do it. It has happened in the past, and it could happen in this situation too.

Second, with respect, I think Senator Andreychuk misses the point. If we look at things through the lens that she suggests, much of the constitutional fabric of our country is not enforceable — that is to say, there are no real sanctions against a prime minister who violates all sorts of provisions of the Constitution, both written and unwritten. Indeed, if Bill S-224 is unenforceable, so too are the existing provisions of the Parliament of Canada Act that require the prime minister to call by-elections within six months.

[Senator Moore]

• (1550)

The object of my bill is not to sanction a prime minister who fails to respect the Constitution. My objective is to clarify the law.

I have already made the argument at second reading that the Constitution clearly requires that vacancies be filled. The provisions are mandatory, not permissive. However, prime ministers can leave Senate vacancies to linger because the Constitution does not provide a time frame and it is difficult to know when a prime minister has waited too long.

Bill S-224 does not attempt to sanction the Prime Minister; it attempts to bring clarity to the issue: to draw the line, so that we will know when a prime minister has crossed it. In light of such clarity, the political consequences that Senator Andreychuk seems to rely upon would be more likely to materialize.

Honourable senators, in conclusion, we all know that prime ministers of both stripes have taken liberties with the powers entrusted to them in respect of vacancies in both Houses of Parliament. Indeed, prime ministers have shown through their actions that they cannot be trusted with such power.

Bill S-224 is a modest attempt to curtail the abuses of the past. It will ensure that the rights of citizens, provinces and territories to representation in Parliament can no longer be manipulated, delayed or denied outright. The measure would put an end to excessive executive power in relation to the legislative branch. Finally, it would ensure that the membership of both Houses is maintained at levels that will allow them to function properly.

I urge honourable senators to support this bill.

On motion of Senator Comeau, for Senator Brown, debate adjourned.

ANTI-SPAM BILL

SECOND READING—DEBATE ADJOURNED

Hon. Yoine Goldstein moved second reading of Bill S-235, An Act concerning unsolicited commercial electronic messages. —(*Honourable Senator Goldstein*)

He said: Honourable senators, last week the world marked a rather inauspicious anniversary, namely the thirtieth anniversary of the sending of the first spam email message. In the intervening 30 years, spam messages, more technically known as "unsolicited emails," have progressed from being a minor nuisance to becoming a serious threat to the integrity of e-commerce, a significant drain on corporate resources and productivity, and a vehicle for a wide range of criminal activities.

Although the word "spam" technically refers to any unsolicited email message, this bill concerns unsolicited commercial messages; namely, those that promote products, goods, services, investment or gaming opportunity. It is these commercial messages that account for the vast majority of spam traffic and that sustain spammers by providing them with significant profits. Commercial spam is also the most straightforward for government to deal with since its commercial nature means that it is not protected by the freedom of speech.

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OFFICIAL REPORT
(HANSARD)

Tuesday, February 10, 2009

THE HONOURABLE NOËL A. KINSELLA
SPEAKER

In Europe, one tonne of carbon offset costs about $15. To put this into perspective, let us consider Kyoto. If we did absolutely nothing to reduce our carbon footprint in Canada, instead of buying a hybrid car, sealing our windows or walking instead of driving, we would have to buy carbon credits in the amount of 250 million tonnes to meet our Kyoto obligations. If we went to the market in Europe to buy those carbon credits, where we would pay $15 per tonne, it would cost us $3.8 billion each year to meet our Kyoto obligations. At $6 per tonne here in Canada, we could pump money into every farm across this country that could want to and would want to create real credits, and it would cost $1.5 billion per year for the five years. What did we reduce in GST? I use the term "we" lightly. I should have said "your government." It would be $13 billion a year, so $1.5 billion or, at maximum, $3.8 billion. We could solve the Kyoto problem and set the stage for leadership in the world, establish this policy in the culture and the context of Canadians' minds and begin to solve a problem that is every bit solvable if we would simply get started. We need leadership.

In some sense of not doing credits, which we certainly have seen with this government, is a moot point because President Obama will bring in a cap-and-trade system. Let it be known to those on this side who want a made-in-Canada policy, it will not be made in Canada; it will be made in the U.S. and it is likely that we will be dragged along, instead of getting ahead of it, which raises serious implications for Canada. In the term "cap and trade," the word "trade" means carbon credits, and it means carbon markets like the one in Europe and the one in Alberta. How does it work? Companies will be given a cap to reduce their emissions from one point to a better point. If they cannot get to that point, then they can buy the required amount from someone who is able to get below that point. We will find that companies will take that money and invest it in an individual business or farm to meet their obligations. Credits cannot go on forever and they will not, but they will provide a way to deal with the low-hanging carbon emission "fruit," as it were. This will establish a huge opportunity in the future green economy. The next Industrial Revolution will be stimulated by this kind of activity in the United States. As I said earlier, it is a breath of fresh air to have such indications from President Obama.

However, Canada will miss that economic opportunity if the government continues its current direction such that we are not prepared to take advantage of that market. If we have not worked with our industry and our farms to develop the structures for carbon credits and reducing our emissions, we will not be able to compete with U.S. firms that have done so. If we do not have a market in Canada for carbon credits, when we are forced by the U.S. regime to lower our carbon emissions, our companies will have to buy them from the U.S. markets. Where will that money go? It will be invested in American firms that had the foresight, supported by government, to reduce carbon. It will go to their technologies, which they will sell around the world, and will create jobs that we could have had but de facto will lose. All we need is some leadership.

No matter the record or the rhetoric of this government, I am profoundly concerned that there simply is not the intensity and the commitment to make this work. We heard almost three years ago that the government would have a cap-and-trade system. We saw the government that got into power cancel all of the climate change plans of the previous Liberal government. When I asked the Minister of the Environment to give me the studies in defence of their action, I was told that a study had not been done. I can show honourable senators the quote. It is not that the government has a commitment but rather that the government has an ideological aversion to investing in or intervening in the economy, even though it is required to do so in this sense. To say that those who want to deal with climate change can go ahead and do so is akin to saying that those who want to win a world war can go off and do so. No, there has to be specific leadership at the government level to work with the various sectors in our society and our economy to make this happen.

This program need not be particularly expensive. It would take a small portion of the amount that will be invested in the stimulus package of the current budget. It would have tremendous leverage in creating stimulus because most of it would go into investment and creating jobs and profits that are the basis of our capitalist system. At a personal level, it would draw the attention of Canadians to the possibility that climate change could be dealt with. It would give Canadians at least one specific mechanism with which they could do so. It is not only an actual tool to meet specific objectives but also an educational tool.

I feel a tremendous sense of urgency, and I implore honourable senators to feel this same urgency. Climate change has not been addressed by this government. In fact, this government has run away from it. This could be a simple, straightforward and effective solution to not only deal with that issue but also to begin to change the culture of Canadians so that they can see the possibilities and become leaders in their own right. Canadians have been waiting too long for government to provide leadership.

(On motion of Senator Comeau, debate adjourned.)

CANADA ELECTIONS ACT
PARLIAMENT OF CANADA ACT

BILL TO AMEND—SECOND READING—DEBATE ADJOURNED

Hon. Wilfred P. Moore moved second reading of Bill S-224, An Act to amend the Canada Elections Act and the Parliament of Canada Act (vacancies).

He said: Honourable senators, I am pleased once again to submit for your consideration Bill S-224, An Act to amend the Canada Elections Act and the Parliament of Canada Act. Honourable senators will recall that my previous bill, which coincidentally had the same number in the second session of the previous Parliament, received second reading in this place, was passed in committee and received third reading on May 29 of last year. Unfortunately the bill did not pass the other place before that session prorogued.

• (1700)

As with the previous bill, the new bill would limit the discretion of prime ministers with respect to vacancies in both houses of Parliament. It is designed to remove the temptation that prime ministers sometimes feel to abuse the discretion they have in favour of their own party. The bill would establish a time frame for filling Senate vacancies within 120 days, and House of Commons vacancies within a similar time frame.

The bill calls for the writ of election to be issued within 60 days and for the polling day to be fixed no later than 60 days after the writ. In addition, the bill would put an end to the selective calling of by-elections, providing that by-elections must be held in the sequence in which the relevant vacancies occurred.

I want to briefly reiterate my reasons for proposing Bill S-224. Above all, I am concerned about the right of the people and of the provinces and territories to full and timely representation in both houses of Parliament. In addition, I believe that the level of discretion that now exists poses a risk to the independence of the legislative branch, which should be free from control or influence by the executive. The past behaviour of prime ministers in addressing vacancies in both houses is another justification for the concern about increasing concentration of power in the Office of the Prime Minister. Finally, I am motivated by a desire to preserve the capacity of each house to function without the impairment that results when there are too many prolonged vacancies.

Honourable senators, our Constitution reflects a compromise reached by the Fathers of Confederation and embraced by each of the provinces that have joined Canada ever since. Compromise is a Canadian value. Our Constitution guarantees the rights of the provinces which were and continue to be the conditions upon which the provinces entered Confederation.

One of the key conditions was representation in both houses of the new federal Parliament. I do not argue that these constitutional provisions are immutable. I do say, however, that it is not for prime ministers to interfere with them unilaterally by manipulating the broad discretion that currently exists with respect to filling vacancies. It is difficult to be definitive, but there is no doubt that somewhere along the way a lingering vacancy ceases to be the result of simple omission or even neglect, and it begins to serve as an illustration of disregard for the rule of law. So long as the current arrangement is the law of the land it must be respected. Failure to fill vacancies in both houses in a timely way is to deny citizens, provinces and territories their rights under the Constitution.

With respect to the House of Commons, a prime minister should not be able to call by-elections in one riding because he thinks he can win, while leaving vacancies in another region to languish for fear the opposition will win them. In one recent case, citizens in Toronto Centre had to wait over eight months for a by-election, while citizens in another part of the country were, by the grace of the Prime Minister, allowed to have a new representative in less than two months. That is worse than just crass partisanship; it is a denial of the constitutional rights of every citizen to be represented in Parliament in a timely way.

What is more, the current government agreed that the excessive discretion of the prime minister needed to be curtailed when it proposed to establish fixed dates of election. Indeed, the potential abuse of prime ministerial discretion was the sole justification for that initiative. Perhaps it was an oversight but, when it made those changes, the government failed to impose similar limitations on by-elections.

As Professor Ned Franks of Queen's University noted in his appearance before our Standing Senate Committee on Legal and Constitutional Affairs which studied the previous bill:

> . . . Australian by-elections are governed by the principle that electors should not be left without representation any longer than necessary.
>
> Unfortunately, the same principle does not govern by-elections in Canada. The current government established fixed election dates so that prime ministers could not fiddle with the timing of general elections to their party's advantage, but it has left the timing of by-elections open to prime ministerial machinations.

I will now turn to the Senate. The Constitution requires that vacancies be filled.

Senator Segal: They were.

Senator Moore: I do not remember the honourable senator advocating that. It is nice to hear him among the converted.

By convention, this is achieved when the prime minister advises the Governor General to make an appointment, but this does not mean that the prime minister has the option of leaving seats vacant. I will quote Professor David Smith of the University of Saskatchewan when he appeared before that committee. He said:

> Is it possible for the chief adviser of the Crown not to give advice when in fact it is only on advice that you have democratized our system of government? How then can you not give advice? I do not think discretion extends to not doing something. It has a breadth of range of things you may do, but I not think it includes doing nothing.

Regrettably, the current government seemed to have a different view, and despite recent appointments that view has not changed.

Honourable senators, I do not want to repeat the arguments I have made in debate on the previous bill about the unconstitutionality of the Prime Minister's refusal to appoint, a policy which he actually articulated in an appearance before one of our special committees. However, I do want to recall those discussions to your attention because they are pertinent. The Prime Minister has, I am happy to say, finally abandoned his unconstitutional policy. We see the result here in this chamber, with 18 new members. I welcome each of them.

I am especially pleased that my own province of Nova Scotia now has a full complement. Until a few weeks ago, Nova Scotia was lacking 30 per cent of its representation in the Senate. I want to acknowledge my long friendship with Senator Fred Dickson. We have known each other for many years and, for those of you who do not know, Fred was the energy and tactician behind the election victories of our former colleague senator, doctor, premier John Buchanan. I also want to welcome Senators MacDonald and Greene. I look forward to working with them on behalf of the people of our province.

As much as I welcome them, recent appointments do not remove the underlying problem that my bill addresses. The appointments do not prevent this or any future prime minister, whatever the party affiliation, from repeating the mistake of leaving vacancies to pile up for years at a time. Moreover, the current government has acknowledged by its actions that it was in the wrong, but it has never admitted its mistake. Presumably, the

government reserves the right to revert to its policy of attrition if it should appear advantageous at some future stage, whatever the remainder of its mandate may be. My bill is still needed because there currently exists nothing to prevent a recurrence of an official policy of piling up vacancies.

At the outset of my remarks I mentioned executive control over the legislative branch and the widespread concern about the concentration of power in the Office of the Prime Minister. It has been 160 years since responsible government began in Nova Scotia. Responsible government means that the executive is accountable to Parliament. It also means that ministers serve only at the pleasure of the elected house. In a way, Parliament is the watchdog over the executive. The increasing power of the prime minister is out of step with this fundamental design.

Today, we confront a situation where the executive has significant control and very broad discretion over filling vacancies that occur in both houses of Parliament. That situation is contrary to the principles of institutional independence and responsible government. It is unworthy of a modern democracy like ours. We cannot effectively promote democratic practices abroad if we fail to observe them at home. The current level of discretion in the hands of the prime minister has no principled basis. It makes both houses of Parliament susceptible to manipulation by the prime minister and it is high time we fixed it.

Bill S-224 would curtail that discretion and remove the improper influence of the executive over the legislative branch while preserving the capacity of government to plan for holidays, provincial elections, weather and other contingencies when issuing writs for by-elections for the House of Commons.

Honourable senators, in the last Parliament all of us on both sides of this chamber felt the weight of the vacancies as we worked to carry on our committee and legislative studies. At one point the Senate had more committees and subcommittees than there were senators on the government benches. That was not good for the institution, it was not good for the government, and it was not good for the opposition. I have spoken on this point at length in the past, so I will not dwell on it now, but it remains a key reason for circumscribing the discretion of prime ministers.

• (1710)

The House of Commons has always placed time limits on the filling of its vacancies, and with good reason. Bill S-224 would put the Senate on par with the House of Commons and ensure that its membership cannot be reduced to the point where it becomes dysfunctional.

Let me briefly outline the issues raised in the Standing Senate Committee on Legal and Constitutional Affairs when it was examining Bill S-224 in the last Parliament.

Honourable senators, when the former government leader in the other place appeared in committee, he talked a lot about the government's proposals for Senate reform and attempted to equate my initiative with the status quo. He seemed to want to create a false choice between my bill and an elected Senate. That is still an important point because I fear that the government will attempt to create this false dichotomy again.

Bill S-224 does not deal with that suggested Senate reform, but rather deals with securing the proper functioning of both houses. Vacancies affect both houses. In addition, no matter what the future brings for the Senate, there will be vacancies. Several provinces have clearly rejected the Prime Minister's current reform initiative, not least because of his unilateralist approach to federalism. However, even if the Prime Minister were to succeed with his proposals, the Senate he envisions will have vacancies. Regardless of the Senate we have today or in the future, prime ministers should not be allowed to let vacancies pile up for years. My bill is needed both for the status quo and for any Senate vacancy-filling process that might exist in the future.

Honourable senators, a concern was raised that my bill could result in by-elections being called with a voting day very close to the fixed date of a general collection. In fact, the existing provisions of the Canada Elections Act address this concern and make provisions for it. My bill merely places a clear time frame on the election to fill a vacancy, and prohibits the selective calling of by-elections to the detriment of the democratic rights of citizens who are without a representative in the House of Commons.

Some of the discussion in committee focused on what could happen if a Senate vacancy were due to be filled immediately after a government is defeated in the House of Commons or defeated in a general election. Obviously, such a government would have lost the legitimacy under our constitutional conventions to tender binding evidence to the Governor General. One senator expressed concern that a future prime minister could intimidate a Governor General into making appointments in such a situation. He raised the spectre of an overbearing prime minister arguing that the law requires the Governor General to accept the advice.

Honourable senators, that concern is allayed by a closer look at how the bill has been drafted. The bill does not constrain the Governor General at all. It merely creates a statutory obligation on the prime minister to tender advice, but does nothing to disturb the settled convention that a Governor General will refuse to act on such advice when it is tendered by a defeated government. That convention was firmly established in 1896 when Lord Aberdeen refused to make appointments on advice from Sir Charles Tupper, who had been defeated in a general election. Bill S-224 does not affect that convention.

In our committee deliberations, government senators raised the theme of legal sanctions and their view that the provisions of Bill S-224 are unenforceable in court. With respect, I think the concern raised misses the point. If we look at things through that lens, much of the constitutional fabric of our country is not enforceable; that is to say, there are no real sanctions against a prime minister who violates all sorts of provisions in the Constitution — both written and unwritten. Indeed, if Bill S-224 would be unenforceable, so too would be the fixed election law that Mr. Harper so desperately passed when he became Prime Minister. We did not hear government senators raise those objections when they were trying to convince us to support a fixed election law. Hence, it would hardly be credible for them to deploy that argument against a bill that seeks to secure the membership of both houses of Parliament.

In short, the object of my bill is not to sanction a prime minister who fails to respect the Constitution. My objective is to clarify the law.

I would like to take a moment to put on the record that my decision to pursue this legislation does not reflect a change in my original position. I have always been of the view that the Constitution clearly requires that vacancies be filled. The provisions are mandatory, not permissive. Vacancies have lingered because the Constitution does not contain a specific time frame, and it is difficult to know when a prime minister has waited too long. Bill S-224 does not attempt to sanction prime ministers; it attempts to bring clarity to the issue and to draw the line so we will know when a prime minister has crossed it. In light of such clarity, the political consequences of failing to act are more likely to move the prime minister to action.

Honourable senators, in conclusion, after reflecting on our committee deliberations, I decided to alter my bill slightly to address the problem with unlimited writ periods for by-election to the House of Commons. My bill would establish a 60-day limit on by-election campaigns. I feel that including this provision makes the bill more effective at serving its fundamental objective, namely, the timely filling of vacancies in both houses of Parliament.

I am the first to admit that prime ministers of both major parties have occasionally gone too far with the discretion and powers entrusted to them in respect of vacancies in both houses of Parliament. They have shown through their actions that prime ministers cannot be trusted with such power. None of them has ever attempted to make a convincing case that the existing discretion is actually necessary.

Bill S-224 is a modest attempt to curtail the abuses of the past. With this measure, I hope to ensure that the rights of citizens, provinces and territories to representation in Parliament can no longer be manipulated, delayed or denied outright. The bill would limit executive power in relation to the legislative branch. Finally, it would ensure that the membership of both houses is maintained at levels that will allow them to function properly.

Honourable senators, I urge you to support this bill once more.

(On motion of Senator Comeau, debate adjourned).

COMMITTEE OF SELECTION

SECOND REPORT OF COMMITTEE ADOPTED

The Senate proceeded to consideration of the second report of the Committee of Selection (*membership of Senate committees*), presented in the Senate earlier this day.

Hon. Terry Stratton: Honourable senators, I move adoption of the report.

Hon. Elaine McCoy: Honourable senators, I rise briefly this afternoon first to congratulate the leadership of the Conservative Party and the Liberal Party for coming to an agreement on committees and, therefore, allowing the Senate to proceed to what is probably its highest and best purpose, namely, to review legislation and pursue inquiries and studies of its own volition.

I am reminded that Canadians value very highly the role the Senate plays. In its role, many consider the Senate as the chamber of sober second thought, but many also consider it as Canada's pre-eminent think-tank — a council of elders where we take great delight in competing for ideas and policies rather than politics and power.

This is also my first opportunity to welcome the 18 new senators to the Senate. I, too, am delighted to see the Senate now at full complement and look forward to their participation. I think this will greatly enhance the outcomes of our work, insofar as each of the new senators I observe has now been assigned to two committees, roughly, as have most senators in the chamber, as is the practice.

• (1720)

I want to put on record, however, that one or two of our traditions seem to be slipping away. We have 17 committees for which nominations have been put on the floor today, and only four of those committees have an independent member nominated to sit on them.

Some years ago now, I believe it was Senator Carstairs who was given credit for introducing a tradition into this chamber that would see an independent member sitting on each of our committees. This tradition, again, spoke to our best and highest purpose, which was to encourage full debate and independent thinking.

I see in this latest nomination round perhaps a little of that highest and best purpose being eroded insofar as perhaps not all our senators are being used to their best capacity. I would say, on behalf of my independent colleagues, that sometimes we have more time to consider the ideas, agendas and witness testimony that come before us insofar as we do not have to attend as many caucus meetings. We have more time to study the brilliant ideas that are brought forward by our colleagues, not to mention other Canadians.

I wanted to put that issue on record; to keep an eye on this tradition as we go forward. Having said that, I look forward to working with all senators in this session. I urge that we now turn our minds to some of the major issues that face Canada today and to reach out in the next session to put more of our own studies on the record. We are famous for remarkable studies that have brought issues in this country forward decade by decade. For example, I think of the Croll report on poverty. I think of the Kirby report on mental health. I think of the report on soil at risk. Senator Fairbairn was part of that study, and it is still being quoted. I think of the marijuana report, which is one of our best sellers, as it turns out. I believe Senator Nolin and Senator Banks were involved in that report.

I look forward to an inquiry. I hope we all support Senator Ringuette's proposition to look at the credit card and debit card situation in our financial institutions today.

I congratulate this chamber for bringing to the forefront of the public policy debate in Canada the proposal to censor Canadian films through tax provisions, which the Senate caught when the House of Commons passed legislation in less than 60 seconds and overlooked that major incursion into our freedom of speech.

We have good things to accomplish here, and we have more things to accomplish here, particularly in these times of global challenges, from an economic, environmental and social point of view.

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CANADA

Debates of the Senate

2nd SESSION • 40th PARLIAMENT • VOLUME 146 • NUMBER 34

OFFICIAL REPORT
(HANSARD)

Tuesday, May 12, 2009

THE HONOURABLE NOËL A. KINSELLA
SPEAKER

Senator Segal: And Quebec, thank you, Senator Joyal.

Then, of course, Queen Victoria made the horrific mistake — let me not go any further in that process.

Senator Rompkey: It is her birthday soon, after all. Can the woman not enjoy her birthday?

Senator Grafstein: I want to thank the honourable senator for his elucidating comments. I am particularly interested in the question of two Canadas: the rich and the poor. While Disraeli understood the difference between the two classes, his successor party in Canada — the Conservative Party — never did. It is true that he stood for two Englands.

I am delighted with the comments of the honourable senator. I agree with virtually everything he said. If he would have read my comments earlier, he would have seen that I provided for two aspects of the national portrait gallery, both the physical building and also the virtual reality. That was part of my text not only recently, but from the outset.

I hope that I will have an opportunity to respond to the honourable senator more forcefully. In many aspects, I am in agreement with him. I will defer to Senator Di Nino to take the adjournment. I hope that he would speak to it briefly because —

Senator Stratton: Like you.

Senator Grafstein: I think Senator Segal and I both agree that this question should not be left to government. This question should be left to Parliament.

I would certainly be satisfied, and I think this side would be satisfied, if this Senate opines and Parliament opines. Let the people speak.

Senator Segal: We do not disagree on the notion that this place should opine and the other chamber should opine in this process. I am supportive of that nation.

I think the honourable senator may have unintentionally misspoken. It is my recollection that Benjamin Disraeli was a one-nation conservative and that one nation was both those with resources and those without who had to be brought together. I am prepared to tip my hat that Gladstone made some modest contributions to the well being of the British condition overall. I would also point to Sir John A. MacDonald, R. B. Bennett and others who fought for low-income Canadians and others throughout their entire political careers. There is a tradition of some of that on both sides of this chamber.

Senator Di Nino: It would be nice to sit here and listen to this wonderful dialogue for the rest of the afternoon, but we do have other work. Therefore, I will move adjournment of the debate.

(On motion of Senator Di Nino, debate adjourned).

• (1550)

CANADA ELECTIONS ACT
PARLIAMENT OF CANADA ACT

BILL TO AMEND—SECOND READING—
MOTION IN AMENDMENT—DEBATE CONTINUED

On the Order:

> Resuming debate on the motion of the Honourable Senator Moore, seconded by the Honourable Senator Day, for the second reading of Bill S-224, An Act to amend the Canada Elections Act and the Parliament of Canada Act (vacancies);
>
> And on the motion in amendment of the Honourable Senator Segal, seconded by the Honourable Senator Nancy Ruth, that Bill S-224 be not now read a second time but that the subject matter thereof be referred to the Standing Senate Committee on Legal and Constitutional Affairs;
>
> That the committee report back no later than September 22, 2009; and
>
> That the Order to resume debate on the motion for the second reading of the bill not appear on the *Order Paper and Notice Paper* until the committee has tabled its report on the subject matter of the bill.

Hon. Wilfred P. Moore: Honourable senators, I cannot help but comment on the dalliance of my colleagues opposite in not addressing this bill. Suffice it to say that I do not support the amendment.

Hon. Gerald J. Comeau (Deputy Leader of the Government): Before the honourable senator speaks about the dalliance on this side, I believe Senator Brown wanted to speak on this subject.

Hon. Bert Brown: Honourable senators, I rise ever so timidly in the face of the incredible oratory of the giant who sits beside me.

Honourable senators, I am pleased to participate in the debate on Bill S-224, An Act to amend the Canada Elections Act and the Parliament of Canada Act (vacancies).

This version of the bill — the third time it has been proposed by Senator Moore — differs in key respects from the previous versions.

The bill requires Senate vacancies to be filled in 120 days instead of the proposed 180-day maximum contained in the previous two bills.

It imposes an upper limit of 60 days for the issue of a writ for a house by-election instead of the current maximum of 180 days.

It fixes the writ period for house by-elections at a maximum of 60 days as opposed to having no maximum.

The principle of the bill remains the same, though, and that is to seek to constrain, for reasons that are less than clear, the way governments have operated for a long time. We have been well served by the political process that we have followed, yet Bill S-224 attempts to create legal constraints that do not currently exist.

Not surprisingly, the government remains opposed to the bill, in particular, that aspect of the bill dealing with Senate appointments. In that regard, I will focus my comments today on the amendment relating to Senate appointments.

My first comment is a question: What problem does Senator Moore seek to address by bringing this legislation forward? I believe it is fundamental that we do not waste this chamber's time in discussing bills that do not serve a purpose, and by that I mean that do not solve an existing problem.

I reviewed Senator Moore's statements when he introduced the bill. He described one objective of his bill as preserving the capacity of each house to function without the impairment that results from too many prolonged vacancies.

Again, I will focus my comments on this chamber. At what point in our history has the Senate been unable to function? At what point did the Senate stop functioning between the 2006 federal election and the recent appointments made by the Prime Minister?

From my perspective, the Senate has always been able to function and perform its job in legislative review and committee study, even before the 18 recent appointments. In fact, when the former Minister for Democratic Reform, Peter Van Loan, appeared before the Standing Senate Committee on Legal and Constitutional Affairs, one committee member took pains to give examples of how effective the Senate had been in legislative review.

As long as the Senate is able to operate, even without a full complement for a period of time, what then is the issue with regard to timing of appointments?

Furthermore, Prime Minister Harper has acknowledged that it is important to ensure the Senate has the capacity to function. Capacity is related in part to the abilities of senators and also to the numbers of senators on both the government and opposition side.

When the Prime Minister appeared before the Special Senate Committee on Senate Reform, he mentioned in particular the need for the government to have sufficient representation in the Senate to carry out the government's legislative program.

There is a recognition that the number of senators could be reduced to a point where the Senate is not able to operate. Theoretically, it is possible that there could be so many vacancies that we would have difficulty obtaining a quorum or establishing committees.

However, this theoretical possibility has never happened in our history. Senator Moore did not cite any specific cases where this situation had occurred.

As the Prime Minister stated at his appearance before the Senate special committee, should it become necessary, he would indeed recommend the appointment of senators.

However, the Prime Minister also made it clear that his preference was not to appoint senators using the existing undemocratic appointment process. Instead, he chose to wait to give the Senate a chance to reform itself before proceeding with appointments.

Unfortunately, the government's Senate reform objectives have been blocked consistently by this chamber. Although the special committee endorsed the Senate tenure bill, as did many of Canada's leading constitutional experts, the Standing Senate Committee on Legal and Constitutional Affairs opposed the bill and amended it to an extent where it no longer effectively met the objective of limiting Senate tenure.

Further, the Senate refused to send the bill to third reading until it had been reviewed by the Supreme Court of Canada.

The Senate has not demonstrated that it embraces reform. On the contrary, it has demonstrated a preference for the status quo. Bill S-224 is a perfect example of this phenomenon. The bill does absolutely nothing to reform the Senate. If this bill is passed tomorrow, we would still have senators with unlimited tenure until age 75. We would still have an undemocratic appointment system, even though Canadians have said, time and again, that they want change.

Senator Moore, in his remarks, referred to this discussion as a "false choice" and he pleaded with us not to create anew this "false dichotomy."

Honourable senators, I submit to you that there is no false dichotomy. There is a dichotomy: On the one hand, Bill S-224 proposes to reinforce the existing appointment system; on the other hand, the government intends to introduce a bill that would give Canadians a say over who is appointed to the Senate.

Longer term, of course, the government has indicated that it would like to reform the Senate fundamentally so that senators may be elected.

In contrast to Bill S-224, the government genuinely is trying to accomplish Senate reform so that we may bring this institution into the 21st century.

Before closing, honourable senators, I want to address briefly Senator Moore's assertion that a long line of Prime Ministers since Confederation have shown "disregard for the rule of law," as he described it, by not ensuring that Senate appointments are made in what he considers to be a "timely fashion." In fact, there is no time period specified in the Constitution within which the Governor General must make a Senate appointment. Correspondingly, as a purely technical matter, there is no legal or constitutional requirement for the Prime Minister to recommend an appointment within a specified time period. Prime Ministers have discretion in this matter, just as prime ministers do in many areas.

There are good reasons for providing prime ministers with discretion on appointments. For example, finding available Canadians with diversified backgrounds who have the necessary experience and ability to fulfil the important role that senators play in the legislative process cannot and should not be short-changed. Since Confederation, all prime ministers, Liberal and Conservative alike, have been careful enough to take the time necessary to find excellent candidates.

There is no disregard for the Constitution here. Prime ministers have worked with their available discretion to ensure the highest quality candidates. Limiting that needed discretion would end up being counterproductive.

In conclusion, I do not believe there is any evidence that this bill is required. No hard evidence has been presented to demonstrate how the Senate has been impaired by the tradition of prime ministerial discretion that exists with regard to the timeliness of Senate appointments.

Of course, that conclusion does not mean that the Senate appointment process cannot and should not be reformed. It should be reformed and the government will continue to fight for reform. Senator Moore's bill, in contrast, simply maintains the outdated appointment system. The government cannot in good conscience support this bill. Canadians deserve better legislation than this. The sooner the Senate comes around to supporting real change, the sooner we can all move forward.

• (1600)

Hon. Joseph A. Day: I have a question of the honourable senator.

The Hon. the Speaker *pro tempore*: Will the honourable senator take a question?

Senator Brown: Yes.

Senator Day: Will the honourable senator tell us if he was speaking on the motion in amendment or on the main motion?

Senator Brown: I was speaking on the main bill.

Senator Day: Your Honour, are we still dealing with the motion in amendment?

The Hon. the Speaker *pro tempore*: And the main bill.

(On motion of Senator Day, debate adjourned.)

CANADA SECURITIES BILL

SECOND READING—DEBATE CONTINUED

On the Order:

> Resuming debate on the motion of the Honourable Senator Grafstein, seconded by the Honourable Senator Fairbairn, P.C., for the second reading of Bill S-214, An Act to regulate securities and to provide for a single securities commission for Canada.

Hon. Jerahmiel S. Grafstein: Honourable senators, this bill is my private member's bill. It has been on the Order Paper for some time. I previously understood that Senator Meighen wanted to address the bill. I have spoken today with Senator Eyton, who would like to address the bill. I will take the adjournment, if I can, in Senator Eyton's name. As soon as he addresses the bill, I will respond.

The Hon. the Speaker *pro tempore*: Does Senator Meighen wish to take the adjournment?

Hon. Michael A. Meighen: Yes.

(On motion of Senator Meighen, debate adjourned.)

STUDY ON ISSUES RELATING TO FEDERAL GOVERNMENT'S CURRENT AND EVOLVING POLICY FOR MANAGING FISHERIES AND OCEANS

SECOND REPORT OF FISHERIES AND OCEANS COMMITTEE AND REQUEST FOR GOVERNMENT RESPONSE ADOPTED

On the Order:

> Resuming debate on the motion of the Honourable Senator Rompkey, P.C., seconded by the Honourable Senator Fraser, that the second report of the Standing Senate Committee on Fisheries and Oceans entitled *Rising to the Arctic Challenge: Report on the Canadian Coast Guard*, deposited with the Clerk of the Senate on May 4, 2009, be adopted and that, pursuant to rule 131(2), the Senate request a complete and detailed response from the government, with the Minister of Fisheries and Oceans, the Minister of Transport, the Minister of Foreign Affairs and International Trade, the Minister of Indian and Northern Affairs, and the Minister of National Defence being identified as ministers responsible for responding to the report.

The Hon. the Speaker *pro tempore*: Are honourable senators ready for the question?

Hon. Senators: Question.

The Hon. the Speaker *pro tempore*: Is it your pleasure, honourable senators, to adopt the motion?

(Motion agreed to and report adopted.)

FISHERIES AND OCEANS

BUDGET AND AUTHORIZATION TO ENGAGE SERVICES AND TRAVEL—STUDY ON ISSUES RELATING TO FEDERAL GOVERNMENT'S CURRENT AND EVOLVING POLICY FRAMEWORK FOR MANAGING FISHERIES AND OCEANS—THIRD REPORT OF COMMITTEE—DEBATE ADJOURNED

The Senate proceeded to consideration of the third report of the Standing Senate Committee on Fisheries and Oceans (*budget—study on the evolving policy framework for managing Canada's fisheries and oceans—power to hire staff and travel*) presented in the Senate on May 7, 2009.

First Session
Thirty-ninth Parliament, 2006

SENATE OF CANADA

Proceedings of the Special Senate Committee on

Senate Reform

Chair:
The Honourable DANIEL HAYS

Thursday, September 7, 2006

Issue No. 2

Third meeting on:

Subjet-matter of Bill S-4, An Act to amend the Constitution Act, 1867 (Senate tenure)

Motion to amend the Constitution of Canada (Western regional representation in the Senate)

APPEARING:
The Right Honourable Stephen Harper, P.C., M.P.
Prime Minister of Canada

WITNESSES:
(*See back cover*)

Première session de la
trente-neuvième législature, 2006

SÉNAT DU CANADA

Délibérations du Comité sénatorial spécial sur la

Réforme du Sénat

Président :
L'honorable DANIEL HAYS

Le jeudi 7 septembre 2006

Fascicule n^{o} 2

Troisième réunion concernant :

La teneur du projet de loi S-4, Loi modifiant la Loi constitutionnelle de 1867 (durée du mandat des sénateurs)

La motion pour modifier la Constitution du Canada (la représentation des provinces de l'Ouest au Sénat)

COMPARAÎT :
Le très honorable Stephen Harper, C.P., député, premier ministre du Canada

TÉMOINS :
(*Voir à l'endos*)

44140

THE SPECIAL SENATE COMMITTEE ON SENATE REFORM

The Honourable Daniel Hays, *Chair*

The Honourable W. David Angus, *Deputy Chair*

and

The Honourable Senators:

Austin, P.C.
Chaput
Dawson
* Hays
(or Fraser)
Hubley
* LeBreton, P.C.
(or Comeau)
Munson
Murray, P.C.
Segal
Tkachuk
Watt

*Ex officio members

(Quorum 4)

LE COMITÉ SÉNATORIAL SPÉCIAL SUR LA RÉFORME DU SÉNAT

Président : L'honorable Daniel Hays

Vice-président : L'honorable W. David Angus

et

Les honorables sénateurs :

Austin, C.P.
Chaput
Dawson
* Hays
(ou Fraser)
Hubley
* LeBreton, C.P.
(ou Comeau)
Munson
Murray, C.P.
Segal
Tkachuk
Watt

*Membres d'office

(Quorum 4)

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MINUTES OF PROCEEDINGS

OTTAWA, Thursday, September 7, 2006
(4)

[*English*]

The Special Senate Committee on Senate Reform met this day in room 160-S, Centre Block, at 2:03 p.m., the Chair, the Honourable Daniel Hays, presiding.

Members of the committee present: The Honourable Senators Angus, Austin, P.C., Chaput, Comeau, Dawson, Hays, Hubley, Munson, Murray, P.C., Segal, Tkachuk and Watt (12).

Other senators present: The Honourable Senators Fairbairn, P.C., Fraser, LeBreton, P.C., Losier-Cool and Prud'homme, P.C. (5).

In attendance: Jack Stilborn, Principal Analyst and Sebastian Spano, Analyst, Library of Parliament; Line Gravel, Committee Clerk and Heather Lank, Principal Clerk, Committees Directorate.

Also present: The official reporters of the Senate.

Pursuant to the Order of Reference adopted by the Senate on Wednesday, June 28, 2006, the committee continued its consideration of the subject-matter of Bill S-4, to amend the Constitution Act, 1867 (Senate tenure) and pursuant to the Order of Reference adopted by the Senate on Wednesday, June 28, 2006, the committee continued its consideration of the Motion to amend the Constitution of Canada (Western regional representation in the Senate).

APPEARING:

The Right Honourable Stephen Harper, P.C., M.P., Prime Minister of Canada

WITNESSES:

Privy Council Office:

Matthew King, Assistant Secretary to Cabinet, Legislation and House Planning;

Dan McDougall, Director of Operations, Legislation and House Planning.

Department of Justice Canada:

Warren J. Newman, General Counsel, Constitutional and Administrative Law Section.

The Chair made a statement.

The Deputy Chair made a statement.

The Prime Minister made a statement and answered questions.

The Chair thanked the Prime Minister.

At 3:05 p.m., the committee suspended.

At 3:25 p.m., the committee resumed.

The Chair made a statement.

Mr. King made a statement and, together with the other witnesses, answered questions.

PROCÈS-VERBAL

OTTAWA, le jeudi 7 septembre 2006
(4)

[*Traduction*]

Le Comité sénatorial spécial sur la réforme du Sénat se réunit aujourd'hui à 14 h 3 dans la pièce 173 de l'édifice du Centre, sous la présidence de l'honorable Daniel Hays (*président*).

Membres du comité présents : Les honorables sénateurs Angus, Austin, C.P., Chaput, Comeau, Dawson, Hays, Hubley, Munson, Murray, C.P., Segal, Tkachuk et Watt (12).

Autres sénateurs présents : Les honorables sénateurs Fairbairn, C.P., Fraser, LeBreton, C.P., Losier-Cool et Prud'homme, C.P. (5).

Aussi présents : Jack Stilborn, analyste principal et Sébastien Spano, analyste, Bibliothèque du Parlement; Line Gravel, greffière du comité et Heather Lank, greffière principale, Direction des comités.

Également présents : Les sténographes officiels du Sénat.

Conformément à l'ordre de renvoi adopté par le Sénat le mercredi 28 juin 2006, le comité poursuit l'examen de la teneur du projet de loi S-4, Loi modifiant la Loi constitutionnelle de 1867 (durée du mandat des sénateurs) et, conformément à l'ordre de renvoi adopté par le Sénat le mercredi 28 juin 2006, le comité poursuit l'examen de la motion pour modifier la Constitution du Canada (la représentation des provinces de l'Ouest au Sénat).

COMPARAÎT :

Le très honorable Stephen Harper, C.P., député, premier ministre du Canada.

TÉMOINS :

Bureau du Conseil privé :

Matthew King, secrétaire adjoint du Cabinet, Législation et planification parlementaire;

Dan McDougall, directeur des opérations, Législation et planification parlementaire.

Ministère de la Justice Canada :

Warren J. Newman, avocat général, Section du droit administratif et constitutionnel.

Le président fait une déclaration.

Le vice-président fait une déclaration.

Le premier ministre fait une déclaration et répond aux questions.

Le président remercie le premier ministre.

À 15 h 5, la séance est suspendue.

À 15 h 25, la séance reprend.

Le président fait une déclaration.

M. King fait une déclaration et, avec les autres témoins, répond aux questions.

At 4:50 p.m. the committee adjourned to the call of the Chair.

ATTEST:

À 16 h 50, le comité s'ajourne jusqu'à nouvelle convocation de la présidence.

ATTESTÉ :

La greffière du comité,

Catherine Piccinin

Clerk of the Committee

EVIDENCE

OTTAWA, Thursday, September 7, 2006

The Special Senate Committee on Senate Reform met this day at 2:03 p.m. to examine the subject-matter of Bill S-4, to amend the Constitution Act, 1867 (Senate tenure), and the motion to amend the Constitution of Canada (Western regional representation in the Senate).

Senator Daniel Hays (*Chairman*) in the Chair.

[*Translation*]

The Chairman: Order, please. I want first to welcome our guests and our viewers to this second meeting with witnesses of the Special Senate Committee on Senate Reform.

For the benefit of our listeners, I'll explain briefly the purpose of our work. Last June, the Senate asked our special committee to examine Bill S-4, the government proposal to set the tenure of future senators at eight years, and the motion of Senator Lowell Murray, seconded by Senator Jack Austin, to increase western provinces representation in the Senate.

[*English*]

To learn more about the work of the committee, I invite viewers to visit the committee's website — the address can be seen at the bottom of your television screen.

Today we are privileged to have as our first witness, Prime Minister Stephen Harper. This is the first time that a sitting Prime Minister has appeared before a Senate committee. We are pleased that he has come before our committee and we are most anxious to hear his views.

I invite the Deputy Chair of the Committee, Senator Angus, to say a few opening words, after which we will hear from the Prime Minister.

[*Translation*]

Senator Angus: Thank you. It is a pleasure for me to add a brief word to welcome our Right Honourable Prime Minister at this historic moment.

[*English*]

In welcoming you, sir, to this Special Senate Committee on Senate Reform, I feel comfortable in saying that we are all most interested in the important subject of Senate reform and renewal, and the potential processes for implementing useful changes over time.

We are well aware of your long-standing interest in and commitment to the matter and we are delighted that you have decided to share with us your vision of reform, generally, and the reasons behind your government's Bill S-4, particularly.

TÉMOIGNAGES

OTTAWA, le jeudi 7 septembre 2006

Le Comité sénatorial spécial sur la réforme du Sénat se réunit aujourd'hui à 14 h 3 pour étudier la teneur du projet de loi S-4, Loi modifiant la Loi constitutionnelle de 1867 (durée du mandat des sénateurs), et la motion pour modifier la Constitution du Canada (la représentation des provinces de l'Ouest au Sénat).

Le sénateur Daniel Hays (*président*) occupe le fauteuil.

[*Français*]

Le président : Honorables sénateurs, je déclare la séance ouverte. Je tiens tout d'abord à souhaiter la bienvenue à nos invités et à nos téléspectateurs à cette deuxième réunion avec témoins du Comité sénatorial spécial sur la réforme du Sénat.

Pour le bénéfice de nos auditeurs, j'expliquerai brièvement le but de nos travaux. Au mois de juin dernier, le Sénat a demandé à notre comité spécial d'examiner le projet de loi S-4, la proposition du gouvernement de fixer le mandat des futurs sénateurs à huit ans, et la motion du sénateur Lowell Murray, appuyé par le sénateur Jack Austin, visant à augmenter la représentation des provinces de l'Ouest au Sénat.

[*Traduction*]

Pour plus d'information sur les travaux du comité, j'invite les téléspectateurs à visiter le site Web du comité dont l'adresse figure au bas de votre écran.

Aujourd'hui, nous avons le privilège d'accueillir notre premier témoin, le premier ministre Stephen Harper. C'est la première fois qu'un premier ministre en fonction témoigne devant un comité sénatorial. Nous sommes heureux qu'il ait accepté de se présenter devant notre comité et nous sommes très impatients d'entendre ses commentaires.

J'invite le vice-président du comité, le sénateur Angus, à faire quelques observations préliminaires, puis nous écouterons l'exposé du premier ministre.

[*Français*]

Le sénateur Angus : Merci. C'est un plaisir pour moi d'ajouter un petit mot pour souhaiter la bienvenue à notre très honorable premier ministre en ce moment historique.

[*Traduction*]

Monsieur, en vous souhaitant la bienvenue à ce comité sénatorial spécial sur la réforme du Sénat, je n'ai aucune hésitation à dire que nous nous intéressons tous beaucoup à l'importante question de la réforme et du renouveau du Sénat, et aux processus qui permettraient de mettre en œuvre des changements efficaces avec le temps.

Nous savons l'intérêt que vous portez depuis longtemps à cette question et l'engagement dont vous faites preuve; nous sommes donc enchantés que vous ayez décidé de nous faire part de votre vision globale de la réforme, et plus particulièrement des motifs sur lesquels repose le projet de loi S-4.

[*Translation*]

We will listen to your comments with great interest. We appreciate a lot that you are here today and that you have agreed to answer our questions after your presentation.

The Chairman: Once again, welcome, Mr. Prime Minister. Please go ahead.

The Right Honourable Stephen Harper, P.C., M.P., Prime Minister of Canada: Thank you, Mr. Chairman.

Good afternoon everyone. First, I want to thank the honourable senators, for this opportunity to speak today on the issue of Senate reform. I understand that, as you just said, this is the first time that a sitting Prime Minister has appeared before a Senate committee. This underlines my interest in Senate reform. As we have little time and our subject matter is important, I will stick to the essentials.

[*English*]

As everyone in this room knows, it has become a right of passage for aspiring leaders and prime ministers to promise Senate reform on their way to the top. The promises are usually made in Western Canada. These statements of intent are usually warmly received by party activists, editorial writers and ordinary people but, once elected, Senate reform quickly falls to the bottom of the government's agenda, nothing ever gets done and the status quo goes on.

[*Translation*]

Honourable senators, this has to end for the Senate must change and we intend to make change happen. The government is not looking for another report but is seeking action.

[*English*]

Honourable senators, years of delay on Senate reform must come to an end, and it will. The Senate must change and we intend to make it happen. The government is not looking for another report — it is seeking action that responds to the commitments we made to Canadians during the recent federal election.

[*Translation*]

As you all know, we made a commitment during last election campaign that, if we were elected, we would proceed with a Senate reform. I came here today to reiterate personally my commitment to reform this institution.

[*English*]

Such reform will make the Senate more democratic, more accountable and more in keeping with the expectations of Canadians, who, as we all know, are not at all satisfied with the status quo.

[*Français*]

Nous écouterons avec beaucoup d'intérêt vos commentaires. Nous vous sommes très reconnaissants d'être présent aujourd'hui et d'avoir accepté de répondre à nos questions à la suite de votre présentation.

Le président : Encore une fois, bienvenue monsieur le premier ministre. La parole est à vous.

Le très honorable Stephen Harper, C.P., député, premier ministre du Canada : Je vous remercie, monsieur le président.

Bon après-midi à tous. Je tiens tout d'abord à remercier messieurs et mesdames les sénateurs de m'avoir permis de prendre la parole aujourd'hui sur la question de la réforme du Sénat. Je crois savoir que, comme vous venez de le dire, c'est la première fois qu'un premier ministre en fonction s'adresse à un comité sénatorial. Cela souligne l'importance que j'accorde à la réforme du Sénat. Comme nous avons peu de temps et que notre sujet est important, je m'en tiendrai à l'essentiel.

[*Traduction*]

Personne ici n'ignore que c'est quasiment un rite de passage de tout aspirant au poste de chef politique et de premier ministre de promettre une réforme du Sénat au cours de son ascension vers le sommet. Les promesses sont généralement faites dans l'ouest du Canada. Ces déclarations d'intention sont généralement bien accueillies par les militants, les éditorialistes et les citoyens ordinaires, mais une fois que les élections sont passées, la réforme du Sénat devient tout à fait secondaire pour le gouvernement, rien ne bouge et le statu quo est maintenu.

[*Français*]

Honorables sénateurs, il faut que cela cesse car le Sénat se doit de changer, et nous serons les auteurs de ce changement. Le gouvernement ne veut pas de rapport, mais de l'action.

[*Traduction*]

Honorables sénateurs, il faut mettre fin à ces éternels reports et retards en ce qui concerne la réforme du Sénat, et ce sera le cas. Le Sénat doit changer et nous comptons être les artisans de ce changement. Le gouvernement ne veut plus de rapport supplémentaire, mais il veut de l'action conforme aux engagements que nous avons pris envers les Canadiens au cours des récentes élections fédérales.

[*Français*]

Comme vous le savez tous, nous avons promis au cours de la dernière campagne électorale que si nous étions élus, nous procéderions à la réforme du Sénat. Je suis venu ici aujourd'hui pour réitérer personnellement l'engagement que j'ai pris de réformer cette institution.

[*Traduction*]

Cette réforme fera du Sénat une institution plus démocratique, qui rendra davantage de comptes aux citoyens et qui sera davantage en harmonie avec les attentes des Canadiens et Canadiennes qui, nul ne l'ignore, sont las du statu quo.

Honourable senators, I believe in Senate reform because I believe in the ideas behind an upper house. Canada needs an upper house that provides sober and effective second thought. Canada needs an upper house that gives voice to our diverse regions. Canada needs an upper house with democratic legitimacy, and I hope that we can work together to move toward that enhanced democratic legitimacy. A modest but positive reform would be the passage of Bill S-4 by the Senate. Bill S-4 neither promises full-scale Senate reform nor will it deliver such, but it does represent positive change by limiting senators to eight-year terms.

[*Translation*]

An eight-year term for senators would be virtually the equivalent of the term of two consecutive majority governments. I think this is a fair proposal which does not offend the common sense of the Canadian people.

[*English*]

The fact that senators can be and occasionally are appointed for terms of 15, 30 or even 45 years is just not acceptable today to the broad mainstream of the Canadian community. This practice has few parallels in western democracies in the 21st century. Therefore, we should act.

The government believes that Bill S-4 is achievable through the actions of Parliament. Honourable senators will know that the 1984 Molgat-Cosgrove Report on Senate Reform not only made a similar recommendation regarding term length, but also confirmed that such a change was achievable without using the general constitutional amending formula. As senators know, the Molgat-Cosgrove report called for a slightly longer term of nine years, rather than the eight years proposed in Bill S-4. I believe the Beaudoin-Dobbie report may have called for a six-year term.

A government can be flexible on accepting amendment to the details of Bill S-4 to adopt a six-year term or an eight-year term or a nine-year term. The key point is this: We are seeking limited, fixed terms of office, not decades based on antiquated criteria of age.

I have carefully reviewed your deliberations on the bill. Some senators have said the proposed legislation goes too far; others have said it does not go far enough. However, we can all agree on one thing: It does go somewhere, somewhere reasonable and somewhere achievable. I would ask senators, when you resume sitting at the end of the month, to bring your deliberations on Bill S-4 to a successful conclusion because the Senate must change. Canadians will be watching to see whether the current Senate will make itself part of the process of change.

Honorables sénateurs, je crois en la réforme du Sénat car je crois dans les idées qui sont à l'origine d'une chambre haute. Il est essentiel que le Canada ait une chambre haute qui fasse un second examen objectif et efficace. Il est essentiel que le Canada ait une chambre haute qui donne la possibilité de s'exprimer à nos diverses régions. Il est essentiel que le Canada ait une chambre haute fondée sur une légitimité démocratique, et j'espère qu'en unissant nos efforts, nous pourrons accroître progressivement cette légitimité démocratique. L'adoption par le Sénat du projet de loi S-4 représenterait déjà en soi une réforme modeste mais constructive. Le projet de loi S-4 ne promet pas une réforme intégrale du Sénat et n'assurera pas la réforme comme telle, mais il représente déjà un changement constructif en limitant à huit ans la durée du mandat des sénateurs.

[*Français*]

Un mandat de huit ans des sénateurs serait un mandat d'une durée à peu près équivalente à celui de deux gouvernements majoritaires consécutifs. Il s'agit, je crois, d'une proposition juste et qui ne heurte pas le gros bon sens de la population canadienne.

[*Traduction*]

Le fait que les sénateurs puissent être, et qu'ils soient à l'occasion, nommés pour des périodes de 15 ans, de 30 ans, voire de 45 ans n'est plus acceptable à l'heure actuelle pour la plupart des membres de la grande collectivité canadienne. On retrouve peu d'équivalents de cette pratique dans les autres démocraties occidentales au XXI^{e} siècle. Il est par conséquent impératif d'agir.

Le gouvernement estime que le projet de loi S-4 est réalisable grâce aux initiatives que peut prendre le Parlement. Les honorables sénateurs n'ignorent probablement pas que le rapport Molgat-Cosgrove de 1984 sur la réforme du Sénat a fait non seulement une recommandation semblable concernant la durée du mandat des sénateurs, mais a en outre confirmé qu'un tel changement était réalisable sans avoir recours à la formule générale de modification de la Constitution. Comme vous le savez, le rapport Molgat-Cosgrove recommandait un mandat d'une durée un peu plus longue, soit de neuf ans, plutôt que le mandat de huit ans proposé dans le projet de loi S-4. Je pense que les auteurs du rapport Beaudoin-Dobbie recommandaient un mandat de six ans.

Un gouvernement peut faire preuve de souplesse et accepter une modification des points de détail du projet S-4 pour adopter un mandat d'une durée de six ans, d'une durée de huit ans ou de neuf ans. Le facteur clé est le suivant : nous voulons un mandat d'une durée limitée et fixe plutôt qu'un mandat d'une durée de plusieurs décennies fondé sur des critères d'âge désuets.

J'ai suivi attentivement vos délibérations sur le projet de loi. Certains sénateurs ont dit que le projet de loi va trop loin alors que d'autres estiment qu'il ne va pas assez loin. Nous sommes toutefois tous d'accord sur un point : il représente un pas en avant raisonnable et réalisable. J'aimerais que lorsque vous reprendrez vos séances à la fin du mois, vos délibérations sur le projet de loi S-4 aboutissent à une conclusion heureuse car le Sénat se doit de changer. Les Canadiens suivront cette affaire pour voir si le Sénat actuel participera à ce processus de changement.

[*Translation*]

As I already said, this legislation proposes a modest reform. We must do more and the government is committed to moving ahead.

[*English*]

As yet another step in fulfilling our commitment to make the Senate more effective and more democratic, the government, hopefully this fall, will introduce a bill in the House to create a process to choose elected senators. This bill will further demonstrate how seriously the government takes the issue of serious Senate reform.

In conclusion, I would like to read a quote from a book I reviewed recently. Let me quote it:

> Probably on no other public question in Canada has there been such unanimity of opinion as on that of the necessity for Senate reform.

Some of you will know the author is Robert MacKay. The book is titled *The Unreformed Senate of Canada*, and the quote, my friends, is from 1926.

Honourable senators, this institution, the Senate of Canada, must change.

[*Translation*]

Honourable senators, this institution, the Senate of Canada, must change for real. I hope you will join the government and the Canadian people, and come on board to constructively bring about this change.

[*English*]

Passage of Bill S-4 would be a modest move forward. After that, we will continue to move forward with further proposals as part of our plan to give Canadians the accountable, democratic institution they desire and deserve. Thank you.

[*Translation*]

Mr. Chairman, I am here until 3 p.m. to answer your questions.

The Chairman: Thank you for your presentation, Mr. Prime Minister.

[*English*]

We will follow a procedure. As the critic of the bill, I will ask the first question, Senator Angus will ask the second and then we will go to members of the committee. If there is room after members have been heard with their questions, then we will go to senators present who are not members of the committee.

[*Français*]

Comme je l'ai déjà dit, le projet de loi propose une réforme modeste. Il faut faire plus et le gouvernement s'est engagé à aller de l'avant.

[*Traduction*]

Pour franchir une étape supplémentaire de son engagement de rendre le Sénat plus efficace et plus démocratique, le gouvernement espère présenter à la Chambre cet automne un projet de loi ayant pour objet d'instaurer un processus de sélection des sénateurs élus. Ce projet de loi sera une preuve supplémentaire du sérieux avec lequel le gouvernement envisage la question d'une réforme véritable du Sénat.

En conclusion, j'aimerais citer une phrase extraite d'un livre que j'ai lu dernièrement. La voici :

> Aucune autre question publique au Canada n'a probablement fait une telle unanimité dans l'opinion publique que la nécessité d'une réforme du Sénat.

Certains d'entre vous savent probablement que l'auteur de cet ouvrage est Robert MacKay. Ce livre est intitulé *The Unreformed Senate of Canada* et la phrase que je viens de citer date de 1926.

Honorables sénateurs, l'institution qu'est le Sénat du Canada se doit de changer.

[*Français*]

Honorables sénateurs, l'institution qu'est le Sénat du Canada se doit de changer pour vrai. J'espère que vous vous joindrez au gouvernement et à la population canadienne en vous associant de façon constructive à ce changement.

[*Traduction*]

L'adoption du projet de loi S-4 serait un modeste pas en avant. Après cela, nous continuerons à progresser avec d'autres propositions dans le cadre de notre plan qui consiste à donner aux Canadiens et Canadiennes l'institution responsable et démocratique qu'ils souhaitent et méritent. Je vous remercie pour votre attention.

[*Français*]

Monsieur le président, je suis ici jusqu'à 15 heures pour répondre à vos questions.

Le président : Merci, monsieur le premier ministre, pour votre présentation.

[*Traduction*]

Nous suivrons une procédure. En ma qualité de critique du projet de loi, je poserai la première question. Le sénateur Angus posera la deuxième, puis nous donnerons la parole aux autres membres du comité. S'il reste encore du temps après les questions des membres, nous donnerons alors la parole aux sénateurs ici présents qui ne sont pas membres du comité.

Mr. Prime Minister, your presentation is much appreciated and, together with your presence here, demonstrates the serious intent you have about the matter of parliamentary reform — in particular, involving the Senate.

My question goes to your comment that it is a step going somewhere, and you are quite right. However, we are left to speculate on what you see as the direction of the reform initiative in general. In other words, we are taking a step if we were to pass this bill which is before the committee. I am the chair, so I am keeping an open mind on it deliberately until such time as we get further along.

However, I will make this comment. Eight years seems to make sense, as you said in your presentation, for an elected Senate, but not so much sense if nothing else changes. Although we are not sure, we believe it is a renewable term because the Leader of the Government has so indicated. We will be looking into this as well, but it does not make so much sense to simply shorten the term, with nothing else. It begs the question of what else, and this is a step toward where or what further change.

I am not sure whether or not you are ready to provide any details; but if you are, it would be very helpful to this committee. Without it, we are left to speculate and that makes our task very difficult.

I believe it is the intention of the government, as well as the intention of Parliament — and at this point the matter is before this house of Parliament — to bring Canadians generally into the picture. The Constitution is the most important law of the country, and Canadians generally should be aware of any change. There should be some indication, either through premiers — or most likely through premiers — of an acceptance of such change in the fundamental law of the land.

Your comments would be appreciated, Mr. Prime Minister.

Mr. Harper: First, as I indicated in my remarks, Mr. Chairman, obviously the government believes that the Senate should be elected; and we will, I would hope in the near future, be taking steps toward beginning that process. I dare say I think in recent years just about anyone who has concluded that the Senate should exist, should be effective, should fulfill the various functions it is supposed to fill, including representation of regional perspectives, would agree that would mean an elected chamber. Obviously, there are a few dissenting voices, but that is obviously the next step in the process.

I do not know how much I would want to elaborate beyond that because our position is that this particular change does stand or fall on its own merits — and that it is worth doing. The government has proceeded with this proposed legislation first because it believes Parliament can act, without engaging other levels of government in a complex constitutional discussion

Monsieur le premier ministre, nous vous sommes très reconnaissants pour votre exposé qui, de même que votre présence, démontre le sérieux de vos intentions en ce qui concerne la question de la réforme parlementaire, et en particulier celle du Sénat.

Ma question est liée à votre commentaire selon lequel ce projet de loi représente un pas en avant, ce en quoi vous avez parfaitement raison. Nous nous posons toutefois des questions sur l'orientation que vous voulez donner à l'initiative de réforme en général. En d'autres termes, nous ferions un pas en avant en adoptant le projet de loi à l'étude. Je suis le président du comité et, par conséquent, je garde délibérément une certaine ouverture d'esprit à cet égard jusqu'à ce que nous avancions davantage.

Je voudrais toutefois faire le commentaire qui suit. Comme vous l'avez signalé dans votre exposé, un mandat d'une durée de huit ans est de toute apparence raisonnable pour un Sénat élu, mais ce l'est moins si rien d'autre ne change. Quoique nous n'en soyons pas certains, nous pensons qu'il s'agit d'un mandat renouvelable, car c'est ce qu'a indiqué le leader du gouvernement. Nous examinerons cette question également, mais il ne serait pas très sensé de se contenter de raccourcir le mandat sans apporter d'autres changements. On ne peut s'empêcher de se demander quels autres changements seraient apportés et dans quelle direction ce serait un pas en avant.

Je ne sais pas très bien si vous êtes disposé à donner des informations plus précises à ce sujet, mais si vous l'êtes, cela pourrait nous être très utile. Sans cela, nous ne pouvons que faire des supputations, ce qui rend notre tâche très difficile.

Je pense que c'est l'intention du gouvernement, et aussi celle du Parlement — alors qu'actuellement cette question est examinée par cette Chambre du Parlement — de mettre les Canadiens et les Canadiennes au courant. La Constitution est la loi la plus importante du pays et les citoyens devraient être au courant de tout changement. Il serait essentiel que l'acceptation d'une telle modification à la loi fondamentale du pays soit manifestée par le biais des premiers ministres des provinces.

Vos commentaires seraient appréciés, monsieur le premier ministre.

M. Harper : Comme je l'ai signalé dans mes observations, monsieur le président, le gouvernement est fermement convaincu que le Sénat devrait être élu. J'espère bien que nous prendrons bientôt des mesures pour entamer ce processus. Je pense qu'au cours des dernières années, presque toutes les personnes qui en sont arrivées à la conclusion que le Sénat doit exister, qu'il doit être efficace et qu'il doit remplir les diverses fonctions qu'il est censé remplir, y compris la représentation des perspectives régionales, s'accordent à dire que pour cela, il est essentiel qu'il s'agisse d'une chambre élue. De toute évidence, il y a quelques voix dissidentes, mais cela concerne l'étape suivante du processus.

Je ne sais pas quelles précisions supplémentaires je pourrais donner, car notre position est la suivante : le bien-fondé de ce changement est indéniable et il en vaut la peine. Le gouvernement a décidé de présenter ce projet de loi avant tout parce qu'il estime que le Parlement peut agir, sans entraîner d'autres paliers de gouvernement dans un débat constitutionnel ou dans un

or amendment process. Quite frankly, I would put it to you that terms of this duration, even if nothing else happened, would enhance the legitimacy of the Senate.

Honourable senators would all be aware that despite the 1965 amendment, many Canadians still refer to senators as "lifers" and as having "life terms" and these kinds of things. The fact of the matter is if that amendment had not gone through, I think the bad publicity the Senate sometimes gets would be worse today. Therefore, I think shortening the term, to the extent it has been shortened, has enhanced it. I think it would be enhanced further by having a fixed term of a more reasonable duration.

One of my predecessors ensured there would be more of a turnover in new blood in the Senate by simply appointing people who were very old. I do not think that is necessarily the best way to achieve the same thing. I would argue that this change will certainly not end the demand for Senate reform but, in and of itself, would increase the turnover of the Senate without jeopardizing the effectiveness of its members generally; and I think that would enhance its image.

Senator Angus: Prime Minister, I gathered from your remarks that you would like senators and the Senate to be part of a process of renewal and reform. I can only imagine that is why you have had Bill S-4 introduced in the Senate so that senators would have an opportunity to participate in the process. I am sure we all welcome that, rather than having some third body or party dealing with the fate, if you will, of the institution.

I understand that Bill S-4 is but a first step in a staged process of reform. We have heard witnesses here, as you know — you indicate you have followed our deliberations closely. There have been many writings on the subject and it is clear that there are opponents to the idea of a staged process. What is the alternative to a staged or step-by-step reform process? How would it unfold if an alternative were taken?

Mr. Harper: Thank you for the question, Senator Angus. There are three general paths we could go down. The two alternatives to step-by-step reform are, first, maintain the status quo; and, second, an attempt at comprehensive reform through, in a sense, mega constitutional negotiations.

On the first alternative, the people of Canada believe that the status quo is not acceptable and, perhaps more pertinently, it is not compatible with the commitments that this government made to the people of Canada in its election campaign.

My observations over the last 20 years of federal-provincial politics, despite my relatively young age, are such that I do not see comprehensive Senate reform achievable today, except, perhaps,

processus de modification de la Constitution complexe. Je suis convaincu que, même en l'absence de tout autre changement, cette durée du mandat renforcerait la légitimité du Sénat.

Les honorables sénateurs devraient tous savoir que, malgré la modification apportée en 1965, de nombreux Canadiens et Canadiennes estiment que les sénateurs sont nommés à vie et qu'ils ont un mandat à perpétuité. En fait, si cette modification n'avait pas été apportée, la mauvaise publicité dont le Sénat fait parfois l'objet serait encore plus mauvaise à l'heure actuelle. Par conséquent, j'estime que le raccourcissement du mandat, dans la mesure où il a été raccourci, a renforcé cette légitimité. Un mandat fixe d'une durée raisonnable lui donnerait, à mon sens, une légitimité encore accrue.

Un de mes prédécesseurs a déclaré de façon péremptoire que la nomination de personnes très âgées garantirait un apport plus régulier de sang neuf au Sénat. Ce n'est pas forcément la meilleure façon d'atteindre le même objectif. J'estime que le changement que nous proposons ne mettrait pas fin définitivement aux requêtes en faveur d'une réforme du Sénat mais qu'il augmenterait le roulement au Sénat, sans compromettre l'efficacité de ses membres; il améliorerait en outre à mon sens son image.

Le sénateur Angus : Monsieur le premier ministre, j'ai cru comprendre, d'après vos observations, que vous aimeriez que les sénateurs et que le Sénat participent à un processus de renouveau et de réforme. Je ne puis que présumer que c'est précisément pour qu'ils aient une occasion de participer au processus que vous avez présenté le projet de loi S-4 au Sénat, ce dont nous nous réjouissions tous, car c'est préférable à l'intervention de tiers pour décider en quelque sorte du sort de cette institution.

Je pense que le projet de loi S-4 n'est qu'une première étape d'un processus de réforme échelonné. Vous savez probablement que nous avons entendu des témoins, car vous avez mentionné que vous suiviez de très près nos délibérations. De nombreux commentaires ont été faits par écrit sur le sujet et il est manifeste que certaines personnes soient contre le concept d'un processus échelonné. Par quoi un processus de réforme échelonné ou par étapes pourrait-il être remplacé? Comment cela se déroulerait-il si l'on procédait d'une autre façon?

M. Harper : Je vous remercie pour la question, sénateur Angus. Il y aurait trois trajectoires possibles. Les deux options de remplacement de la réforme par étapes sont premièrement, le maintien du statu quo et, deuxièmement, la tentative de procéder à une réforme globale par le biais de méganégociations constitutionnelles.

En ce qui concerne la première possibilité, la population pense que le statu quo n'est pas acceptable et, de façon peut-être encore plus pertinente, qu'il n'est pas compatible avec les engagements que le présent gouvernement a pris à l'égard des Canadiens et Canadiennes au cours de sa campagne électorale.

La conclusion que j'en tire, après avoir observé depuis une vingtaine d'années la politique canadienne, en dépit de mon âge relativement jeune, est qu'une réforme globale du Sénat n'est pas

one kind of comprehensive reform — abolition. For that reason, I would urge all senators on this committee to conclude that step-by-step reform is the preferable way to proceed.

Senator Austin: Prime Minister, I add my welcome to that of my colleagues and move on because the time is short.

One issue that concerns us is the constitutionality of Bill S-4. We must deal with that before we can move on to the desirability of taking this step at this time. The Constitution is what governs this country and we must all respect it.

My question is not to ask you for a constitutional opinion, Prime Minister, but you have said that you believe there is a constitutional basis for Senate reform. I would ask whether you have consulted with the provinces in respect of Bill S-4 and, if so, have you received responses either in support or deferring views? I know that the Intergovernmental Minister of Quebec, Benoît Pelletier, has said that he is not convinced it is constitutional. We have heard other views from constitutional advisers, some of whom say that it is constitutional, some say it might be and some say it is not. What advice can you give the committee vis-à-vis the provinces and Bill S-4?

Mr. Harper: In terms of the constitutionality of Bill S-4, I will answer the question but, perhaps, not in detail. The government is firm in its view that this is a constitutional measure and that the operative point is the comprehensive amending formula adopted in 1982. That formula says that the Constitution of Canada in respect of the Senate can be amended by the Houses of Parliament with four exceptions, and this is not one of them. The government is very clear on that view.

The government has not had a comprehensive consultation with the provinces on Bill S-4, although some informal consultations on the issue of Senate reform in general have been done. I am not aware of any objections to the bill. I have consulted Premier Charest directly on the proposed legislation before it was tabled in the House. As senators are aware, his public comments and his private comments are that he has no objection to the bill. I am not aware of any premiers suggesting that they want to resist the government moving in this direction on this proposed legislation. Senator, I am not aware of any body of opinion outside the Senate that has suggested we should resist this particular change.

Senator Austin: The issue is not that the change is being resisted, but rather it is whether the Constitution permits us to make this change. As former Senator Lynch-Staunton used to remind us: If there is any doubt about a constitutional change, do

réalisable à l'heure actuelle, sauf peut-être un seul type de réforme globale, à savoir l'abolition. C'est pourquoi j'exhorte tous les honorables sénateurs ici présents à en conclure que la réforme par étapes est la façon de procéder qui est préférable.

Le sénateur Austin : Monsieur le premier ministre, je vous souhaite la bienvenue, moi aussi. Je pose immédiatement ma question car nous disposons de peu de temps.

Une question qui nous préoccupe est celle de la constitutionnalité du projet de loi S-4. Nous devons la régler avant de pouvoir continuer de discuter de l'opportunité de franchir maintenant cette étape. La Constitution est ce qui gouverne notre pays et il est essentiel que nous la respections tous.

Ma question n'a pas pour but de vous demander un avis constitutionnel, monsieur le premier ministre, mais vous avez mentionné que vous pensiez que la réforme du Sénat avait un fondement constitutionnel. J'aimerais savoir si vous avez consulté les provinces en ce qui concerne le projet de loi S-4 et si, dans l'affirmative, vous avez obtenu des réactions d'appui ou entendu des avis dissidents. Je sais que le ministre responsable des Affaires intergouvernementales canadiennes du Québec, Benoît Pelletier, a dit qu'il n'était pas convaincu de sa constitutionnalité. Nous avons entendu d'autres avis de conseillers en matière constitutionnelle, dont certains estiment qu'il est constitutionnel alors que d'autres n'en sont pas sûrs ou d'autres encore pensent qu'il est carrément anticonstitutionnel. Quel avis pouvez-vous nous donner en ce qui concerne l'opinion des provinces sur le projet de loi S-4?

M. Harper : En ce qui a trait à la constitutionnalité du projet de loi S-4, je répondrai à la question, mais peut-être pas de façon très détaillée. Le gouvernement a la ferme conviction que c'est une mesure constitutionnelle et que le dispositif sur lequel il s'appuie est la formule globale de modification adoptée en 1982. D'après cette formule, la Constitution du Canada peut être modifiée par les Chambres du Parlement en ce qui concerne le Sénat, sous réserve de quatre exceptions qui ne s'appliquent pas à ce projet de loi. Le gouvernement est très clair à ce sujet.

Le gouvernement n'a pas tenu de consultations globales auprès des provinces au sujet du projet de loi S-4, bien que des consultations informelles de nature générale sur la question de la réforme du Sénat aient été faites. Je ne suis au courant d'aucune objection à ce projet de loi. J'ai consulté le premier ministre Charest sur le projet de loi avant qu'il ne soit déposé à la Chambre. Comme vous le savez, d'après les commentaires qu'il a faits en public et en privé, il n'oppose aucune objection à ce projet de loi. Aucun premier ministre provincial n'a, à ma connaissance, manifesté la volonté de s'opposer à ce que le gouvernement s'engage dans cette voie avec ce projet de loi. Sénateur, je ne connais aucun corps d'opinion à l'extérieur du Sénat qui ait mentionné qu'il faille opposer une résistance à ce changement.

Le sénateur Austin : La question n'est pas que l'on ait opposé une résistance au changement, mais plutôt de savoir si la Constitution nous permet de le réaliser. Comme nous le rappelle l'ex-sénateur Lynch-Staunton : si l'on a le moindre doute au sujet

not try it. It would be an enormous mess if the court were to find that it was not constitutional to make the change. That is one of the questions before the committee.

My next question relates to whether the length of term, for example eight years, would be subject to a repetition of appointment for another eight years. What is the government's purpose on that topic?

Mr. Harper: As you know, Bill S-4 is silent on that question. By its silence, you can presume that it means there would be the possibility of renewal. I have listened to the debate in the Senate, and to some degree in this committee, with great interest on that point. I will be frank in saying that I tend to think of a future Senate in terms of it being an elected body. For that reason, I tend to automatically reach the conclusion that renewability is desirable. I would say to this committee that if senators conclude that renewability is not desirable, whether for constitutional or other reasons, certainly the government would be flexible in making that amendment so that the terms would be non-renewable. The government can live with it either way.

Whether renewability would inhibit independence is the debated question. In my assessment of whether senators would alter their behaviour in light of a renewable term, I tend to dismiss that. In my experience, whether members of either House are willing to work with the government is determined first and foremost by their party affiliation. That is not likely to change whether the terms are renewable or otherwise. That is my take on human nature as it pertains to the legislative process.

Senator Tkachuk: Prime Minister, it means a great deal to me that you are attending this committee meeting on its pre-study of Bill S-4. As Senator Austin said, in this way you are showing a great deal of respect for the Senate as an institution and its members.

My question concerns accountability, a term that was used extensively in the recent federal election and a word that you mentioned in your opening statement before the committee today. I did not hear the word mentioned yesterday by either the witnesses or senators in yesterday's meeting of the committee.

Could you explain how Bill S-4 fits into your vision of accountability for Canadians? Is it necessary to have elections to have accountability or will Bill S-4 fulfil your vision of accountability?

Mr. Harper: Senator, I believe that the passage of Bill S-4 would not achieve the kind of accountability that the Senate and other legislative bodies require. Anything short of a democratic electoral process would fall short of what we ultimately need on accountability. A fixed term of eight years, which would lead to renewal, would present us with less danger of

d'une modification à la Constitution, il ne faut pas la tenter. Nous serions dans de beaux draps si la Cour estimait que la modification n'était pas constitutionnelle. C'est une des questions que doit examiner le comité.

Ma question suivante a pour objet de savoir si la durée du mandat, huit ans par exemple, serait renouvelable pour une période supplémentaire de huit ans. Quel est l'objectif du gouvernement à ce chapitre?

M. Harper : Comme vous le savez, le projet de loi S-4 passe cette question sous silence. Ce silence vous permet de présumer qu'il y aurait possibilité de renouvellement. J'ai suivi avec beaucoup d'intérêt les discussions sur cette question au Sénat et, dans une certaine mesure, à ce comité-ci. Pour être franc, j'ai tendance à avoir une vision future du Sénat qui est celle d'une assemblée élue. C'est pourquoi j'ai nécessairement tendance à en conclure que ce renouvellement est souhaitable. Si vous arrivez à la conclusion que ce renouvellement n'est pas souhaitable, que ce soit pour des motifs d'ordre constitutionnel ou pour d'autres motifs, le gouvernement ferait preuve de souplesse dans le contexte de cette modification pour indiquer que le mandat ne serait pas renouvelable. Le gouvernement peut accepter l'une ou l'autre option.

La question qui fait l'objet des discussions est celle de savoir si ce renouvellement entraverait son indépendance. En ce qui concerne la possibilité que les sénateurs modifient leur comportement si le mandat est renouvelable, j'aurais tendance à écarter cette hypothèse. À la lumière de l'expérience que j'ai acquise, la volonté des membres de l'une ou l'autre des chambres de collaborer avec le gouvernement est déterminée d'abord et avant tout par leur appartenance politique. Que le mandat soit renouvelable ou qu'il ne le soit pas, cela ne fera probablement aucune différence. C'est mon opinion sur la nature humaine en ce qui concerne le processus législatif.

Le sénateur Tkachuk : Monsieur le premier ministre, j'attache beaucoup d'importance au fait que vous participiez à cette séance du comité consacrée à son étude préliminaire du projet de loi S-4. Comme l'a fait remarquer le sénateur Austin, par cette participation, vous démontrez que vous éprouvez beaucoup de respect pour l'institution qu'est le Sénat et pour ses membres.

Ma question concerne l'imputabilité, terme qui a été utilisé fréquemment au cours des récentes élections fédérales, et que vous avez mentionné aujourd'hui dans vos observations préliminaires. Je ne me souviens pas que les témoins ou les sénateurs aient utilisé ce terme au cours de la séance d'hier.

Pourriez-vous expliquer les raisons pour lesquelles le projet de loi S-4 cadre avec votre vision de l'imputabilité envers les Canadiens? Est-il nécessaire de tenir des élections pour assurer l'imputabilité ou est-ce que le projet de loi S-4 est en parfait accord avec votre vision en la matière?

M. Harper : Sénateur, je pense que l'adoption du projet de loi S-4 ne serait pas garante du type d'imputabilité qui est nécessaire en ce qui concerne le Sénat ou d'autres organes législatifs. Toute autre initiative qu'un processus électoral démocratique ne permettrait pas de répondre pleinement à nos besoins en matière d'imputabilité. Un mandat fixe de huit ans qui

ossification and could limit the number of senators who, over time, become less effective and less interested. In that sense it would improve accountability but, in and of itself, it would not get us to where we want to go.

Senator Tkachuk: Have you canvassed the provinces to know their views on the election of senators? Would the process be national or could some provinces opt for appointed senators and some opt to elect senators?

Mr. Harper: I think there has been insufficient clarity of reporting on the government's position from the recent campaign. We desire a national process for electing senators rather than a province-by-province process.

I view the Senate properly structured as an important national institution, not a federal institution, not a provincial institution. There is no doubt that to change the process in a formal constitutional sense — to making senators elected — would require provincial consent.

The government would be seeking to have the ability to consult the population before making Senate appointments. Obviously, this is an interim step of democratization but we think it would be an important one.

[*Translation*]

Senator Dawson: Mr. Prime Minister, we appreciate enormously you being here today and I respect your commitment towards constitutional reform. To use the Quebec term, it has been your "dada" for 15 years, and I understand that this is very important for you.

But for 15 years, you have always been talking of an elected Senate, and even your leader in the Senate told us, at the beginning of the Speech from the Throne, that the priority of this government is to table a legislation for an elected Senate.

All of a sudden, the first bill which is tabled is not for the election of senators but for eight-year terms for senators. I like to respect your word, your commitments, but the Constitution is stronger than your word.

You are saying: I see that in terms of elections. But if you accept the eight-year term, this would mean that Mr. Trudeau, Mr. Mulroney and Mr. Chrétien, if they had had the Constitution as you interpret it, Mr. Trudeau could have appointed 200 senators, because he was there for 16 years. Mr. Mulroney could have appointed a fully conservative Senate without the least opposition. And Mr. Chrétien could have appointed about a hundred senators during his term, thus controlling completely the second house.

It is obvious to me, Mr. Prime Minister, in spite of all the respect I have for your word, that if we pass this bill as it is written, without having control through election, and if you have

mènerait à un renouvellement représenterait un moins grand danger de sclérose et limiterait peut-être le nombre de sénateurs qui, avec les années, deviennent moins efficaces et manifestent moins d'intérêt. Dans ce sens, cela améliorerait l'imputabilité, mais cela ne nous permettrait pas d'atteindre nos objectifs comme tels en la matière.

Le sénateur Tkachuk : Avez-vous fait un sondage auprès des provinces pour connaître leurs opinions sur l'élection des sénateurs? S'agirait-il d'un processus national et certaines provinces pourraient-elles opter pour la nomination des sénateurs alors que d'autres pourraient opter pour leur élection?

M. Harper : J'estime que l'on pas donné des explications assez précises sur la position du gouvernement au cours de la récente campagne. Nous souhaitons un processus national en ce qui concerne l'élection des sénateurs plutôt qu'un processus laissé à l'appréciation de chaque province.

Ma vision du Sénat est celle d'une assemblée bien structurée, à titre d'institution nationale importante, et pas en tant qu'institution fédérale ni qu'institution provinciale. Il ne fait aucun doute que pour modifier le processus de façon constitutionnelle formelle — afin de procéder à l'élection des sénateurs —, le consentement des provinces serait indispensable.

Le gouvernement voudrait obtenir la capacité de consulter la population avant de procéder à des nominations au Sénat. De toute évidence, il s'agit là d'une étape provisoire de démocratisation, mais nous estimons qu'elle serait importante.

[*Français*]

Le sénateur Dawson : Monsieur le premier ministre, nous apprécions énormément votre présence ici, aujourd'hui, et je respecte votre engagement envers la réforme constitutionnelle. Pour utiliser l'expression québécoise c'est votre « dada » depuis 15 ans, et je comprends que cela est très important pour vous.

Mais depuis 15 ans, vous nous avez toujours parlé d'un Sénat élu, et même votre leader au Sénat nous a dit, au début du discours du Trône, que la priorité de ce gouvernement est de déposer une législation pour un Sénat élu.

Tout d'un coup, le premier projet de loi qui est déposé ce n'est pas pour l'élection des sénateurs, mais pour le mandat de huit ans des sénateurs. J'aime bien respecter votre parole, vos engagements, mais la Constitution est plus ferme que votre parole.

Vous dites : je prévois cela en termes d'élections. Mais si vous acceptez le terme de huit ans, cela voudrait dire que M. Trudeau, M. Mulroney et M. Chrétien, s'ils avaient eu votre Constitution telle que vous l'interprétez, M. Trudeau aurait pu nommer 200 sénateurs, parce qu'il a été là pendant 16 ans. M. Mulroney aurait pu nommer un Sénat complètement conservateur sans la moindre opposition. Et M. Chrétien aurait pu nommer une centaine de sénateurs pendant son terme et donc contrôler complètement la deuxième chambre.

Il me semble évident, monsieur le premier ministre, malgré tout le respect que j'ai pour votre parole, que si nous adoptons le projet de loi tel qu'il est, sans avoir le contrôle par l'élection, et

the right to renew your senators, you will have much more power — and several people say that the Prime Minister's Office already has a lot of power — than Mr. Mulroney, Mr. Trudeau or Mr. Chrétien had in the past. It seems obvious to me that as protectors of the Constitution of Canada, we wish to trust your good faith, your commitments. Incidentally, we expected a conference on taxation for this Fall, but this changed. I like to respect your word. You had said that you were going to have the senators elected and the first thing you did was to appoint a senator to the Cabinet. And he is now part of your government. It is the first move you made.

I like to think that I have to respect the Prime Minister's word, but we are in a minority government situation. Do you think, Mr. Prime Minister, that we can trust, just on your word, that senators will be elected and that they will remain only eight years, or that you will be able to have a power that neither Mr. Trudeau, nor Mr. Chrétien or Mr. Mulroney had in the past?

Mr. Harper: Senator Dawson, I assume that your speech indicates support for the election of senators in the future. I'll watch much more closely your reaction when we table a legislation for such a purpose.

However, I must say that this government appointed a senator for a clear reason: ensure a representation of the Montreal region in Cabinet, and this senator will leave his seat at the next election to obtain a seat in the House of Commons.

There are still nine vacant seats for senators. I do not intend to appoint senators, unless necessary. But I can tell you that the government intends to table a legislation to create an elected Senate.

Senator Dawson: I would like you to answer the question on the power the Prime Minister would have had to give himself a Senate under the present powers, if he had it over a period of sixteen years, in Mr. Trudeau's case, or of eight or nine years, in Mr. Mulroney's case. For the time being, I want to respect your word, I do not want to question it, but you are in a minority situation. If ever you are defeated at the next election and next Spring you have not passed your legislation on the election of senators, the next prime minister will then be able to appoint as many senators as he wants, for the tenure he wants. I would like to now if this committee has a firm commitment from you. But you had said that you would not appoint senators. Incidentally, there is a vacant seat in Repentigny.

Mr Harper: Of course, Mr. Dawson, I think this bill limits the power of the Prime Minister to appoint a senator. A senator can be appointed only for eight years and, as I have just said, if this committee is concerned about the power, the right to renew the terms of senators, the government is prepared to accept such an amendment, such a suggestion from the committee. But I must say that my constitutional powers, during the next few years, will remain more or less the same. The Prime Minister has today the power to appoint senators. This doesn't change except with a constitutional amendment.

que vous avez le droit de renouveler vos sénateurs, vous allez avoir beaucoup plus de pouvoir — et plusieurs disent que le cabinet du premier ministre a déjà beaucoup de pouvoir — que MM. Mulroney, Trudeau ou Chrétien en ont eu dans le passé. Il me semble évident qu'à titre de protecteurs de la Constitution canadienne, nous désirons nous fier à votre bonne foi, à vos engagements. Nous attendions d'ailleurs une conférence sur la fiscalité à l'automne, mais cela a changé. J'aime respecter votre parole. Vous aviez dit que vous alliez faire élire les Sénateurs et la première chose que vous avez faite c'est de nommer un sénateur au Cabinet. Et il fait maintenant partie de votre gouvernement. C'est le premier geste que vous avez posé

J'aime penser que je dois respecter la parole du premier ministre, mais on est dans une situation de gouvernement minoritaire. Est-ce que vous pensez, monsieur le premier ministre, qu'on peut faire confiance, juste sur votre parole, que les sénateurs seront élus et qu'ils ne feront que huit ans ou que vous allez pouvoir avoir un pouvoir que ni MM. Trudeau, Chrétien ou Mulroney ont eu par le passé?

M. Harper : Sénateur Dawson, j'assume que votre discours indique un appui pour les élections des sénateurs à l'avenir. Je vais regarder avec beaucoup d'attention votre réaction quand nous déposerons un projet de loi pour un tel objectif.

Mais je dois dire que ce gouvernement a nommé un sénateur pour une raison claire : assurer une représentation de la région de Montréal au Cabinet, et ce sénateur quittera son siège lors de la prochaine élection afin d'obtenir un siège à la Chambre des communes.

Il reste encore neuf sièges sans sénateur. Je n'ai pas l'intention de nommer des sénateurs à moins que ce soit nécessaire. Mais je peux dire que le gouvernement a l'intention de déposer un projet de loi pour créer un Sénat élu.

Le sénateur Dawson : J'aimerais que vous répondiez à la question du pouvoir que le premier ministre aurait, s'il l'avait sur une période de 16 ans, dans le cas de M. Trudeau, ou 8 ou 9 ans, dans le cas de M. Mulroney, de pouvoir se donner un Sénat avec les pouvoirs actuels. Pour le moment, je veux respecter votre parole, je ne veux pas la mettre en doute, vous êtes dans une situation minoritaire. Si, par hasard, vous êtes battu aux prochaines élections et qu'au printemps prochain vous n'avez pas passé votre loi sur l'élection des sénateurs, le prochain premier ministre pourra nommer autant de sénateurs qu'il veut, pour la durée qu'il veut. J'aimerais savoir si le comité a un engagement ferme de votre part. Mais vous aviez dit que vous ne nommiez pas de sénateurs. Et, en passant, il y a un siège de libre dans Repentigny.

M. Harper : Évidemment, monsieur Dawson, je pense que ce projet de loi limite le pouvoir du premier ministre de nommer un sénateur. On peut nommer un sénateur juste pour huit ans et comme je viens de le dire, si ce comité s'inquiète du pouvoir, du droit de renouveler les termes des sénateurs, le gouvernement est près à accepter un tel amendement, une telle suggestion du comité. Mais je dois dire que mes pouvoirs constitutionnels, pendant les prochaines années, restent plus ou moins les mêmes. Le premier ministre aujourd'hui a le pouvoir de nommer des sénateurs. Cela ne change pas sauf avec un amendement constitutionnel.

The reality is that, even with this bill, the term of present senators will continue until the age of 75. I think that, in the future, the Prime Minister will have members of the Senate who will change more quickly than today. But this is not yet the case for several years.

Senator Comeau: Welcome here, Mr. Prime Minister. I don't know if you heard the comments on a proposal before this committee concerning a deposition made by senators Austin and Murray concerning a resolution aiming to address the issue of regional imbalance in representation in the Senate.

The proposal is that British Columbia and Alberta have more seats and that British Columbia becomes a region just as the other existing regions.

Could we have your comments on that proposal? Is it a means through which we will be able to address this regional imbalance?

Mr. Harper: I can only say that we recognize the imbalance in existing representation. In the future, we will have to address this problem but at the same time, the government has to choose a staged approach. We began with the easiest step, where we can do things here, in Parliament, and we can gain a large support for change from the people.

The issue of the representation of each province is perhaps the most difficult issue in the debate about Senate reform and for this reason, the government did not start with this step. The government started first with the terms and secondly with an election process.

But I must note that, concerning Bill S-4, the government's position is clear, and I think that even honourable senators Murray and Austin are clear. We need the support of the provinces and the use of the general constitutional amending formula. In such a case, we do not need the voice of the Senate. Ultimately, the power of the Senate is a suspensive veto. And it is not necessary to consult the Senate for such a change. It is necessary to consult the provinces.

Senator Comeau: I agree, Mr. Prime Minister, to say that the measure proposed through Bill S-4, namely a tenure of eight years, is rather modest. But the population still thinks that this is a very important matter.

What will happen if the senate rejects the modest measures proposed through Bill S-4?

Mr. Harper: This will suggest to the population that any change is difficult, impossible or even that the present Senate is not able to take part in such a reform. I think there would be political consequences to such a situation.

La réalité est que, même avec ce projet de loi, le terme des sénateurs actuels va continuer jusqu'à 75 ans. Je pense que le premier ministre, à l'avenir, aura des membres au Sénat qui changeront plus rapidement qu'aujourd'hui. Mais ce n'est pas le cas encore pour plusieurs années.

Le sénateur Comeau : Bienvenue parmi nous, monsieur le premier ministre. Je ne sais pas si vous avez entendu les commentaires sur une proposition, devant ce comité, concernant une déposition faite par les sénateurs Austin et Murray au sujet d'une résolution qui voudrait régler la question du déséquilibre régional de représentation au Sénat.

La proposition veut que la Colombie-Britannique et l'Alberta aient plus de siège et que la Colombie-Britannique devienne une région au même titre que les autres régions qui existent actuellement.

Pourriez-vous nous donner vos commentaires sur cette proposition? Et est-ce que c'est un moyen par lequel on peut arriver à régler ce déséquilibre régional?

M. Harper : Je peux seulement dire que l'on reconnaît le déséquilibre de la représentation existante. À l'avenir, on doit régler ce problème, mais en même temps, le gouvernement doit choisir une approche, étape par étape. Nous avons commencé avec l'étape la plus facile, celle où nous pouvons faire des choses ici, au Parlement, et nous pouvons gagner un grand appui de la part de la population pour le changement.

La question de la représentation de chaque province est peut-être la question la plus difficile dans les discussions sur la réforme du Sénat et pour cette raison, le gouvernement n'a pas commencé avec cette étape. Le gouvernement a commencé avec, premièrement, le terme, et deuxièmement, un processus de direction.

Mais je dois noter que pour le projet de loi S-4, la position du gouvernement est claire, le Sénat a une voix. Pour la question de l'amendement au sujet des quatre régions, c'est clair et je crois que même les honorables sénateurs Murray et Austin sont clairs. On a besoin de l'appui des provinces et de l'usage de la formule de l'amendement général de la Constitution. Pour une telle situation, on n'a pas besoin de la voix du Sénat. Le pouvoir du Sénat, à la fin, est un véto suspensif. Et il n'est pas nécessaire de consulter le Sénat pour effectuer un tel changement. Il est nécessaire de consulter les provinces.

Le sénateur Comeau : Je suis d'accord, Monsieur le premier ministre, pour dire que la mesure proposée par le projet de loi S-4, soit un mandat de huit ans, est assez modeste. Mais la population pense tout de même qu'il s'agit d'une question très importante.

Que se passera-t-il si le Sénat rejette les modestes mesures proposées par le projet de loi S-4?

M. Harper : Cela suggérera à la population que n'importe quel changement est difficile, impossible, voire même que l'actuel Sénat n'est pas capable de participer à une telle réforme. Je crois qu'il y aurait des conséquences politiques à une telle situation.

Senator Murray: As you know, Mr. Prime Minister, the issue of the imbalance in representation in the Senate is not easier to address than that of the fiscal imbalance.

[*English*]

Senator Austin and I believe we have a proposition that stands on its own merits, that even if nothing else were done about the Senate, it would be important to correct an inequity from which Western Canada suffers in representation. That is our view.

Far be it from me to put words in your mouth, but I would hope that if that resolution passes the Senate, we would send it to the other players in the process. We do have the right to initiate, as you know, a constitutional amendment. That is what we are trying to do.

If it passes the Senate, we would send it to the provinces and, of course, to the federal government. Everybody would have three years to make up their minds as to what to do, to pass it or not. I would hope that the federal government would not close the door or threaten to interpose your veto, at least until you see what measure, if any, of provincial consensus exists for our amendment. Would you go that far?

Mr. Harper: Senator Murray, what I would do with such a suggestion, were it to come from the government, is I would actually consult the provinces first rather than later to see whether there was a chance of success. I think we all know the experiences of constitutional reform — particularly ones that involve federal-provincial discussion. I am concerned that, in the future, we not get too far down any path unless we think we have a pretty good chance of success.

If you are asking me indirectly what are my views on the merits of the proposal you have put forward, I do not have to tell you that I think anything that would improve the Senate representation of the smaller provinces, and of the West in particular, is a good thing.

Would this particular proposal be seen as addressing the imbalance? Frankly, I doubt it because I see some fairly obvious problems with it. The most obvious is that Saskatchewan and Manitoba, for instance, which have a greater population than Nova Scotia and New Brunswick, will continue to have fewer senators than those two those provinces. It is certainly an improvement, but that is difficult to justify as any kind of end point, even temporarily.

Senator Murray: Let us see what happens. Do not interpose your veto until we see what level of provincial —

Mr. Harper: It is not clear, senator, as you know, that I have a veto. According to the Regional Veto Act, I may or may not have to go to the provinces first.

Le sénateur Murray : Comme vous le savez, monsieur le premier ministre, le problème du déséquilibre de représentation au Sénat n'est pas plus facile à régler que celui du déséquilibre fiscal.

[*Traduction*]

Le sénateur Austin et moi-même estimons avoir une proposition intrinsèquement valable, à savoir que même si l'on ne prenait aucune autre initiative au sujet du Sénat, il serait important de corriger une inégalité dans la représentation qui désavantage l'ouest du Canada. C'est notre opinion.

Je n'ai pas du tout l'intention de vous faire dire ce que vous n'avez pas dit, mais j'espère que si cette résolution est adoptée par le Sénat, on la communiquera aux autres parties au processus. Nous avons bel et bien le droit de mettre en place, comme vous le savez, une modification à la Constitution. C'est ce que nous tentons de faire.

Si la résolution est adoptée par le Sénat, nous la communiquerons aux provinces et, bien entendu, au gouvernement fédéral. Toutes les parties auraient trois ans pour décider de l'adopter ou de la rejeter. J'espère que le gouvernement fédéral ne fermerait pas la porte ou ne menacerait pas d'imposer son veto, du moins tant qu'il ne saurait pas s'il y a un consensus de la part des provinces au sujet de notre amendement. Pourrait-il aller jusque-là?

M. Harper : Sénateur Murray, ce que je ferais si une telle suggestion venait du gouvernement, c'est que je consulterais les provinces au préalable plutôt que de voir plus tard si l'on a des chances de réussite. Nous sommes tous au courant des expériences en matière de réforme constitutionnelle — surtout de celles liées à des discussions fédérales-provinciales. J'aimerais veiller à ce qu'à l'avenir, nous n'allions pas trop loin, dans quelque direction que ce soit, avant d'estimer d'avoir d'assez bonnes chances de réussite.

Si vous me demandez de façon indirecte quelles sont mes opinions sur les mérites de la proposition que vous avez faite, il est inutile de vous dire que j'estime que toute initiative susceptible d'améliorer la représentation des plus petites provinces au Sénat, et de celles de l'Ouest en particulier, est une initiative constructive.

Cette proposition serait-elle considérée comme une solution au problème du déséquilibre? À vrai dire, j'en doute, car j'estime que des problèmes assez évidents se poseraient. Le plus visible est que la Saskatchewan et le Manitoba par exemple, dont la population est supérieure à celle de la Nouvelle-Écosse et du Nouveau-Brunswick, continueraient d'être représentés par un moins grand nombre de sénateurs que ces deux provinces. Ce serait indéniablement beaucoup mieux, mais ce serait difficile à justifier comme objectif, fut-il temporaire.

Le sénateur Murray : Voyons ce qui se passera. N'imposez pas votre veto avant de constater le degré d'appui des provinces...

M. Harper : Comme vous le savez, honorable sénateur, il n'est pas clair que j'aie un veto en la matière. Aux termes de la Loi sur le veto régional, je devrais peut-être ou ne devrais peut-être pas consulter d'abord les provinces.

Senator Murray: The Regional Veto Act applies only to constitutional amendments introduced by a minister of the Crown, of whom Senator Austin and I are not one.

Mr. Harper: Right. My point is that in the House it obviously could not, at least according to the Regional Veto Act — and we could have a discussion about the constitutionality of it — a minister of the Crown in the Commons could not introduce the measure.

Senator Murray: But somebody else could.

Senator Hays: Senators, I still have on my list Senator Munson, Segal and Chaput without quite enough time for five minutes each. Bear that in mind.

Senator Munson: Prime Minister, welcome. I cannot help myself; once a reporter, always a reporter. You suggested in French that there would be political consequences if the Senate said no to an eight-year term.

As you know, we are studying the proposed accountability act and Senate reform in a serious way and there may be amendments. It may take some time and it is serious work. There are critics who believe you would like nothing better than to fight an election on the backs of the Senate.

Mr. Harper: Well, do not give me the opportunity.

Senator Munson: There will be political consequences then.

Mr. Harper: What there would be political consequences on, if we could go back to my answer in French, is if the population were to become thoroughly convinced that any kind of Senate reform were impossible. Given that the government is committed to Senate reform, we have to look at how to proceed.

The Senate has a job to do on this. I have indicated to the committee already that on a couple of significant points, the government is open to your ideas and amendments.

On the proposed federal accountability act, the Senate traditionally has the role of review of legislation. However, I think you all understand the importance of that piece of legislation to the government's program and to the Canadian population at large.

Senator Munson: Just briefly, you do sound like Mr. Trudeau when he said, "Just watch me." At the same time, you talk about creating a process this fall, yet all we see now is a path for an eight-year term to some place we do not know where we are going. I am wondering if we are leading, in this reform, to the Americanization of the Senate.

Mr. Harper: I wondered when that particular line would come up.

Le sénateur Murray : La Loi sur le veto régional ne s'applique qu'aux modifications constitutionnelles présentées par un ministre de l'État, ce que le sénateur Austin et moi-même ne sommes pas.

M. Harper : Bien. Ce que je veux dire, c'est que, de toute évidence, du moins pas aux termes de la Loi sur le veto régional — nous pourrions d'ailleurs également discuter de sa constitutionnalité —, un ministre de l'État ne pourrait pas présenter la mesure.

Le sénateur Murray : Mais quelqu'un d'autre pourrait le faire.

Le sénateur Hays : Sénateurs, j'ai encore sur ma liste le sénateur Munson, le sénateur Segal et le sénateur Chaput, alors qu'il ne reste plus assez de temps pour accorder cinq minutes à chacun d'entre eux. Je vous demande d'y penser.

Le sénateur Munson : Soyez le bienvenu, monsieur le premier ministre. C'est plus fort que moi; journaliste un jour, journaliste toujours. Vous avez signalé en français que cela aurait des conséquences politiques si le Sénat refusait la proposition d'un mandat de huit ans.

Comme vous le savez, nous examinons avec sérieux le projet de loi sur l'imputabilité et la réforme du Sénat; il est donc possible que des modifications soient apportées Cela prendra peut-être un certain temps et c'est un travail sérieux. Certains détracteurs estiment que votre plus vif souhait est de mener des élections sur le dos du Sénat.

M. Harper : Eh bien, ne m'en donnez pas l'occasion.

Le sénateur Munson : Cela aurait alors des conséquences politiques.

M. Harper : Là où cela aurait des conséquences politiques, si vous me permettez de revenir à la réponse que j'ai faite en français, c'est si la population acquérait l'entière conviction que tout type de réforme du Sénat est impossible. Étant donné que le gouvernement s'est engagé à procéder à une réforme du Sénat, il est nécessaire que nous examinions la façon de procéder.

Le Sénat a une tâche à accomplir dans ce domaine. J'ai déjà signalé au comité qu'en ce qui concerne deux ou trois points importants, le gouvernement est réceptif à vos idées et à vos amendements.

En ce qui concerne le projet de loi fédéral sur l'imputabilité, le Sénat a, par tradition, la fonction d'examiner les projets de loi. Je pense cependant que vous êtes tous conscients de l'importance de ce projet de loi pour le programme du gouvernement et pour la population canadienne en général.

Le sénateur Munson : On croirait entendre M. Trudeau lorsqu'il a dit « Just watch me ». Vous parlez en même temps de créer un processus cet automne alors que tout ce que nous voyons pour le moment, c'est un mandat de huit ans, sans savoir où cela nous mènera. Je me demande si cette réforme n'entraînera pas l'américanisation du Sénat.

M. Harper : Je me demandais quand on ferait ce commentaire.

I do not think the Americans have any particular monopoly on democracy. I think it is as Canadian an idea — in fact, it is an idea now shared by a growing number of countries in the world. They virtually all now elect their legislatures.

Senator Segal: Prime Minister, you were good enough to make reference to introducing legislation in the fall with respect to some public involvement in the electoral process with respect to the Senate.

I ask you to reflect for a moment, assuming that piece of legislation is successful and that Bill S-4 is successful, and we find ourselves in the proximate future with a Senate composed more and more of elected individuals who have eight- or nine- or ten-year terms as the case may be. Depending on how that process is determined, they may feel they have far more clout than members of the House of Commons, that they have been elected from a broader base.

In terms of balance between the two Houses, I think it is fair to say now that, by and large, the tradition in the Senate — for good and substantial reason — has been to accept that the House is where the critical decisions are made. That is where democracy is expressed; that is where the government receives its confidence over a period of time. Can you share with us your view on how some of that balance issue might be addressed going forward, assuming Bill S-4 was successful and that whatever is proposed by the government in good time with respect to the electoral process is also successful?

Mr. Harper: As I mentioned earlier, the proposed legislation the government will bring forward is obviously by necessity permissive in nature. It allows the government of the day not just to create elected senators, but to evaluate how that is affecting the system and what is happening; and it will occur over a period of time.

I can just say that my frank hope is that that process would force the provinces and others to, at some point in the future, seriously address other questions of Senate reform. There are questions such as the distribution of seats and the powers that we are all clear must be addressed through a general amending formula, constitutional amendment. I welcome the day when there is a public appetite for that discussion because I think the country needs it at some point.

[*Translation*]

Senator Chaput: Thank you, Mr. Prime Minister, for being here with us today. Personally, I have no problem with the fixed term. It has always been my philosophy. A longer term than eight years might be better but I have no difficulty with fixed terms. My concern relates rather to the next steps — Bill S-4 being only the first step of Senate reform — and to the election of senators. Today, in the Senate, we have aboriginal

Je ne pense pas que les Américains aient de monopole spécial sur la démocratie. C'est à mon avis un concept tout aussi canadien; en fait, c'est une idée partagée par un nombre croissant de pays. Ils élisent actuellement pratiquement tous leurs assemblées législatives.

Le sénateur Segal : Monsieur le premier ministre, vous avez eu l'obligeance de mentionner la présentation à l'automne d'un projet de loi portant sur une participation publique au processus électoral en ce qui concerne le Sénat.

J'aimerais que vous réfléchissiez à l'éventualité suivante : à supposer que ce projet de loi soit adopté et que le projet de loi S-4 le soit également et à supposer que nous nous retrouvions sous peu avec un Sénat composé d'un nombre croissant de membres élus ayant un mandat de huit à dix ans, selon le cas. Selon la façon dont ce processus est établi, ils auront peut-être la perception d'avoir davantage d'influence que les députés et d'avoir été élus à partir d'un bassin plus large.

En ce qui concerne l'équilibre entre les deux chambres, je pense qu'il est juste de dire que, somme toute, la tradition au Sénat — pour des raisons valables et importantes — consistait à accepter que la Chambre était l'institution au sein de laquelle sont prises les décisions cruciales. C'est là que la démocratie est exprimée; c'est là que le gouvernement est investi de la confiance dont il jouit pendant une période donnée. Pouvez-vous nous faire part de vos opinions sur les possibilités de régler cette question d'équilibre, à supposer que le projet de loi S-4 soit adopté et que toute initiative proposée par le gouvernement en temps opportun en ce qui concerne le processus électoral soit également acceptée?

M. Harper : Comme je l'ai déjà mentionné, le projet de loi qui sera présenté par le gouvernement est forcément habilitant de nature. Il permet au gouvernement au pouvoir non seulement de créer des sénateurs élus, mais aussi d'évaluer l'incidence que cela aura sur le système et ce qui se passe; cela se déroulera sur une certaine période de temps.

Je me contenterai de dire que j'espère bien que ce processus forcera les provinces et d'autres parties, à un moment ou l'autre, à s'attaquer sérieusement à d'autres aspects de la réforme du Sénat, tels que la répartition des sièges et les pouvoirs, questions qui doivent être réglées, comme nous le savons tous, par le biais d'une formule générale de modification, d'une modification de la Constitution. Je me réjouis de voir arriver le jour où le public s'intéressera à ce type de discussion car je pense que le pays en aura besoin à un certain moment.

[*Français*]

Le sénateur Chaput : Merci, monsieur le premier ministre, d'être ici avec nous aujourd'hui. Personnellement, je n'ai pas de problèmes avec un mandat fixe. Cela a toujours été ma philosophie. Peut-être qu'un mandat plus long que huit ans, non renouvelable, serait préférable, mais je n'ai pas de difficulté avec les mandats fixes. Ma préoccupation porte plutôt sur les prochaines étapes — le projet de loi S-4 n'étant que la première étape de la

people, many women and representatives of official language minority communities. I myself am from Manitoba and I represent the French-speaking minority.

If I understood properly, you mentioned earlier the election process would be a national process. Can you guarantee that this process will permit to maintain in the Senate representatives of aboriginal people, women and members of official language minority communities? Would it be possible to address this concern?

Mr. Harper: This is a debate we will have during the next step. The government is going to introduce a bill and I presume there will be discussions on this point. I think there are ways to encourage the election of individuals who represent Canada's diversity. However, the nature of an election process is such that we cannot dictate voters' choice.

Senator Chaput: As you know, the majority takes care of itself but for minorities, it is much more difficult. This is my concern and I wanted to tell you about it.

Mr. Harper: I can say that the role of an efficient Senate is to represent the regional minorities of this country. It is possible to create a Senate which represents all the diversities.

Senator Chaput: If Bill S-4 is passed this Fall, do you intend to start immediately to appoint senators for eight years or will you wait for the other steps of the reform, among which that of election, to be passed?

Mr. Harper: The government prefers not to appoint senators unless it has the necessary reasons to do so. I mentioned one of these reasons in the case of senator Fortier. Frankly, we are concerned about the representation in the Senate and about the number and the age of our Senate caucus. It is necessary for the government, even in the present system, to have a certain number of senators to do the work of the government in the Senate. We have not reached a point where it is necessary to appoint certain senators to meet this objective. At this time, I prefer to have an election process where we can consult the population rather than to appoint senators traditionally.

[*English*]

Senator Hubley: Since July of 2004, my province of Prince Edward Island has had a Senate vacancy. My question is: Are you ignoring my province's constitutional right to representation within the Parliament of Canada by not filling that vacancy?

Mr. Harper: You are going to have to forgive me in observing that I have today been pushed on your side both to proceed more quickly with elections and also to now proceed more quickly with

réforme du Sénat — et concerne l'élection des sénateurs. Actuellement, au Sénat, nous retrouvons des Autochtones, beaucoup de femmes et des représentants des communautés de langue officielle. Je suis moi-même du Manitoba et je représente les francophones en situation minoritaire.

Si j'ai bien compris, vous avez mentionné tout à l'heure que le processus d'élections serait un processus national. Pourrez-vous garantir que ce processus permette de conserver au Sénat des représentants autochtones, des femmes et des membres des communautés de langue officielle en situation minoritaire? Est-ce qu'il y aurait moyen de trouver une solution à cette préoccupation?

M. Harper : C'est un débat que nous aurons à la prochaine étape. Le gouvernement va présenter un projet de loi et je présume qu'il y aura des discussions sur ce point. Je pense qu'il y a des façons d'encourager l'élection d'individus qui représentent la diversité du Canada. Cependant, la nature d'un processus d'élections est qu'on ne peut pas dicter le choix des électeurs et des électrices.

Le sénateur Chaput : Comme vous le savez, la majorité prend soin d'elle-même, mais pour les minorités, c'est beaucoup plus difficile. C'est ma préoccupation et je voulais vous en faire part.

M. Harper : Je peux dire que le rôle d'un Sénat efficace est de représenter les minorités régionales de ce pays. Il est possible de créer un Sénat qui représente toutes les diversités.

Le sénateur Chaput : Si le projet de loi S-4 est adopté cet automne, est-ce que vous avez l'intention de commencer immédiatement à nommer des sénateurs pour huit ans où attendrez-vous l'adoption des autres étapes de la réforme dont celle des élections?

M. Harper : Le gouvernement préfère ne pas nommer de sénateurs à moins d'avoir des raisons nécessaires. J'ai mentionné une de ces raisons dans le cas du sénateur Fortier. Je peux être franc en disant que nous sommes préoccupés par la représentation au Sénat et par le nombre et l'âge de notre caucus sénatorial. Il est nécessaire pour le gouvernement, même dans le système actuel, d'avoir un certain nombre de sénateurs pour faire le travail du gouvernement au Sénat. Nous ne sommes pas au point où il est nécessaire de nommer certains sénateurs pour remplir cet objectif. Je préfère avoir, à ce moment-ci, un processus électoral où nous pouvons consulter la population au lieu de nommer des sénateurs de façon traditionnelle.

[*Traduction*]

Le sénateur Hubley : Depuis juillet 2004, ma province, l'Île-du-Prince-Édouard, a un poste vacant au Sénat. La question que je voudrais vous poser est la suivante : ne faites-vous pas abstraction du droit constitutionnel de ma province à la représentation au Parlement du Canada en omettant de pourvoir ce poste?

M. Harper : Il faudra que vous me pardonniez de faire remarquer que les membres de votre parti ont insisté aujourd'hui pour que j'active les élections et également les

appointments. I think the reality of the situation today is there are a number of vacancies. They are certainly not exclusively in Prince Edward Island. There are nine vacancies across five or six different provinces.

The government does not feel any pressure from the population at large to fill the vacancies. I think it would become a bigger issue were the Senate viewed as the kind of effective body it could be. Once an electoral option was in place, I suspect the pressure to deal with any vacancy would become much greater.

Senator Hubley: Is it your intention, then, to initiate the process to choose an elected Senate on Prince Edward Island this fall?

Mr. Harper: It is our intention, on the assumption that we will make progress on Bill S-4, to proceed quickly to the next step, which would be to set up a process for electing senators or for consulting the population on Senate appointments. I would suggest to you that the tentative timing of that would be the next federal election campaign. It could be the next provincial election campaign.

If the government had in place at some point in time the capacity — we do not have a legislative capacity today to consult the population — I think we would want to do that in conjunction with some other democratic exercise. The costs of a stand alone process are quite high.

Senator Watt: Prime Minister, welcome. In your answer to Senator Chaput, I think I already have your response to the matter I was going to raise. It has more to do with the fact that the country is very diverse. I think we have a lot of catching up to do as a country to bring it to the level where everyone is properly represented and has a voice. It is very important to all of us within the country.

I would like to take this a step further and ask whether you are open to the idea of giving guaranteed seats in the Senate to a certain group — for example, the Inuit who live in the High Arctic, in the North. I am actually talking about three regions — Nunavut, Labrador and Nunavik. They all have something in common.

From time to time, as you can appreciate, Prime Minister, it has been difficult for us as parliamentarians to properly represent our people, especially at times when issues are wrapped around partisan matters.

If we are serious about reforming the Senate, I think it is timely to move in the direction of reforming the House of Commons at some point down the road. That is another issue. That is of concern to the Aboriginal people in this country, more importantly for the Inuit.

Our voice at times is heard; our voice at times is buried amongst a lot of other concerns because we are a minority people in this country.

nominations. Il y a en réalité un certain nombre de postes vacants, et pas exclusivement à l'Île-du-Prince-Édouard. Neuf postes sont vacants dans cinq ou six provinces différentes.

Le gouvernement ne perçoit de la part de la population aucune pression pour combler ces postes. Cela deviendrait à mon avis plus délicat si le Sénat était considéré comme l'organisme efficace qu'il pourrait être. Je présume que les pressions pour combler les postes augmenteraient considérablement à partir du moment où une option électorale serait en place.

Le sénateur Hubley : Avez-vous dès lors l'intention d'amorcer le processus d'élection des membres du Sénat à l'Île-du-Prince-Édouard cet automne?

M. Harper : Pour autant que nous réalisions des progrès en ce qui concerne le projet de loi S-4, nous avons l'intention de passer rapidement à l'étape suivante, à savoir de mettre en place un processus d'élection des sénateurs ou de consultation de la population au sujet des nominations au Sénat. À mon avis, cela devrait coïncider avec la prochaine campagne électorale fédérale. Cela pourrait coïncider avec la prochaine campagne électorale provinciale.

Si le gouvernement avait en place à un certain moment la capacité nécessaire — nous n'avons actuellement pas la capacité législative de consulter la population —, nous ferions coïncider cela avec un autre exercice démocratique. Les coûts d'un processus qui ne serait pas combiné avec une autre activité sont très élevés.

Le sénateur Watt : Je vous souhaite la bienvenue, monsieur le premier ministre. Je pense que votre réponse au sénateur Chaput contient déjà la réponse à la question que je voulais poser. Elle est plutôt liée à la grande diversité du pays. Nous avons à mon sens beaucoup de rattrapage à faire pour atteindre un niveau de représentation adéquate de tous les citoyens et pour que chacun ait la possibilité de s'exprimer. C'est très important pour nous tous.

J'aimerais pousser la question un peu plus loin et demander si vous êtes réceptif au principe qui consisterait à accorder des sièges garantis au Sénat à un certain groupe, par exemple aux Inuits qui vivent dans l'Arctique, c'est-à-dire dans le Nord. Il s'agit en fait de trois régions — le Nunavut, le Labrador et le Nunavik. Elles ont des points communs.

Comme vous pouvez le constater, monsieur le premier ministre, nous avons de temps à autre de la difficulté à représenter efficacement nos électeurs, surtout lorsqu'il s'agit de questions liées à des considérations partisanes.

Si nous voulons sérieusement réformer le Sénat, il est à mon avis opportun d'entreprendre également à un certain moment une réforme de la Chambre des communes. C'est une autre question. C'est une question qui préoccupe les Autochtones et surtout les Inuits.

Notre voix est parfois entendue, mais elle est parfois enterrée parmi de nombreuses autres préoccupations parce que nous sommes un peuple minoritaire dans ce pays.

If a process is established, would you be inclined in the future to discuss what the Senate and the House of Commons should become and the relationship between the two? Would you consider providing a space for the Aboriginal people within those two institutions?

Mr. Harper: My understanding of the Constitution today is that it would be next to impossible to do such a thing in either House without an amendment to the Constitution itself. This does not mean that when we are discussing a particular electoral system in the Senate that it may or may not be possible to devise systems that improve the possibility of certain kinds of representation.

I think I would leave it at that. To achieve what you are suggesting, I think, as a final outcome could not be done without a full-scale constitutional revision.

Senator Watts: Which I do realize. Thank you.

The Chairman: Prime Minister, thank you very much for this unique appearance. We hope it is not 139 years before another occasion like this occurs. In any event, we very much appreciate your help. As you know, the Senate prides itself in its work in committees and your presentation to us today will assist us greatly in our deliberations. Thank you.

I welcome the next panel of witnesses, Matthew King, Dan McDougall and David Anderson, from the Privy Council Office; and Warren J. Newman, from the Department of Justice.

Mr. King, please proceed with your introductory remarks and take senators through the bill.

Matthew King, Assistant Secretary to Cabinet, Legislation and House Planning, Privy Council Office: Honourable senators, given that the Prime Minister has just laid out in some detail the government's approach to Senate reform, we agree there is not much requirement for excessive comment on our part.

My colleagues and I are looking forward to providing as much detail and information as possible on Bill S-4, now before the Senate and the subject matter of which is being studied by this committee. I will take a few moments and review with the committee the key elements of Bill S-4, Senate tenure, after which we would be happy to take questions.

The government introduced Bill S-4 in the Senate on May 30, 2006. There was a question earlier, and the Prime Minister gave his reasons as to why the government chose to introduce this bill in the Senate. Bill S-4 proposes to amend section 29 of the Constitution Act, 1867, employing the procedures set out in section 44 of the Constitution Act, 1982. As we know, it is the government's position that subject to sections 41 and 42, section 44 gives to the Parliament of Canada the power to act to make laws amending the Constitution in relation to the executive government of Canada, the House of Commons or the Senate.

Si un processus est établi, seriez-vous disposé à l'avenir à discuter de la façon dont le Sénat et la Chambre des communes devraient évoluer et des relations entre les deux? Examineriez-vous la possibilité de prévoir un espace pour les Autochtones dans ces deux institutions?

M. Harper : Je pense, d'après mon interprétation de la Constitution, qu'il serait pratiquement impossible de le faire dans l'une ou l'autre chambre sans modifier la Constitution comme telle. Cela n'exclut toutefois pas, lorsqu'on discute d'un système électoral spécifique au Sénat, la possibilité de concevoir des systèmes qui amélioreraient les possibilités de certains types de représentation.

Je pense que je n'en dirai pas davantage. En ce qui concerne votre suggestion, un résultat définitif ne serait pas possible à mon avis sans procéder à une révision complète de la Constitution.

Le sénateur Watt : Ce dont je suis conscient. Je vous remercie.

Le président : Monsieur le premier ministre, nous vous remercions infiniment pour cette participation unique dans les annales du Sénat. Nous espérons qu'il ne faudra pas attendre à nouveau 139 ans pour qu'une autre occasion semblable se présente. En tout cas, nous apprécions beaucoup votre aide. Comme vous le savez, le Sénat est fier du travail qu'il fait dans les comités et l'exposé que vous avez fait aujourd'hui nous sera d'une aide précieuse dans nos délibérations. Merci.

J'accueille maintenant le groupe suivant de témoins, à savoir Matthew King, Dan McDougall et David Anderson, du Bureau du Conseil privé, et Warren J. Newman, du ministère de la Justice.

Monsieur King, veuillez faire votre exposé préliminaire et donner aux sénateurs un aperçu du projet de loi.

Matthew King, secrétaire adjoint du Cabinet, Législation et planification parlementaire, Bureau du Conseil privé : Honorables sénateurs, étant donné que le premier ministre vient d'exposer de façon assez précise l'approche du gouvernement en ce qui concerne la réforme du Sénat, nous ne ressentons pas le besoin de faire des commentaires très poussés.

Mes collègues et moi sommes impatients de donner des informations aussi précises que possible sur le projet de loi S-4, actuellement à l'étude au Sénat, et dont la teneur est examinée par ce comité. Je passerai en revue pendant quelques instants avec vous les principaux éléments du projet de loi S-4, concernant la durée du mandat des sénateurs, puis nous répondrons avec plaisir aux questions.

Le gouvernement a présenté le projet de loi S-4 au Sénat le 30 mai 2006. Une question a déjà été posée à ce sujet et le premier ministre a exposé les motifs pour lesquels le gouvernement a décidé de présenter ce projet de loi au Sénat. Le projet de loi S-4 propose de modifier l'article 29 de la Loi constitutionnelle de 1867, en utilisant les procédures exposées à l'article 44 de la Loi constitutionnelle de 1982. Nous savons tous que le gouvernement estime que, sous réserve des articles 41 et 42, l'article 44 donne au Parlement du Canada le pouvoir de modifier des dispositions de la Constitution relatives au pouvoir exécutif fédéral, au Sénat et à la Chambre des communes.

[*Translation*]

Under section 29, as it is now, a senator can hold his place until he attains the age of seventy-five, subject to sections 30 and 31, of course.

As the Prime Minister said and as indicated by other people who already appeared, I think, before this committee, section 29, combined with section 23, which requires that a senator must be of the full age of thirty years, means that, at the present time, the maximum tenure in the Senate is of 45 years.

[*English*]

Bill S-4 would amend the Constitution Act, 1867, by replacing the current section 29 with a new section 29 that would limit the tenure of senators to a period of eight years. In so doing, the bill effectively removes the requirement that senators must retire at 75 years of age. However, it does include a transitional provision that would allow existing senators to hold their appointments until the age of 75 years. Bill S-4 does not change the section 23 requirement that senators must be 30 years of age, nor does it change any other aspect of the qualifications of senators as listed in section 23, including the property qualifications.

The Prime Minister provided some detail on this earlier, but I will repeat that the government chose the eight-year term on the basis that it is long enough for senators to gain the experience necessary to effectively carry out their role in legislative review and policy investigations. The Prime Minister also noted earlier that the eight-year term is close to the recommendation of the 1984 joint House and Senate Molgat-Cosgrove report. The government shares the view set out in that report that introducing an eight-year or a nine-year term could be accomplished by Parliament using section 44 of the Constitution Act.

Mr. Chairman, these are the key elements of the bill. We are happy to take questions.

Senator Angus: I understand that all three of you are from the Parliamentary Reform Secretariat of the PCO; is that correct?.

Mr. King: My colleague, Warren Newman, is from the Department of Justice.

Senator Angus: My question stems from the current mandatory retirement age of 75. Am I correct in my understanding that should the bill pass as drafted, someone appointed to the Senate at age 74 could stay until the age of 82?

Mr. King: That is correct.

Senator Angus: That would be permitted under the proposed legislation.

Senator Angus: That is correct.

Senator Angus: My next concern flows somewhat from the Prime Minister's remarks today on an electoral process relating to senators. In regard to the bill that the Prime Minister said would be forthcoming in the future, I do not believe that he mentioned a

[*Français*]

En vertu de l'article 29, tel qu'il existe actuellement, un sénateur peut demeurer en poste jusqu'à l'âge de 75 ans sous réserve, bien entendu, des articles 30 et 31.

Comme l'a dit le premier ministre et comme l'ont indiqué d'autres personnes qui ont déjà, je crois, comparu devant ce comité, l'article 29 couplé à l'article 23, qui exige qu'un sénateur doit être âgé de 30 ans révolus, signifie qu'à l'heure actuelle, la durée maximale du mandat sénatorial est de 45 ans.

[*Traduction*]

Le projet de loi S-4 modifierait la Loi constitutionnelle de 1867 en remplaçant l'article 29 actuel par un nouvel article 29 qui limiterait la durée du mandat des sénateurs à une période de huit ans. Du fait même, le projet de loi supprime l'obligation pour les sénateurs de se retirer à l'âge de 75 ans. Cependant, il inclut une disposition transitoire qui permettrait aux sénateurs actuels d'exercer leurs fonctions jusqu'à l'âge de 75 ans. Le projet de loi S-4 ne modifie pas l'obligation pour les sénateurs d'être âgés de 30 ans, énoncée à l'article 23, ni aucun autre aspect des qualités exigées des sénateurs énumérées dans cet article, y compris les conditions concernant leurs propriétés.

Le premier ministre a déjà donné des informations précises à ce sujet, mais je rappelle que le gouvernement a choisi le mandat d'une durée de huit ans parce qu'il est assez long pour que les sénateurs acquièrent l'expérience nécessaire pour exercer efficacement leurs fonctions en matière d'examen législatif et d'examen d'orientation. Le premier ministre a en outre déjà mentionné que le mandat de huit ans est conforme à la recommandation faite dans le rapport mixte de la Chambre et du Sénat Molgat-Cosgrove de 1984. Le gouvernement partage l'opinion exposée dans ce rapport, à savoir que l'instauration d'un mandat d'une durée de huit ou de neuf ans pourrait être faite par le Parlement par l'intermédiaire de l'article 44 de la Loi constitutionnelle.

Voilà les principaux éléments du projet de loi, monsieur le président. Nous répondrons avec plaisir aux questions.

Le sénateur Angus : Je pense que vous êtes tous trois du secrétariat de la réforme parlementaire du BCP; est-ce exact?

M. King : Mon collègue, Warren Newman, travaille au ministère de la Justice.

Le sénateur Angus : Ma question concerne l'actuel âge de la retraite obligatoire fixé à 75 ans. Ai-je raison de penser que si le projet de loi était adopté sous son libellé actuel, une personne qui serait nommée au Sénat à l'âge de 74 ans pourrait y rester jusqu'à l'âge de 82 ans?

M. King : C'est exact.

Le sénateur Angus : Ce serait donc autorisé en vertu du projet de loi.

M. King : C'est exact.

Le sénateur Angus : Ma préoccupation suivante est liée quelque peu aux observations que le premier ministre a faites aujourd'hui au sujet d'un processus électoral applicable aux sénateurs. En ce qui concerne le projet de loi qui, d'après le premier ministre, sera

date. Would this bill specifically involve the election of senators to the Senate or would it deal with a process to permit some senators who had gone through a kind of election to be available for appointment, as in the case of Senator Stanley Waters, for example?

Mr. King: I believe the Prime Minister indicated in response to a question that the proposed bill would likely include a type of popular public consultation process whereby Canadians would have the opportunity to express an opinion through a vote on a Senate vacancy.

Unfortunately, senator, that bill is still in development and before cabinet so I cannot say more in regard to the details than that. That is my recollection of the position taken by the Prime Minister today.

Senator Angus: I appreciate that. It seems that some members of the media were drawing conclusions, perhaps some senators also, from what the Prime Minister said about elections, and I did not get that. I think you have confirmed that I have the right impression. He is not saying there will be an election of senators like there is an election of members of Parliament, but there will be a consultation process that will make senators more accountable in the future, from which he could then appoint.

Mr. King: It is important to underline that it would be a consultation process that would leave unchanged the ability of the Prime Minister to recommend and the power of the Governor General to appoint senators. Anything further than that would require a more extensive amendment.

Senator Angus: Mr. Newman, you guys are always under the gun on legislation to sign off on whether legislation is intra or ultra vires before it is submitted in a cabinet document and eventually introduced in Parliament. As an adviser to the government on legal and constitutional matters, are you satisfied that Bill S-4, which provides for an eight-year renewable term — if indeed it is interpreted that the term is renewable — would be within the authority of Parliament? Would it be intra vires of Parliament?

Warren J. Newman, General Counsel, Constitutional and Administrative Law Section, Department of Justice Canada: I will preface my remarks with the usual proviso that I will not reveal, because I am bound not to do so, any advice that the Department of Justice gave in the context of the development of this bill, but clearly the department was consulted closely on the development of the legislation. You heard the Prime Minister say today that the government is confident that the legislation is a constitutional measure. I would have no hesitation in saying that

présenté ultérieurement, je ne pense pas qu'il ait mentionné de date. Ce projet de loi porterait-il spécifiquement sur l'élection des sénateurs au Sénat ou sur un processus visant à autoriser des sénateurs qui auraient été soumis à un processus électoral d'un type ou d'un autre à être disponibles pour une nomination, comme dans le cas du sénateur Stanley Waters?

M. King : Je pense que le premier ministre a répondu à une question en disant que le projet de loi inclurait probablement un quelconque processus de consultation populaire qui donnerait aux Canadiens et Canadiennes l'occasion d'exprimer une opinion par le biais d'un vote sur un siège vacant au Sénat.

Sénateur, ce projet de loi est malheureusement toujours en cours d'élaboration et à l'étude par le Cabinet. Par conséquent, je ne peux pas donner d'informations plus précises que cela. C'est ce dont je me rappelle de la position adoptée par le premier ministre aujourd'hui.

Le sénateur Angus : J'apprécie cela. Il semblerait que certains journalistes tiraient des conclusions des commentaires que le premier ministre avait faits au sujet des élections, peut-être certains sénateurs aussi, et je n'avais pas compris cela. Je pense que vous avez confirmé que mon impression est la bonne. Le premier ministre n'a pas dit que des élections semblables à celles organisées pour les députés seraient tenues en ce qui concerne les sénateurs, mais que l'on mettrait en place un processus de consultation qui permettrait aux sénateurs de rendre davantage de comptes à l'avenir et sur lequel lui-même pourrait se baser pour les nominations.

M. King : Il est important de souligner qu'il s'agirait d'un processus de consultation qui laisserait intacte la capacité du premier ministre de recommander des candidats et le pouvoir du gouverneur général de nommer des sénateurs. Tout changement qui irait plus loin que cela nécessiterait une modification plus poussée de la Loi constitutionnelle.

Le sénateur Angus : Monsieur Newman, vous subissez toujours des pressions pour dire si un projet de loi est constitutionnel ou anticonstitutionnel avant qu'il ne soit présenté dans un document du Cabinet, puis au Parlement. À titre de conseiller du gouvernement sur les questions légales et constitutionnelles, êtes-vous convaincu que le projet de loi S-4, qui instaure un mandat renouvelable d'une durée de huit ans — si on interprète cela effectivement comme un mandat renouvelable — serait possible pour le Parlement? Serait-il constitutionnel?

Warren J. Newman, avocat général, Section du droit administratif et constitutionnel, ministère de la Justice Canada : Je vous avertis d'emblée que je ne révélerai pas, car cela m'est interdit, les avis que le ministère de la Justice a donnés dans le contexte de l'élaboration de ce projet de loi, mais le ministère a effectivement été activement consulté. Le premier ministre a mentionné aujourd'hui que le gouvernement est convaincu que le projet de loi est une mesure constitutionnelle. Je n'hésiterais nullement à faire remarquer que l'article 44 de la formule de

section 44 of the amending formula does provide for a procedure of legislative amendment of the Constitution and that this bill would fall squarely within the ambit of that constitutional amending procedure.

Senator Angus: The bill does not say that these eight-year terms are renewable, but the Leader of the Government in the Senate has indicated — you have heard, I am sure, what we have all been asking — that it does not say they are not renewable. Therefore, can we assume that the intention of this legislation is that they are renewable. Do you agree?

Mr. Newman: I agree that the bill does not say anything on its face about renewability. There is legislation that does talk about renewable terms, and we can discuss that in the context of the independence of this particular body if you want to do so at some point later in this discussion. The fact of the matter, as Mr. King has pointed out, is that the legal and constitutional power to summon senators to the Senate lies with the Governor General, and so nothing in this bill touches that power on its face in any way.

The Prime Minister indicated today that the government would be willing to entertain the possibility of amendments if that is the desire of the committee, and ultimately the Senate in this regard. Certainly there is nothing on the face of the bill that would, I think, trouble one from a constitutional perspective in terms of what it does not do to the appointment process and what it does do to section 29 as is it now stands in the Constitution Act, 1867.

Senator Angus: Were you suggesting, though, in the beginning of your answer, that there is another piece of legislation on the books that deals specifically with this renewability of appointments?

Mr. Newman: I am getting ahead of myself.

Senator Angus: I might have overlooked that statute.

Mr. Newman: I am following, as is everyone else who is interested in this issue, the debates both in the Senate at large and before this committee yesterday. One thing that struck me was the question as to whether the mere fact of renewability would diminish the independence of the Senate and its constitutional role in relation to the House of Commons.

I would advise, if I may be so bold, honourable senators, to reflect upon the role of the Senate as a political institution performing essentially legislative functions. The appropriate comparator is perhaps not judicial independence — where judges perform adjudicative functions in individual cases and not only doctrines of fairness but natural justice apply — but the political role that the Senate plays in terms of high politics and how that can best be accommodated in relation to its independence vis-à-vis the House of Commons and in relation to the executive.

modification renferme une procédure de modification législative de la Constitution et que ce projet de loi est conforme à l'essence même de cette procédure de modification de la Constitution.

Le sénateur Angus : Le projet de loi ne mentionne pas expressément que ces mandats d'une durée de huit ans sont renouvelables, mais le leader du gouvernement au Sénat a signalé qu'il ne spécifiait pas non plus qu'ils ne le sont pas. Vous avez certainement entendu la question que nous avons tous posée. Par conséquent, pouvons-nous présumer que la volonté du législateur en l'occurrence est qu'il soit renouvelable? Est-ce votre opinion?

M. Newman : Je reconnais que le projet de loi ne fait aucune mention expresse de la possibilité que ce mandat soit renouvelable. Certaines dispositions législatives font mention de mandats renouvelables et si vous le désirez, nous pourrons examiner la question dans le contexte de l'indépendance de cette institution au cours des présentes discussions. En fait, comme l'a signalé M. King, le pouvoir légal et constitutionnel de mander des sénateurs au Sénat appartient au gouverneur général et, par conséquent, aucune disposition de ce projet de loi ne porte de toute façon sur ce pouvoir.

Le premier ministre a fait savoir aujourd'hui que le gouvernement serait disposé à envisager la possibilité que des amendements soient présentés à cette fin, si c'est le souhait du comité et, en définitive, du Sénat. À mon avis, le projet de loi ne renferme aucune disposition susceptible de déranger quelqu'un d'un point de vue constitutionnel en ce qui concerne les changements qu'il n'apporte pas au processus de nomination et les modifications qu'il apporte à l'article 29 de la Loi constitutionnelle de 1867.

Le sénateur Angus : Vouliez-vous dire toutefois, dans la première partie de votre réponse, que le gouvernement prévoit présenter un autre projet de loi portant spécifiquement sur la possibilité de renouveler les nominations?

M. Newman : J'avance un peu trop vite.

Le sénateur Angus : J'ai peut-être fait abstraction de ce projet de loi.

M. Newman : Comme toute autre personne qui s'intéresse à la question, j'ai suivi les débats au Sénat et au comité hier. Ce qui m'a frappé, c'est la question de savoir si la possibilité de renouveler le mandat réduirait l'indépendance du Sénat et son rôle constitutionnel par rapport à la Chambre des communes.

Si vous me permettez d'avoir cette audace, honorables sénateurs, j'aurais tendance à envisager le rôle du Sénat comme celui d'une institution politique exerçant essentiellement des fonctions législatives. Le point de comparaison approprié n'est peut-être pas l'indépendance judiciaire — en vertu de laquelle les juges exercent des fonctions judiciaires dans des cas particuliers et s'appliquent non seulement des principes d'équité mais aussi de justice naturelle — mais le rôle politique que joue le Sénat en matière de grande politique et la meilleure façon d'en tenir compte par rapport à son indépendance vis-à-vis de la Chambre des communes et de l'exécutif.

I wish simply to point out that there are other high public officers of whom we expect a certain level of independence and autonomy. These functionaries are appointed for seven-year terms in most cases, with the possibility of renewal spelled out in the legislation, yet we do not expect that at five or six years they will start acting less independently in those positions.

I can mention, among others, the heads of administrative tribunals such as the Immigration and Refugee Board, the Canadian Human Rights Commission, or officers of Parliament such as the Privacy Commissioner or the Commissioner of Official Languages. They are all appointed to fixed terms of seven years and their terms are renewable based on the provisions of the legislation, yet we still expect a certain level of probity and independence on their part.

Senator Angus: My only query in that regard is then why have the drafters of the legislation not specified that the terms are renewable? Why leave it open to vagueness and trying to figure out what was intended? I am talking about longer down the road.

Mr. Newman: This is a constitutional amendment, and it is part of the spare drafting one sees in the context of the Constitution. It is not necessarily as detailed as some of the statutory provisions we would look at. In addition, the implication is that given the power of appointment, if it does not say that the term cannot be renewed, as is the case for the Auditor General — that is an exception to the other examples I was giving you — then, in principle, as the legislation is currently worded, nothing prevents the Governor General from proceeding to appoint for a further term.

Senator Austin: Mr. Chairman, I am very happy to have our witnesses here today. They are very senior and excellent public servants. Mr. Newman, I say that because I need to ask you a question to define your role here, particularly because of what you said in your opening remarks. Are you here as an advocate for the government, or are you here to advise us as equally and objectively as you would advise the government with respect to constitutional issues?

Mr. Newman: Your question is a good one. It is one I think any witness coming before a parliamentary committee must ask himself or herself beforehand. I have been involved in the development of the legislation from the perspective of a legal adviser. There are roles of providing legal advice in which I am bound by solicitor-client privilege and then there are other roles one can play as an advocate. I am attempting not to play an advocacy role in any way of a partisan nature because I am an official. I am not an elected or appointed politician. However, to the extent to which you ask me questions relating to the amending

Je voudrais signaler qu'il y a d'autres hauts fonctionnaires dont nous attendons un certain niveau d'indépendance et d'autonomie. Ces fonctionnaires sont nommés pour la plupart pour une période de sept ans, la possibilité du renouvellement du mandat étant mentionnée expressément dans la loi, et pourtant, nous ne nous attendons pas à ce qu'après cinq ou six ans, ils se mettent à agir de façon moins indépendante dans ces fonctions.

Je pourrais mentionner entre autres les dirigeants des tribunaux administratifs comme la Commission de l'immigration et du statut de réfugié, la Commission canadienne des droits de la personne, ou les hauts fonctionnaires du Parlement, comme le Commissaire à la protection de la vie privée ou le Commissaire aux langues officielles. Ils sont tous nommés pour des mandats fixes d'une durée de sept ans et leur mandat est renouvelable conformément aux dispositions de la loi; pourtant, on s'attend toujours à un certain niveau de probité et d'indépendance de leur part.

Le sénateur Angus : Je me demande alors pourquoi les rédacteurs de ce projet de loi n'ont pas spécifié que les mandats sont renouvelables. Pourquoi laissent-ils planer un doute et nous obligent-ils à tenter de deviner ultérieurement quelles étaient leurs intentions?

M. Newman : Il s'agit d'une modification de la Constitution et cela fait partie du mode de rédaction économique qui est courant dans ce contexte. Ce n'est pas nécessairement aussi précis que certaines autres dispositions législatives. En outre, compte tenu du pouvoir de nomination, si les dispositions du projet de loi ne précisent pas que le mandat ne peut pas être renouvelé, comme dans le cas du vérificateur général — c'est une exception par rapport aux autres exemples que je cite — en principe, dans le contexte du libellé actuel du projet de loi, rien n'empêche le gouverneur général de procéder à une nomination pour un mandat supplémentaire.

Le sénateur Austin : Monsieur le président, je suis très heureux de la présence de ces témoins. Ce sont des fonctionnaires qui ont beaucoup d'ancienneté et qui sont très compétents. Monsieur Newman, je le précise car j'ai besoin que vous répondiez à une question concernant vos fonctions dans ce contexte, en particulier en raison des commentaires que vous avez faits dans vos observations préliminaires. Êtes-vous ici à titre de défenseur du gouvernement ou pour nous donner des avis aussi équitables et objectifs que ceux que vous donneriez au gouvernement sur les questions constitutionnelles?

M. Newman : Votre question est une bonne question. C'est une question qu'à mon avis toute personne qui témoigne devant un comité parlementaire doit se poser au préalable. J'ai participé à l'élaboration du projet de loi à titre de conseiller juridique. Mes fonctions consistent donc à donner des avis juridiques et, à ce titre, je suis tenu par le secret professionnel; il y a ensuite d'autres fonctions que l'on peut remplir à titre d'avocat. Je ne tente pas de jouer un rôle de défenseur d'intérêts particuliers, qui soient de quelque façon de nature partisane, car je suis fonctionnaire. Je ne suis pas un politicien élu ou nommé. Cependant, dans la mesure

formula or how this bill fits within the current constitutional framework, I will try to give you the best objective view I can, bearing in mind that I cannot really reveal legal advice.

Senator Austin: I am looking for your best professional and objective view, not tainted by a political responsibility. Is that possible?

Mr. Newman: I am afraid you will just have to accept that I will give you the best answer I can in view of the position in which I find myself. You will have other witnesses who will be more independent from your perspective perhaps than I will be in terms of their position in relation to the legislation.

I am a government lawyer. You will have other constitutional experts to whom you can address questions as well.

Senator Austin: I appreciate your answer. I have long advocated in issues of constitutional matters that the Senate committee have its own independent advice, because I have been in government and I understand the role of an official from the Department of Justice Canada.

What I want to do — and this is preliminary to the questions and therefore the nature of your answers — is address the final recital in the preamble of Bill S-4 more or less that argues that the bill does not change the essential characteristics of the Senate. I have the bill here and I probably should go to it so that I can quote it exactly.

It says:

> And whereas Parliament wishes to maintain the essential characteristics of the Senate within Canada's parliamentary democracy as a chamber of independent, sober second thought;

That is an aspiration and a political argument. It does not by itself conclude the issue; I think you would agree to that.

Mr. Newman: I would certainly agree that it is an aspiration. It is part of a preamble; and a preamble, of course, is one means of demonstrating legislative intent. Therefore, it would be part of the context in which the provisions would be interpreted, one would think.

Senator Austin: I am sure you are very familiar with the upper house reference, a 1980 Supreme Court advisory opinion. As you know, the government of Prime Minister Trudeau in 1978 asked the Supreme Court of Canada a series of questions that related to Bill C-60, one I was quite familiar with. Among the questions asked was whether the Parliament of Canada alone could change the tenure of members of the Senate.

où vous me posez des questions concernant la formule de modification ou la conformité de ce projet de loi au cadre constitutionnel actuel, je m'applique à vous donner l'opinion la plus objective possible, compte tenu du fait que je ne peux pas divulguer les avis juridiques.

Le sénateur Austin : Je voudrais votre opinion la plus professionnelle et la plus objective possible, une opinion qui ne soit pas déformée par une responsabilité politique. Est-ce possible?

M. Newman : Je crains que vous n'ayez pas le choix et que vous deviez accepter le fait que je vous donnerai la meilleure réponse possible compte tenu de ma situation. Vous entendrez d'autres témoins qui, à votre point de vue, seront plus indépendants que moi dans leur situation par rapport à ce projet de loi.

Je suis un avocat du gouvernement. Vous accueillerez d'autres experts en matière de Constitution auxquels vous pourrez poser également des questions.

Le sénateur Austin : J'apprécie votre réponse. J'ai longtemps préconisé qu'en ce qui concerne les questions constitutionnelles, le comité sénatorial ait des avis indépendants, car j'ai été fonctionnaire, et je comprends le rôle d'un fonctionnaire du ministère de la Justice.

Ce que je voudrais faire — et c'est préliminaire aux questions et, par conséquent, à la nature de vos réponses —, c'est examiner le dernier paragraphe du préambule du projet de loi S-4 qui signale que le projet de loi ne modifie pas les caractéristiques essentielles du Sénat. J'ai le projet de loi ici et j'aurais probablement intérêt à lire ce passage pour le citer avec exactitude.

Il dit ceci :

> que le Parlement entend préserver les caractéristiques essentielles du Sénat, lieu de réflexion indépendante, sereine et attentive au sein de la démocratie parlementaire canadienne,

C'est une aspiration et un argument politique. Cela ne règle pas la question comme telle; je pense que vous l'admettrez.

M. Newman : J'admets que c'est une aspiration. Cela fait partie d'un préambule et un préambule est, bien entendu, une façon de démontrer l'objet d'un projet de loi. Par conséquent, on aurait tendance à penser qu'il ferait partie du contexte dans lequel les dispositions seraient interprétées.

Le sénateur Austin : Je suis certain que vous connaissez le renvoi relatif à la Chambre haute, un avis consultatif donné par la Cour suprême en 1980. Comme vous le savez, le gouvernement du premier ministre Trudeau avait, en 1978, posé à la Cour suprême du Canada une série de questions relatives au projet de loi C-60, que je connaissais très bien. Une de ces questions avait pour objet de savoir si le Parlement du Canada pouvait unilatéralement modifier la durée du mandat des sénateurs.

At page 76 [1980] 1 SCR, the Supreme Court said:

> At present, a senator, when appointed, has tenure until he attains the age of seventy-five. At some point, a reduction of the term of office might impair the functioning of the Senate in providing what Sir John A. Macdonald described as "the sober second thought in legislation". The Act contemplated a constitution similar in principle to that of the United Kingdom, where members of the House of Lords hold office for life. The imposition of compulsory retirement at age seventy-five did not change the essential character of the Senate. However, to answer this question we need to know what change of tenure is proposed.

So I really have three questions for you. First, the Act contemplated a Constitution similar in principle, and that principle is an appointed chamber of the House of Lords. How do you deal constitutionally with that issue — what is your constitutional argument?

Second, on the question of at some point a reduction in the term of office might impair the functioning of the Senate, how do you determine that eight years is constitutional? Would one year be constitutional? If it would not be, then why eight years? You know where that argument is going.

I will leave those two questions with you and I have one more.

Mr. Newman: Thank you for those interesting questions and clearly you have pinpointed the key passage in the Upper House Reference that relates to the question of tenure, which the court demurely declined to answer directly.

In relation to "a Constitution similar in Principle to that of the United Kingdom," clearly that is a recital in the preamble of the Constitution Act, 1867, which carries great weight. To this day, it is cited in constitutional cases, including the Provincial Court Judges Reference and the New Brunswick Broadcasting case, the Secession Reference and so on.

It does carry weight and it is important. I would say that in the current context of our constitutional amending formula, it is quite clear on the face of section 42, read with section 44, that any change to the fundamental essential characteristics of the Senate — which I would submit are laid out in section 42, at least for the most part — would require a complex constitutional amendment; that is, an amendment involving the provincial legislative assemblies.

The Senate is in law, and at law, an appointed, not an elected body. Everyone would have to bear that in mind, including with whatever legislative measures the government brings forward. As a matter of constitutional law, as a matter of law, the Senate is an appointed body.

There will be a question as to, "Yes, but are you speaking so much in terms of formalism rather than purposiveness and effectiveness, that you are saying we can transform the Senate effectively while leaving it, in terms of its shell, as being an

À la page 78 [1980] 1 R.C.S., la Cour suprême dit que :

> À l'heure actuelle, un sénateur nommé reste en poste jusqu'à l'âge de 75 ans. Une réduction éventuelle de la durée du mandat pourrait empêcher le Sénat de « modérer et de contrôler la législation », comme l'a décrit Sir John A. Macdonald. L'Acte envisagerait une constitution semblable en principe à celle du Royaume-Uni, où les membres de la Chambre des lords restent en poste toute leur vie. L'imposition de la retraite obligatoire à 75 ans n'a eu aucune incidence sur le caractère essentiel du Sénat. Cependant, pour répondre à la question, il faudrait que nous sachions quels changements sont proposés.

J'ai en fait trois questions à vous poser. La première, l'Acte envisageait une constitution semblable en principe et ce principe est une Chambre des lords dont les membres seraient nommés. Comment réglez-vous cette question sur le plan constitutionnel? Quel est votre argument constitutionnel?

Deuxièmement, en ce qui concerne la possibilité qu'une réduction de la durée du mandat empêche le Sénat de remplir ses fonctions, comment pouvez-vous décider qu'un mandat d'une durée de huit ans est constitutionnel? Est-ce qu'un mandat d'une durée d'un an serait constitutionnel? Sinon, pourquoi avoir choisi huit ans? Vous savez dans quel sens va l'argument.

Je vous laisse répondre à ces deux questions, puis j'en aurai encore une autre à vous poser.

M. Newman : Merci pour ces questions intéressantes. Vous avez indéniablement signalé le passage clé du Renvoi relatif à la Chambre haute qui porte sur la question de la durée du mandat, question à laquelle la Cour a sagement refusé de répondre de façon directe.

En ce qui concerne un principe constitutionnel semblable à celui qui a été adopté au Royaume-Uni, il s'agit clairement d'un énoncé du préambule de la Loi constitutionnelle de 1867, qui a beaucoup de poids. Jusqu'à ce jour, il est cité dans les affaires concernant la Constitution, y compris dans le Renvoi des juges de la cour provinciale et dans l'affaire concernant la radiodiffusion au Nouveau-Brunswick, dans le Renvoi sur la sécession, et cetera.

Il a du poids et il est important. Je pense que dans le contexte actuel de notre formule de modification de la Constitution, il est clair qu'en vertu de l'article 42, examiné conjointement avec l'article 44, toute modification des caractéristiques essentielles fondamentales du Sénat — qui sont exposées à l'article 42, du moins en grande partie — nécessiterait une modification de la Constitution complexe, c'est-à-dire une modification exigeant la participation des assemblées législatives provinciales.

Le Sénat est, du point de vue du droit, un organisme non élu. Il ne faut jamais l'oublier, y compris dans le contexte des mesures législatives que le gouvernement présente. En matière de droit constitutionnel et en matière de droit tout court, le Sénat est un organisme non élu.

On peut effectivement se poser la question, mais s'agit-il de formalisme plutôt que d'intentionnalité et d'efficacité, quant à savoir si l'on peut transformer le Sénat efficacement tout en le maintenant, du moins dans son enveloppe extérieure, en tant

appointed body?" I would have to say again that our Constitution contains many formal aspects to which we adhere in law; and at the same time, in practice, through constitutional convention and otherwise, we exercise the legal powers in various ways to accommodate the changing values of the country.

I think that is a factor as well. In other words, it is perfectly consistent to say that the Senate is, as a matter of constitutional law, an appointed, not an elected body, and to say that there may be means down the road for informing the appointment process.

Let me get to your second question, if I may, the point that the Supreme Court had said that, and I take it almost as a spectrum, at some point a reduction would or could compromise the effectiveness of the Senate as a chamber of sober second thought in the legislative process. I will not stand on solicitor-client privilege. I believe I can say right now if any piece of legislation came forward and tried to reduce the tenure of senators to one year, it would not pass muster. That would obviously affect the nature of the Senate to that degree.

However, I would ask you, senator, if that is appropriate, through the chair, were the government to have come forward simply with the type of amendment that was proposed in 1972 by the Molgat-MacGuigan committee to reduce the age of retirement of senators to 70 years instead of 75 years, surely that would be permissible under section 44 of the amending formula. We would not go to the provinces to seek their formal concurrence through provincial legislative assemblies for that type of change.

It does become, to some extent, a matter of degree. It may sound as well, if I may invoke other metaphors, like the death of a thousand cuts, but at some point you come to the question as it where can Parliament legitimately act, including with the concurrence of the Senate.

Eight years is quite close to what has been recommended. It is a principled figure, derived I would think from looking at the recommendation of the Molgat-Cosgrove committee, looking at the terms of other upper houses and Senates, looking at what would be necessary for experience. I think that is where the eight years comes from, and it is a defendable period of time under section 44.

The Prime Minister said a term of maybe nine years would be appropriate, or six years, so it is not hard and fast. However, I think eight years is well within the range of what lawyers would consider reasonable.

The Chairman: In the interests of fairness, but benefiting from an exchange between witnesses and one of the senators, if Senator Austin is prepared to engage, that is fine. However, I would remind him and those who are before us as witnesses that his time is up, so if we could do it very briefly.

qu'organisme non élu? Je dois rappeler que notre Constitution renferme de nombreux aspects formels auxquels nous adhérons en droit alors qu'en pratique, en se fondant sur une convention constitutionnelle et sur d'autres principes, nous exerçons les pouvoirs légaux de diverses façons pour tenir compte de l'évolution des valeurs de notre société.

Ce facteur intervient également. En d'autres termes, il est parfaitement logique de dire que le Sénat est, en droit constitutionnel, un organisme non élu, dont les membres sont nommés tout en précisant qu'il y a peut-être des possibilités d'éclairer le processus de nomination.

En ce qui concerne votre deuxième question, à savoir que la Cour suprême avait signalé, et je prends pratiquement cela comme un spectre, qu'une réduction compromettrait ou pourrait compromettre à un moment ou l'autre l'efficacité du Sénat à titre de chambre de second examen modéré et réfléchi, je n'invoquerai pas le secret professionnel. Je pense pouvoir signaler d'emblée que si l'on présentait un projet de loi visant à réduire la durée du mandat des sénateurs à un an, il ne serait pas jugé valable. Une telle initiative aurait forcément une incidence négative sur la nature du Sénat.

Sénateur, je vous le demande toutefois, si c'est approprié, par l'intermédiaire du président, à supposer que le gouvernement se soit contenté de proposer le type de modification qui fut proposée en 1972 par le Comité Molgat-MacGuigan pour réduire l'âge de la retraite des sénateurs de 75 ans à 70 ans, ce serait certainement autorisé en vertu de l'article 44 de la formule de modification. Nous ne serions pas obligés de solliciter l'accord officiel des provinces par le biais des assemblées législatives provinciales en ce qui concerne ce type de changement.

C'est donc dans une certaine mesure une question de degré. Si vous me permettez de faire appel à d'autres métaphores, cela pourrait être comparable à une mort à petit feu mais, à un certain moment, on en arrive à se demander si le Parlement peut agir légitimement, y compris avec l'accord du Sénat.

Un mandat de huit ans est proche de ce qui a été recommandé. C'est un chiffre raisonné qui devrait être fondé sur la recommandation du Comité Molgat-Cosgrove, sur les mandats dans d'autres chambres hautes et sénats, sur ce qui serait nécessaire à titre d'expérience. Je pense que c'est de là que vient le chiffre de huit ans, et j'estime que c'est une période défendable aux termes de l'article 44.

Le premier ministre a dit qu'un mandat d'une durée de neuf ans ou de six ans, serait peut-être approprié. Ce n'est donc pas un chiffre absolument définitif. Cependant, j'estime que huit ans correspond approximativement à une durée que des avocats jugeraient raisonnable.

Le président : Par souci d'équité, mais en profitant d'une discussion entre les témoins et un des sénateurs, je suis d'accord si le sénateur Austin est disposé à continuer. Cependant, je lui rappelle et je rappelle aux témoins que le temps dont il disposait est écoulé. J'apprécierais par conséquent que l'on soit très bref.

Senator Austin: The situation is, chair, that the answers have been fulsome and I appreciate them, but it would be unfair for me not to be able to pursue the lines at this point because this is where the answers were given. I want to say, I appreciate the answers and your attempt to make and justify the bill.

The question essentially is that the Constitution speaks with clarity and the Supreme Court has interpreted it. Now that we have a Supreme Court reference, could you tell us whether, in your opinion, this case stands as good law, having preceded the constitutional amendment? Are you prepared to make an argument that this is no longer good law because of the constitutional amendment?

Mr. Newman: I will hedge my response, senator, and be cautious. Since the reference, there has been an enactment of the amending formula, but it is still a very important reference point to the interpretation of how the amending formula works. No constitutional lawyer worth his or her salt would attempt to interpret sections 44 and 42 without having a look at what the Supreme Court said in the Upper House Reference. I think it is, by and large, good law. There are some slight adjustments to which we could allude in looking at the amending formula, but I think it is a very important precedent.

Senator Comeau: You referred to the number of years, whether seven, eight, nine years, as reasonable. I present another argument: The current average tenure of senators is 9.25 years. Eight years would be close to that average, but nine years would be closer.

Continuing with the constitutionality of the bill, I understand that section 42 would deal with powers, qualifications, residence and method of selection. However, I recall in the 1980s when a senator was appointed after a popular election. The Prime Minister chose to use it as a consultative election and recommended to the Governor General that the person who had been elected be appointed.

During the two-year Meech Lake negotiations, four senators were appointed under a method of selection that could have been considered unconstitutional but it was done. There were never any challenges to what would be, almost, a section 42 provision. I cannot see what the argument is now because such major provisions were accepted at the time. Some people are now saying that tenure is such a huge change. I am trying to wrap my mind around how people could accept selection but not accept tenure. I would like you to comment on that.

[*Translation*]

Mr. Newman: At the time of the Meech Lake Accord, it was anticipated to establish an appointment process taking more into account the provincial concerns in this regard. The were no challenges at that time, but I would still like to make a comment on this subject.

Le sénateur Austin : Monsieur le président, les réponses ont été très étoffées, ce que j'apprécie, mais il serait injuste de ne pas me permettre de continuer à poser les questions que j'ai à poser. J'apprécie les réponses et votre tentative de justifier le projet de loi.

La question est essentiellement que la Constitution est claire à ce sujet et que la Cour suprême l'a interprété. Étant donné que nous avons un renvoi à la Cour suprême, pourriez-vous nous dire si, à votre avis, ce projet de loi peut être considéré comme une mesure législative acceptable, compte tenu du fait qu'elle précède la modification de la Constitution? Êtes-vous disposé à dire que ce n'est plus une bonne mesure législative à cause de la modification de la Constitution?

M. Newman : Je couvrirai ma réponse, sénateur, et ferai preuve de prudence. Depuis le renvoi, la formule de modification a fait l'objet d'une disposition législative, mais c'est toujours un point de repère important pour l'interprétation de l'application de la formule de modification. Aucun avocat spécialisé en droit constitutionnel digne de ce nom ne tenterait d'interpréter les articles 44 et 42 sans examiner les commentaires qu'a faits la Cour suprême dans le Renvoi relatif à la Chambre haute. J'estime que c'est globalement une bonne mesure législative. Nous pourrions y apporter quelques légers ajustements à la lumière de la formule de modification, mais c'est un précédent très important.

Le sénateur Comeau : Vous avez dit qu'une durée de sept, huit ou neuf ans serait raisonnable. J'ai un autre argument à présenter : la durée moyenne du mandat des sénateurs à l'heure actuelle est de neuf années et quart. Une durée de huit ans serait proche de cette moyenne, mais neuf ans serait plus proche.

Toujours à propos de la constitutionnalité du projet de loi, je pense que l'article 42 concerne les pouvoirs, les qualités, les conditions de résidence et le mode de sélection. J'ai toutefois le souvenir d'un sénateur qui, dans les années 80, avait été élu après un scrutin populaire. Le premier ministre avait décidé d'utiliser cette méthode comme élections consultatives et recommandé au gouverneur général de nommer la personne qui avait été élue.

Au cours des négociations sur le lac Meech qui ont duré deux ans, quatre sénateurs ont été nommés en vertu d'un mode de sélection qui aurait pu être jugé anticonstitutionnel. Ce qui serait pratiquement une disposition de l'article 42 n'a jamais fait l'objet d'aucune contestation. Je ne vois pas très bien pourquoi on invoquerait maintenant cet argument, car des dispositions importantes de ce type ont été acceptées alors. Certaines personnes trouvent que c'est un changement énorme en ce qui concerne la durée du mandat. J'essaie de comprendre comment on pourrait accepter la sélection sans accepter le mandat. J'aimerais que vous fassiez des commentaires là-dessus.

[*Français*]

M. Newman : À l'époque de l'Accord du lac Meech, on avait prévu mettre en place un processus de nomination tenant compte davantage des préoccupations des provinces à cet égard. Il n'y avait pas de contestations à ce moment-là, mais j'aimerais quand même faire un commentaire à ce sujet.

Not all constitutional amendments require a review by the courts. Since 1982, in spite of the failure of the Meech Lake Accord and of the Charlottetown agreement, the government passed about ten constitutional amendments. At least three amendments were about the process set out in section 44 and the others were bilateral amendments under section 43, in conjunction with one of the provinces.

I know that four of these amendments were challenged before the courts, having defended the validity of two of those amendments before Quebec and Newfoundland courts. And even there, there was no reference to the Supreme Court. The government was convinced that the constitutional amendments were valid. We thus defended them before the courts.

We hear that it would be chaos if ever this amendment to the Constitution were passed and afterwards made invalid. I would like to specify that if the legislation would have been without effect, nothing would have changed. At that time, a senator would have continued to sit and his term would have lasted until the age of seventy-five. His or her appointment wouldn't have been affected in any way from the point of view of its validity.

Nothing changes from this point of view as it is not a structural amendment to the Constitution which is proposed.

Senator Comeau: My last question concerns the renewal of the term and the argument that as the appointment date comes closer, senators lose their independence.

[*English*]

As we near the eighth year, senators will begin to suck up to the Prime Minister in order to be reappointed.

[*Translation*]

In my view, a senator who would do this would not have his term renewed. On the other hand, to avoid this, we could propose an amendment to the bill so as there is no renewal. This could be done in the case where the second step proposed by the Prime Minister, the elected Senate, would not occur within eight years. Would it be possible?

Mr. Newman: If I understood the extent of your words, either we amend the bill to prohibit a second appointment, or we leave the bill as it is in relation to this issue and there, if ever the second bill results in an act of Parliament and it is an appointment process, Parliament always has the option to amend again the Constitution because this is feasible under section 44, through the legislative amending process.

Senator Comeau: The elected Senate step would probably follow the reform step and it may be preferable not to limit the number of terms at this time in order to prepare the next steps.

Ce ne sont pas tous les amendements constitutionnels qui nécessitent un examen par les tribunaux. Depuis 1982, malgré l'échec de l'Accord du lac Meech et de l'entente de Charlottetown, le gouvernement a fait adopter une dizaine d'amendements constitutionnels. Au moins trois modifications concernaient la procédure l'article 44 et les autres étaient des modifications bilatérales en vertu de l'article 43, avec le concours de l'une des provinces.

Je sais que quatre de ces amendements ont été contestés devant les tribunaux, ayant défendu la validité de deux de ces amendements devant les tribunaux du Québec et de Terre-Neuve. Encore là, il n'y avait pas de renvoi à la Cour suprême. Le gouvernement était persuadé que les modifications constitutionnelles étaient valides et valables. On les a donc défendues devant les tribunaux.

On entend dire que ce serait le chaos si jamais cette modification à la Constitution était adoptée et par la suite, invalidée. J'aimerais préciser que si la loi avait été jugée sans effet, rien n'aurait changé. À ce moment-là un sénateur aurait continué de siéger et son mandat durerait jusqu'à l'âge de 75 ans. Sa nomination n'aurait été touchée d'aucune façon du point de vue de sa validité.

Rien ne change sur ce plan puisqu'il ne s'agit pas d'une modification structurelle qu'on propose à la Constitution.

Le sénateur Comeau : Ma dernière question porte sur le renouvellement du mandat et sur l'argument qui dit qu'au fur et à mesure qu'on approche de la date de nomination, les sénateurs perdent leur indépendance.

[*Traduction*]

À l'approche de l'échéance de huit ans, les sénateurs se mettront à lécher les bottes du premier ministre pour être nommés à nouveau.

[*Français*]

D'après moi, un sénateur qui ferait cela ne verrait pas son mandat renouvelé. Par contre, pour éviter que cela se produise, on pourrait proposer un amendement au projet de loi afin qu'il n'y ait pas de renouvellement. Cela pourrait se faire dans le cas où la deuxième étape proposée par le premier ministre, le Sénat élu, n'aurait pas lieu d'ici huit ans. Est-ce que ce serait possible?

M. Newman : Si j'ai bien saisi la portée de votre propos, soit on amende le projet de loi pour interdire une seconde nomination, soit on laisse le projet de loi tel quel par rapport à cette question, et là, si jamais le deuxième projet de loi n'aboutit pas à une loi adoptée par le Parlement et que c'est une procédure de nomination, il est toujours loisible au Parlement de modifier à nouveau la Constitution parce que cela se fait en vertu de l'article 44, par le processus de modification législative.

Le sénateur Comeau : Il est probable que l'étape du Sénat élu suivrait celle de la réforme et peut-être il vaut mieux de ne pas limiter le nombre de mandats à ce moment-ci afin de préparer les prochaines étapes.

[*English*]

The Chairman: Senator Tkachuk has a supplementary to one of Senator Comeau's questions.

Senator Tkachuk: My question follows along the discussion on the eight-year term of tenure. It is always interesting to discuss the relationship between the Canadian Senate and the British House of Lords. However, surely we would not propose legislation that would allow senators to leave their Senate seats to their children as they did in 19th century England. By title, you do not get to sit in the Senate.

The courts would be reasonable. We would be acting unconstitutionally if we did something to impair the functioning of the Senate. Surely no one can argue that an eight-year term would impair the functioning of the Senate. It would probably renew the Senate and might even make things better. I want you to comment on that.

Would there be a problem if the term was 15 or 20 years? It is simply a question of a number that is reasonable. Even the courts can be reasonable, I assume. I think an eight-year term would be considered reasonable and Bill S-4 would not be ruled unconstitutional.

Dan McDougall, Director of Operations, Legislation and House Planning, Privy Council Office: I think that is, essentially, the issue. Is it a reasonable term and does it provide a sufficient amount of time for senators to discharge the functions given to them by the Constitution?

With reference to the original question from Senator Austin, you referred to the preamble to the Constitution giving guidance as to how the Constitution itself is interpreted. It goes back as well to the preamble that you have here, which presumably, as Mr. Newman indicated, would give guidance to the intention of the government at the time as to what they intended by this measure. The intention, as was referenced when you quoted from the preamble, is to maintain those essential characteristics and to maintain the Senate as a chamber of independent sober second thought. The question then becomes, is that length of time sufficient to give effect to that intention? The policy of the government is that what we are proffering here is a length of time that will do that.

As has been mentioned, if you make a number of comparisons around the world, you will find that there are a number of different terms. There is quite a range of term limits associated with those upper houses. As the Prime Minister indicated earlier, I think you will find that few, if any, have a length of term we have here, which is potentially 45 years.

On the other hand, the lowest time limit I am aware of is six years. Australia, which has a legislative upper house similar in some ways to ours, has a six-year term. France has a nine-year

[*Traduction*]

Le président : Le sénateur Tkachuk voudrait poser une question supplémentaire à une des questions du sénateur Comeau.

Le sénateur Tkachuk : Ma question est liée aux discussions sur la durée du mandat de huit ans. Il est toujours intéressant de discuter des liens entre le Sénat du Canada et la Chambre des lords britannique. Cependant, nous ne proposerions certainement pas un projet de loi qui permettrait aux sénateurs de léguer leur siège au Sénat à leurs enfants comme cela se faisait dans l'Angleterre du XIX^{e} siècle. On ne peut pas obtenir un siège au Sénat en vertu d'un titre.

Les cours seraient raisonnables. Nous agirions de façon anticonstitutionnelle si nous prenions une initiative ayant pour objet d'empêcher le Sénat de remplir efficacement ses fonctions. Personne ne peut prétendre qu'un mandat d'une durée de huit ans l'en empêcherait. Il renouvellerait probablement le Sénat et améliorerait peut-être la situation. Je voudrais que vous fassiez des commentaires à ce sujet.

Est-ce que cela poserait un problème si le mandat était d'une durée de 15 ou 20 ans? Il s'agit simplement de trouver un chiffre qui soit raisonnable. Même les cours peuvent être raisonnables, je présume. Un mandat d'une durée de huit ans serait jugé raisonnable et le projet de loi S-4 ne serait pas considéré comme anticonstitutionnel.

Dan McDougall, directeur des opérations, Législation et planification parlementaire, Bureau du Conseil privé : Je pense que c'est essentiellement la question que l'on se pose. S'agit-il d'un mandat d'une durée raisonnable et accorde-t-il assez de temps aux sénateurs pour s'acquitter des fonctions qui leur sont attribuées en vertu de la Constitution?

En ce qui concerne la question initiale du sénateur Austin, vous avez mentionné que le préambule de la Constitution donnait des instructions sur l'interprétation de la Constitution comme telle. Il faut se reporter également au préambule du projet de loi qui, comme M. Newman l'a mentionné, donnerait probablement des informations sur les intentions du gouvernement en ce qui concerne cette mesure. Comme l'indique le passage du préambule que vous avez cité, les intentions sont de préserver les caractéristiques essentielles du Sénat, en tant que lieu de réflexion indépendante, sereine et attentive. La question qui se pose dès lors est la suivante : cette durée est-elle suffisante pour que ces intentions soient respectées? Le gouvernement estime que la durée que nous proposons dans ce projet de loi est une durée qui le permettra.

Comme quelqu'un l'a mentionné, en comparant les chambres hautes d'autres pays, on constate que la durée du mandat varie dans une fourchette assez large. Comme l'a signalé le premier ministre tout à l'heure, un mandat d'une durée comparable à celle du mandat actuel au Canada, qui peut atteindre 45 ans, ne se retrouve pratiquement nulle part.

Par ailleurs, la durée la plus courte que je connaisse est de six ans. En Australie, pays où la Chambre haute est analogue à la nôtre à certains égards, la durée du mandat est de six ans.

term. Again, there is a range of terms with regard to upper houses within the global community. A term of eight years falls within that range.

I think that is probably reflected as well in previous studies that have been done on this subject and that had been mentioned previously when the Senate itself studied this area and made recommendations. They tend to coalesce around the same point.

Senator Hays: Supplementary questions in my experience as a chairman can be a slippery slope. Out of deference to Senator Austin, the dean of the Senate, I will extend a second supplementary.

Senator Austin: Practice them or do not practice them, but I will take this one.

The difference, Mr. McDougall, is that we have a recital that refers to a chamber that is for life, that being the House of Lords.

I understand your points. In the world of the "ought," that might be a good argument. In the world of the "is," we have a Constitution that is similar in characteristic to Westminster, and that is still an appointed chamber. The question of respecting the intent of the founders is one of those issues we have seen Mr. Newman argue away from.

Mr. Newman: I would add that the Supreme Court has told us we have a Constitution similar in principle to that of the United Kingdom but not identical. There is always going to be some play there.

I think we all agree that the Senate is an appointed body, and that is what we take from that recital in relation to the House of Lords. It is to be appointed rather than elected, but it is not an aristocratic upper body. It is an upper body modelled on the House of Lords but not identical to it.

Senator Murray: Your friend and former colleague Leslie Seidle was here yesterday and told us that the property qualification can be dropped by using section 44. Can I take it that is your view as well?

Mr. King: To be frank, I am not sure we concur with Mr. Seidle in his conclusion. I can say, however, it was not one of the things that came up in the context of putting Bill S-4 together.

Senator Murray: What about the age qualification?

Mr. Newman: Are you talking about the 30-year rule?

Senator Murray: Yes. Could Parliament acting under section 44 change the 30 years to 21 or 35?

Mr. Newman: Possibly.

Senator Murray: You are not sure about the property qualification?

Mr. King: Residency is a more difficult qualification.

En France, il est de neuf ans. La durée du mandat des chambres hautes varie donc considérablement d'un pays à l'autre. Un mandat de huit ans correspond à cette fourchette.

C'est probablement ce qu'indiquent des études qui ont été faites antérieurement à ce sujet et qui ont déjà été mentionnées lorsque le Sénat a étudié lui-même la question et a fait des recommandations qui ont tendance à aller dans le même sens.

Le sénateur Hays : D'après mon expérience, les questions supplémentaires peuvent comporter des risques de dérapage. Par respect envers le sénateur Austin, qui est le doyen du Sénat, je permettrai une deuxième question supplémentaire.

Le sénateur Austin : Qu'on pratique les questions supplémentaires ou qu'on ne les pratique pas, j'accepterai celle-ci.

La différence, monsieur McDougall, est qu'il s'agit ici d'une énumération faisant référence à une chambre nommée à vie, à savoir la Chambre des lords.

Je comprends vos arguments. Cela pourrait être un bon argument au niveau des principes. Cependant, dans le contexte réel, nous avons une Constitution dont les caractéristiques sont semblables à celles de Westminster, à savoir que le Sénat demeure une chambre dont les membres sont nommés. La question du respect de l'intention des fondateurs est une des questions qui ont été esquivées par M. Newman.

M. Newman : Je signale également que la Cour suprême nous a confirmé que nous avions une Constitution fondée sur des principes analogues à ceux sur lesquels repose celle du Royaume-Uni, mais qu'elle n'est pas identique. Il restera toujours une certaine marge de manœuvre.

Nous reconnaissons tous que le Sénat est un organisme non élu et que c'est ce qu'indiquent les dispositions relatives à la Chambre des lords. Ses membres doivent être nommés plutôt qu'élus, mais il ne s'agit pas d'une chambre haute aristocratique. C'est une chambre haute calquée sur le modèle de la Chambre des lords, mais pas identique.

Le sénateur Murray : Votre ami et ex-collègue, Leslie Seidle, a témoigné hier et il a signalé que l'on pouvait retirer les conditions relatives aux propriétés au moyen de l'article 44. Puis-je en déduire que c'est votre opinion également?

M. King : En toute franchise, je ne suis pas certain que nous approuvions la conclusion de M. Seidle. Je peux toutefois signaler que ce n'est pas une des questions qui a été examinée dans le contexte de l'élaboration du projet de loi S-4.

Le sénateur Murray : Et que pensez-vous de la disposition concernant l'âge?

M. Newman : Parlez-vous de la règle de 30 ans minimum?

Le sénateur Murray : Oui. Le Parlement pourrait-il, aux termes de l'article 44, ramener l'âge de 30 à 21 ans ou le porter à 35 ans?

M. Newman : Ça se pourrait.

Le sénateur Murray : Vous n'êtes pas certain en ce qui concerne les conditions relatives aux propriétés?

M. King : Les conditions de résidence sont plus complexes.

Mr. Newman: The residence qualifications are clearly outlined in section 42.

The court indicated in the upper house reference that the property qualification was probably not as important today as it had been in 1867. There is an indication it might be able to be done by section 44. We have never had to have a considered view on it, and I could not reveal —

Senator Murray: Mr. Seidle was much more categorical than that.

Mr. Newman: He is no longer with us.

Senator Murray: He works for the Institute for Research on Public Policy now and is independent.

Bill S-4 provides for an eight-year term for senators who are appointed in the future. Could the government have made it retroactive and gotten rid of all of us who have served eight years or more, leaving only Senator Segal and Senator Dawson at this table? Could they have done that under section 44?

Mr. Newman: With respect, that is a hypothetical question. It is not what the government has put forward, nor was it what the government put forward in 1965 when the first amendment to Senate tenure was introduced. In other words, in both bills, the status quo was maintained for sitting senators.

I hesitate to venture into that sort of speculation because it is certainly not the intention of the government to have it that way.

Senator Murray: It is not the intention of the government, but if a reduction from retirement at age 75 to an eight-year term is within the power of Parliament acting under section 44, I do not know why making it retroactive would not also be possible. We will leave it at that if you do not want to answer it.

In the early 1960s, the precedent for what Mr. Pearson did later in the Senate was the Diefenbaker government's amendment to retire federally appointed judges at the age of 75. I should know the answer to this question, but I do not: Could Parliament acting alone make the retirement age 65, or could we decide to appoint judges for an eight- or ten-year term acting alone?

Mr. Newman: I hesitate to go down that road partly because it is speculation. I understand why you are raising the concern, and that is the analogy with the amendments in 1960 and 1965 both having ended up with a retirement age of 75 years.

I tried to make the point earlier that I think one would not want to press the analogy of judicial functions, vis-à-vis legislative and political functions, too far in terms of what level of independence may be required. It is not, from my perspective, inimical to the exercise of legislative power or political power of the type the Senate wields responsibly and has wielded to date to

M. Newman : Les conditions de résidence sont spécifiées à l'article 42.

La Cour a indiqué dans le renvoi relatif à la Chambre haute que les conditions relatives à la propriété n'étaient probablement pas aussi importantes aujourd'hui qu'elles ne l'étaient en 1867. Ce serait une indication que ce serait peut-être possible en vertu de l'article 44. Nous n'avons jamais dû avoir une opinion raisonnée à ce sujet et je ne pourrais pas révéler...

Le sénateur Murray : M. Seidle a été beaucoup plus catégorique que cela.

M. Newman : Il n'est plus avec nous.

Le sénateur Murray : Il travaille maintenant pour l'Institut de recherche en politiques publiques et est indépendant.

Le projet de loi S-4 instaurerait un mandat d'une durée de huit ans en ce qui concerne les sénateurs qui seraient nommés à l'avenir. Le gouvernement pourrait-il rendre cette disposition rétroactive et se débarrasser de tous les sénateurs qui sont en fonction depuis huit ans ou plus, seuls les sénateurs Segal et Dawson restant à cette table? Aurait-il pu le faire en vertu de l'article 44?

M. Newman : Sauf votre respect, c'est une question hypothétique. Ce n'est pas ce que le gouvernement a proposé ni ce qu'il avait proposé en 1965 lorsqu'il a présenté la première modification concernant la durée du mandat des sénateurs. En d'autres termes, dans les deux projets de loi, le statu quo a été maintenu en ce qui concerne les sénateurs en poste.

J'hésite à me lancer dans ce type de discussion hypothétique car ce n'est certainement pas dans les intentions du gouvernement.

Le sénateur Murray : Ce n'est pas dans les intentions du gouvernement, mais si le gouvernement peut remplacer la retraite obligatoire à l'âge de 75 ans par un mandat de huit ans en vertu de l'article 44, je ne vois pas pourquoi la rétroactivité d'une telle disposition ne serait pas également possible. Nous ne pousserons pas la question plus loin si vous ne voulez pas y répondre.

Au début des années 60, le précédent en ce qui concerne l'initiative que M. Pearson a prise plus tard au sujet du Sénat était la modification du gouvernement Diefenbaker fixant l'âge de la retraite obligatoire à 75 ans pour les juges de nomination fédérale. Je devrais connaître la réponse à la question suivante, mais je l'ignore : le Parlement pourrait-il fixer unilatéralement l'âge de la retraite à 65 ans ou pourrions-nous décider unilatéralement de nommer des juges pour un mandat de huit ou dix ans?

M. Newman : J'hésite à m'engager dans ce type de discussion car c'est notamment une question hypothétique. Je comprends pourquoi vous la posez, et c'est par analogie avec les modifications de 1960 et de 1965 qui ont abouti à un âge de retraite de 75 ans.

J'ai déjà tenté d'expliquer tout à l'heure qu'à mon avis, il n'est pas souhaitable de pousser trop loin l'analogie entre les fonctions judiciaires et les fonctions législatives et politiques en ce qui concerne le niveau d'indépendance qui pourrait être requis. J'estime que ce n'est pas une entrave à l'exercice du type de pouvoir législatif ou de pouvoir politique qu'exerce et qu'a exercé

contemplate a term of six, eight, nine or 10 years, as opposed to determining where we are with judicial independence these days, because judicial independence and jurisprudence have developed strongly in terms of the separation of powers between the judicial, legislative and executive functions. Of course, the Senate, although independent from the House of Commons and the executive, is nonetheless part of the legislative function.

Senator Murray: I appreciate all that, Mr. Newman. I said I should know the answer to the question. The Supreme Court is mentioned in the Constitution; it is mentioned, I believe, in the amending formula.

Mr. Newman: Yes.

Senator Murray: However, the question is this: Looking at the 1982 amending formula, would Parliament have the power, acting unilaterally, acting alone, without going to 7 and 50 or unanimity or one of the other formulae, to change the tenure of federally appointed judges? Surely I can ask that question and you do know the answer.

Mr. Newman: I do know the answer to a degree. It is not an area in which I necessarily specialize. Other colleagues might ask themselves why I would venture to answer these questions, except out of politeness to your honourable self.

I would say that, yes, of course, there is a legislative power in relation to the courts and in relation to federal courts and federally appointed courts that resides with the Parliament of Canada, and that is through section 101 of the Constitution Act, 1867 in relation to federal courts. There are also powers that relate to federally appointed judges.

I do not want to speculate on what could or could not be done in relation to judges. First, I am not briefed to speak to that issue. Second, I have tried to indicate that I do not think, from my perspective, with all due respect, that it takes us very far in terms of where we go with the Senate. That is what we are dealing with here.

Senator Murray: I appreciate that.

Mr. Newman: There are other colleagues in our department, including in the judicial affairs area, who would be very pleased at some point to engage with you on what could be done in relation to judicial appointments and the tenure of the judiciary. I do not want to go too far in that area.

Senator Murray: It was pretty clear what the Prime Minister was talking about in terms of the future process for selecting senators. It is clear to me, Senator Angus, that he was talking about elections. He was talking about a process that might take place at the same time as provincial or federal elections. I do not think we are talking about some indirect process. The consultative process is election.

le Sénat jusqu'à présent avec autorité, et de façon responsable, d'envisager un mandat de six, huit, neuf ou dix ans, plutôt que de déterminer où nous en sommes actuellement en ce qui concerne l'indépendance judiciaire, car l'indépendance judiciaire et la jurisprudence sont solidement établies en ce qui concerne la séparation des pouvoirs entre les fonctions judiciaires, législatives et exécutives. Naturellement, le Sénat, bien qu'il soit indépendant de la Chambre des communes et de l'exécutif, fait néanmoins partie de la fonction législative.

Le sénateur Murray : Je sais tout cela, monsieur Newman. J'ai dit que je devrais connaître la réponse à la question. La Cour suprême est mentionnée dans la Constitution; je pense qu'elle est mentionnée également dans la formule de modification.

M. Newman : Oui.

Le sénateur Murray : Cependant, la question est la suivante : d'après la formule de modification de 1982, le Parlement aurait-il le pouvoir, en agissant unilatéralement, de son propre chef, sans avoir recours à la formule 7-50, à la règle de l'unanimité ou à une des autres formules, de modifier la durée du mandat des juges de nomination fédérale? Je peux certainement poser cette question et vous connaissez la réponse.

M. Newman : Je connais la réponse dans une certaine mesure. Ce n'est pas un domaine dans lequel je suis nécessairement spécialisé. D'autres collègues pourraient se demander pourquoi je tenterais de répondre à ce type de questions, si ce n'est par politesse envers votre honorable personne.

À mon avis, le Parlement du Canada a effectivement un certain pouvoir législatif en ce qui concerne les cours, et plus particulièrement les cours fédérales et les cours de nomination fédérale, par le biais des dispositions de l'article 101 de la Loi constitutionnelle. Il a également des pouvoirs relatifs aux juges de nomination fédérale.

Je ne veux pas supputer les possibilités en ce qui concerne les juges. Premièrement, je n'ai pas l'information nécessaire pour pouvoir en parler. Deuxièmement, j'ai essayé d'indiquer que, malgré tout le respect que je vous dois, je ne pense pas que cela nous avance beaucoup pour ce que nous voulons faire à propos du Sénat, car c'est la question qui nous intéresse en l'occurrence.

Le sénateur Murray : J'en suis conscient.

M. Newman : D'autres collègues du ministère, notamment dans le secteur des affaires judiciaires, se feraient un grand plaisir de discuter avec vous de ce qui pourrait être fait à propos des nominations judiciaires et du mandat des juges. Je ne veux pas m'aventurer trop loin dans ce domaine.

Le sénateur Murray : Ce dont le premier ministre a parlé à propos du futur processus de sélection des sénateurs est très clair. En ce qui me concerne, il est clair, sénateur Angus, qu'il faisait allusion aux élections. Il faisait allusion à un processus qui pourrait se dérouler simultanément à des élections provinciales ou fédérales. Je ne pense pas qu'il faisait allusion à un processus indirect. Les élections sont le processus de consultation.

One cannot go very far with this. Are we talking about amendments to the present Canada Elections Act? Is that the universe you are in?

Mr. King: As I mentioned at the beginning, I am not in a position to get into any of the details on what may or may not be included in that bill. Hopefully, it will be introduced in the House soon.

It is the position of the government that this will be a popular consultation process. It will be structured in such a way so as not to fetter the ability of the Governor General to appoint senators. That is the position of the government at this point.

Senator Murray: Is that the extent of it?

Mr. King: Yes.

Senator Murray: Are you taking into account the unique situation of Quebec with the 24 senatorial districts?

Mr. King: Again, the bill is far from drafted. One thing for certain is that it will be a very complicated bill.

Senator Murray: The answer to my last question is one that I should know. It is fairly clear from what the Prime Minister had to say this afternoon how he sees this file evolving. "Give me the eight-year term," he says, "and it stands on its own even in an appointed Senate," although he was commendably flexible as to whether it will be renewable or not. "Give me the eight-year term, then this fall we will bring in a bill for elections in the Senate." Then, in answer to Senator Segal, who raised questions about the relationship between this elected Senate and the elected House of Commons — in other words, the question of powers — the Prime Minister said, "At that point we will have to sit down with the provinces." By way of editorial comment, that is leaving a lot of hostages to fortune. I do not think you can leave powers until the end, but you do not have to comment on that, unless you want to, of course.

The powers issue is a 7-50 issue, is it not?

Mr. King: Yes, it is. It is the same as the seat distribution. It would be a 7-50 issue now.

Senator Murray: Presumably, an elected Senate would not want to sit still for a suspensive veto in the amending process. An elected Senate would have the legitimacy to demand a full veto in the amending process.

The Chairman: On your last point, Senator Murray, I guess that would be up to the provinces.

Apropos Senator Murray's last point on amending the Constitution to change the mandate of sitting senators, that probably could be done under section 44. I took it that way. Of

On ne peut pas aller très loin dans ce domaine. Faudrait-il apporter des modifications à l'actuelle Loi électorale du Canada? Est-ce l'univers dans lequel vous vous trouvez?

M. King : Comme je l'ai mentionné précédemment, je ne suis pas en mesure de faire des commentaires précis sur les dispositions que ce projet de loi pourrait contenir ou ne pas contenir. J'espère qu'il sera bientôt présenté à la Chambre.

Le gouvernement estime que ce sera un processus de consultation populaire. Il sera structuré de manière à ne pas entraver la capacité du gouverneur général de nommer des sénateurs. C'est la position actuelle du gouvernement.

Le sénateur Murray : Est-ce là toute la portée de sa position?

M. King : Oui.

Le sénateur Murray : Est-ce que vous tenez compte de la situation particulière du Québec, avec ses 24 divisions sénatoriales?

M. King : Je vous rappelle que la rédaction du projet de loi est loin d'être terminée. Une chose est certaine, c'est qu'il sera très complexe.

Le sénateur Murray : La réponse à ma dernière question est une que je devrais connaître. La perception qu'a le premier ministre de l'évolution de ce dossier est très claire, d'après les commentaires qu'il a faits cet après-midi. Il recommande d'accepter sa proposition, soit un mandat de huit ans, qui se justifierait, même dans un Sénat non élu, quoiqu'il ait fait preuve d'une souplesse louable en ce qui concerne la possibilité de renouveler ce mandat. Il a recommandé que l'on accepte le mandat de huit ans en s'engageant dans ce cas à présenter cet automne un projet de loi concernant les élections au Sénat. Puis, en réponse aux questions du sénateur Segal portant sur les rapports entre le Sénat élu et la Chambre des communes élue — en d'autres termes, la question des pouvoirs — le premier ministre a dit qu'il faudra, à ce moment-là, discuter avec les provinces. J'estime que c'est s'en remettre aux forces du destin. Je ne pense pas que vous puissiez laisser la question des pouvoirs en suspens jusqu'à la fin, mais vous n'êtes pas obligés de faire des commentaires là-dessus, à moins que vous y teniez, bien entendu.

La question des pouvoirs est une question de répartition selon la formule 7-50. Est-ce bien cela?

M. King : Oui. C'est la même chose que la répartition des sièges. Ce serait maintenant une question de répartition selon la formule 7-50.

Le sénateur Murray : Un Sénat élu ne voudrait probablement pas se contenter d'un veto suspensif dans le processus de modification. Un Sénat élu aurait la légitimité d'exiger un veto complet en la matière.

Le président : En ce qui concerne votre dernier commentaire, sénateur Murray, je présume que la décision appartiendrait aux provinces.

À propos du dernier commentaire du sénateur Murray sur la modification de la Constitution pour modifier le mandat des sénateurs en poste, je pense que ce serait probablement possible

course, the Senate has an absolute veto on constitutional initiatives taken under section 44. Therefore, if the mandate of sitting senators were to be changed in any way, it would be with the agreement of a majority of senators.

My question is not that so much as it is this: The Prime Minister would have to have the House of Commons do it because it cannot be done by a minister. Would there be a way for a change to occur under section 38? In other words, you are convinced that it is section 44 and the Senate would have a veto, but if there was concern about the Senate vetoing such a bill, could it go under section 38, if the government felt strongly about it and wanted to pursue it as that kind of amendment, or is this not a cafeteria? Can you only go to one spot and not another?

Mr. Newman: That is a fascinating question, and not one on which I will expand, given the short period of time today.

There has been much written in the scholarly community about the extent to which the amending procedures are exclusive, because when you read section 44, it says "subject to sections 41 and 42." It does not say "subject to section 38." It reads that Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and the House of Commons.

The question that is begged is, can you go to what is called the general amending formula, although it has been used so seldom since 1982? Can you go to the next stage up and accomplish the same thing?

One answer would be that maybe you can because under section 38 you will still, with sweetness and light, get the Senate and the House of Commons and the provincial legislative assemblies. What if the Senate did not concur in the amendment under section 38, yet has an absolute veto under section 44? Would you be robbing the Senate of its role somehow or passing an amendment over its objection?

I am not prepared to give a categorical answer to that question, but there is something to be said for saying that sometimes various combinations of amending formulae may or may not work.

Senator Murray will well recall in the Meech Lake period that the package was complex enough; it was enough of a seamless web that both sections 41 and 38 seemed to be engaged, the worst of all worlds, where you had to achieve unanimity within three years, it would have appeared. At the tail end of that process, that question was about to be re-examined, but ultimately the fate of the proposal did not require it.

All that is to say that section 44 speaks on its face of being an exclusive procedure, but subject to sections 41 and 42. We know that what is in sections 41 and 42 cannot be done under

aux termes de l'article 44. Bien entendu, le Sénat a un veto absolu sur les initiatives constitutionnelles prises en vertu de l'article 44. Par conséquent, si l'on voulait modifier de quelque façon que ce soit le mandat des sénateurs en poste, ce serait avec l'accord de la majorité des sénateurs.

La question que je me pose n'est pas tellement celle-là, mais la suivante : le premier ministre devrait demander à la Chambre des communes de le faire car cela ne peut être fait par un ministre. Y aurait-il une possibilité d'apporter un changement en vertu de l'article 38? En d'autres termes, vous êtes convaincus qu'il s'agit de l'article 44 et que le Sénat aurait le veto, mais si l'on craignait que le Sénat impose son veto sur ce type de projet de loi, ne pourrait-il pas être présenté en vertu de l'article 38, si le gouvernement tenait absolument à apporter ce type de modification? Ne pouvez-vous invoquer qu'un seul article et pas un autre?

M. Newman : C'est une question très intéressante, mais ce n'est pas une question sur laquelle je m'étendrai longuement, compte tenu du peu de temps dont nous disposons aujourd'hui.

De nombreux textes ont été écrits dans les milieux universitaires au sujet du degré d'exclusivité des procédures de modification car l'article 44 spécifie « sous réserve des articles 41 et 42 ». Il ne spécifie pas que c'est sous réserve de l'article 38. Il indique que le Parlement a compétence exclusive pour modifier les dispositions de la Constitution du Canada relatives au pouvoir exécutif fédéral, au Sénat ou à la Chambre des communes.

La question qui s'impose est la suivante : peut-on avoir recours à ladite formule générale de modification, bien que l'on y ait eu très peu recours depuis 1982? Pouvez-vous passer à l'étape suivante et accomplir la même tâche?

Une réponse serait que ce serait peut-être possible car, en vertu de l'article 38, en faisant preuve de gentillesse et de perspicacité, vous pourriez peut-être vous assurer le concours du Sénat, de la Chambre des communes et des assemblées législatives provinciales. Qu'adviendrait-il si le Sénat n'approuvait pas l'amendement en vertu de l'article 38 tout en ayant un veto absolu en vertu de l'article 44? Priveriez-vous le Sénat en quelque sorte de son rôle ou adopteriez-vous une modification sans tenir compte de ses objections?

Je ne suis pas prêt à donner une réponse catégorique à cette question, mais on pourrait signaler que, dans certains cas, diverses combinaisons de formules de modification pourraient être efficaces.

Le sénateur Murray se souvient probablement de l'extrême complexité de l'ensemble de propositions faites durant la période de l'Accord du lac Meech; c'était extrêmement complexe car on faisait apparemment intervenir les articles 41 et 38, la pire de toutes les éventualités, qui contraignait à obtenir l'unanimité dans un délai de trois ans. À la toute fin de ce processus, la question était sur le point d'être réexaminée mais, en définitive, en raison du sort qu'a subi le projet, un réexamen n'a pas été nécessaire.

Si je le mentionne, c'est pour expliquer que l'article 44 indique qu'il s'agit d'une procédure exclusive, mais sous réserve des articles 41 et 42. Nous savons pourtant que ce qui est prévu aux

section 44. We have not had to examine in detail whether what could be done under section 44 could also be done under section 38.

The Chairman: There seems to be doubt that you could take the alternative approach, as I read your comment.

Mr. Newman: I think one of the academics who might be appearing before you would have a more expansive reading of that.

The Chairman: Another matter I wish to raise is in terms of the meaning of independence and the way in which that is used in the opinion of the Supreme Court, and also in the minds of those who framed the initial institutional structures in 1867, and your analogy to appointees to administrative tribunals.

I think it is arguable that independence in an administrative tribunal is always subject to the appeals provisions of the legislation or, if necessary, extraordinary remedies that would be available. However, in the case of a senator and the word "independence," there is no similar procedure to remedy a bad judgment on the part of a senator. That is not necessarily a good argument to use in terms of bringing into question whether or not someone who wished, either as a senator or as a chairman of an administrative board subject to appointment by the federal government, that it would not affect their independence or that we do not regard their independence as being compromised in any way. Arguably, it is not a good comparison because of the nature of the duty of a decider of questions of law that are allocated to that decider under the legislation creating the administrative tribunal and the nature of independent judgment exercised by a senator — or a member of the House of Commons, but a senator in our case — when deciding what to do with a particular piece of legislation.

Mr. Newman: You are absolutely right; none of these analogies are perfect. I was simply trying to give you, in an offhand way, some examples of senior officials who exercise public functions and are expected to exercise them in an independent manner, who are appointed to terms that are renewable. A seven-year term is not that far from an eight-year term and so on.

However, I agree that there is a process of appeal and correction ultimately, and rules of fairness and natural justice will also apply to the extent they exercise quasi-judicial functions.

The slightly better analogy might be to some of the ombudsmen, the Privacy Commissioner, the Commissioner of Official Languages and so on, who do not decide anything but actually exercise a specialized function to assist Parliament with investigations, recommendations and reporting. They can make reports to Parliament and Parliament can hear them in a special context and so on. That might be a better analogy.

articles 41 et 42 ne peut être fait aux termes de l'article 44. Nous avons donc dû examiner en détail les possibilités de faire également en vertu de l'article 38 ce qui pouvait être fait en vertu de l'article 44.

Le président : Il semblerait que l'on ait des doutes que vous puissiez opter pour l'autre approche, si je comprends bien votre commentaire.

M. Newman : Je pense que l'un des universitaires qui comparaîtra peut-être pourrait vous donner une interprétation plus précise à ce sujet.

Le président : Une autre question que je désire soulever concerne la signification de l'indépendance et la façon dont elle est utilisée de l'avis de la Cour suprême, et également dans l'esprit de ceux qui ont élaboré les structures institutionnelles initiales en 1867, et votre comparaison avec les personnes nommées aux tribunaux administratifs.

On peut, à mon avis, invoquer le fait que l'indépendance dans un tribunal administratif est toujours assujettie à des dispositions législatives offrant des possibilités d'appel, voire, au besoin, de recours à des remèdes exceptionnels. Cependant, dans le cas d'un sénateur et du terme « indépendance », il n'existe pas de procédure analogue pour remédier à un mauvais jugement de la part d'un sénateur. Ce n'est pas nécessairement un bon argument pour tenter de déterminer si quelqu'un, un sénateur ou le président d'un organisme administratif sujet à une nomination par le gouvernement fédéral, désire que cela ne constitue aucune entrave à son indépendance ou que nous ne pensions pas que son indépendance est compromise de quelque façon que ce soit. On pourrait dire que ce n'est pas une bonne comparaison en raison de la nature des fonctions d'une personne qui doit prendre des décisions sur des questions de droit qui lui sont soumises en vertu de la loi instituant le tribunal administratif et de la nature du jugement indépendant exercé par un sénateur — ou un député, mais un sénateur en l'occurrence — lorsqu'il s'agit de prendre une décision au sujet d'un projet de loi spécifique.

M. Newman : C'est parfaitement exact; aucune de ces comparaisons n'est parfaite. J'essayais seulement de citer au pied levé quelques exemples de hauts fonctionnaires qui exercent des fonctions publiques et dont on s'attend à ce qu'ils les exercent de façon indépendante, qui sont nommés et ont un mandat renouvelable. Un mandat de sept ans n'est pas très éloigné d'un mandat de huit ans, par exemple.

Cependant, je suis d'accord que l'on mette en place un processus d'appel et de rectification finale; j'estime en outre que les règles d'équité et de justice naturelle s'appliqueront également dans la mesure où ils exercent des fonctions quasi judiciaires.

Une comparaison un peu plus pertinente serait peut-être une comparaison à certains des ombudsmans, comme le commissaire à la protection de la vie privée et le commissaire aux langues officielles, par exemple, qui ne prennent aucune décision mais exercent en fait une fonction spécialisée pour aider le Parlement en faisant des enquêtes et des recommandations et en présentant des rapports. Ils peuvent présenter des rapports au Parlement et le Parlement peut les faire témoigner dans un contexte particulier, par exemple. Ce serait peut-être une comparaison plus pertinente.

At the end of the day, the Senate performs a political function. In my humble estimation, what senators must take from the Supreme Court judgment, but also come to their own reflection about, is what level of independence is to be expected of a senator. As someone mentioned earlier, there is a party affiliation. Although Senate committees are wonderful in this regard, one can never depend on fairness, for example. You cannot force a Senate or House of Commons committee to be fair in the sense of an administrative tribunal because it is a political process — and it should be. There are other bodies that perform judicial, quasi-judicial and executive functions.

All I am saying is that independence must be ensured, but it must be taken in its context, which is political and not judicial.

The Chairman: I appreciate your paper and I will look at it. However, what you said about the Supreme Court opinion expressed in its reference carrying weight I took comfort in, in that your interpretation of the effect of section 44, when read with the other sections, is not simply based on the black letter provisions of the Constitution. Rather, you do see the opinion of the court as expressed in the reference relevant to the decision-making process, if it came to that, that the court might revisit, if asked about this particular proposal. I am not suggesting anything by that other than that you see the terms of the reference as still being relevant.

Mr. Newman: Yes, the terms are still relevant. The court is not necessarily bound by its own decisions, but it overturns them only in exceptional cases. It is a relevant precedent and not everything in this world is contingent. It remains a relevant point of reference in relation to the amending formula.

One thing I would like to stress is that the amending formula does contain a fair amount of formalism. The amending procedures have to be made to work at certain times when the will is there to do so. I have expressed that before to the courts in relation to some of these constitutional amendments. It is not for the courts to go beyond saying have the procedures being complied with, in the case of a section 43 amendment, for example, the appropriate resolutions from the Senate and the House of Commons and the legislative assembly.

In some respects, formalism is important because our procedures are formal. You would not necessarily want to add on many additional unwritten requirements, but there is a role for interpretation and for purpose as well.

The Chairman: If I could have one last request for a comment. It has been touched on already, but I am not sure there is not more to say. Let me test that.

In terms of the next step that the government has under consideration and that the Prime Minister referred to, is there anything you can help us with in terms of timing?

En fin de compte, le Sénat exerce une fonction politique. À mon humble avis, ce que les sénateurs doivent retenir du jugement de la Cour suprême mais aussi voir par eux-mêmes, c'est le degré d'indépendance que l'on attend d'un sénateur. Comme l'a mentionné quelqu'un tout à l'heure, il y a une question d'appartenance politique qui entre en ligne de compte. Bien que les comités sénatoriaux soient formidables à cet égard, on ne peut jamais compter entièrement sur l'équité, par exemple; on ne peut pas forcer un comité sénatorial ou un comité de la Chambre des communes à être équitable de la même façon qu'un tribunal administratif, car il s'agit d'un processus politique — et c'est très bien ainsi. D'autres organismes sont chargés d'exercer des fonctions judiciaires, quasi judiciaires et exécutives.

Ce que je veux dire, c'est que l'indépendance doit être assurée et prise en ligne de compte, mais dans son contexte, à savoir dans un contexte politique, et pas dans un contexte judiciaire.

Le président : J'apprécie le document que vous nous avez présenté et je l'examinerai. Cependant, le fait que vous ayez signalé que l'opinion exprimée par la Cour suprême dans son renvoi avait du poids me rassure car votre interprétation des conséquences de l'article 44, lorsque je lis les autres articles, n'est pas fondée uniquement sur les dispositions immuables de la Constitution. Vous estimez au contraire que l'opinion que la Cour a exprimée dans le renvoi est pertinente en ce qui concerne le processus décisionnel mais que si c'était nécessaire, la Cour pourrait réexaminer la question si on le lui demandait, en ce qui concerne cette proposition précise. Je n'insinue rien d'autre que le fait que vous considérez que les commentaires du renvoi sont toujours pertinents.

M. Newman : Oui, ils sont encore pertinents. La Cour n'est pas nécessairement liée par ses décisions, mais elle ne les renverse que dans des cas exceptionnels. C'est un précédent pertinent et tout n'est pas qu'éventualité dans ce monde. Cela reste un point de repère pertinent en ce qui concerne la formule de modification.

J'aimerais souligner que la formule de modification renferme une bonne dose de formalisme. Il faut faire en sorte que les procédures de modification soient efficaces à certains moments, lorsque la volonté y est. Je l'ai dit devant les tribunaux en ce qui concerne certaines de ces modifications constitutionnelles. Les tribunaux doivent s'en tenir à confirmer que les procédures ont été respectées, dans le cas d'une modification de l'article 43, par exemple, et que les résolutions appropriées ont été présentées par le Sénat, la Chambre des communes et l'assemblée législative.

À certains égards, le formalisme est important parce que nos procédures sont formelles. On ne tient pas nécessairement à ajouter de nombreuses conditions supplémentaires informelles, mais il y a une place pour l'interprétation et pour l'objectif.

Le président : J'aimerais vous demander de faire un dernier commentaire. La question a déjà été abordée, mais je ne suis pas certain qu'il n'y ait plus rien d'autre à dire à ce sujet. J'aimerais m'en assurer.

En ce qui concerne l'étape suivante qu'envisage le gouvernement et que le premier ministre a mentionnée, pourriez-vous donner une information susceptible de nous être utile au sujet de la date à laquelle on passera à cette étape.

In the absence of knowing what approach is to be taken, we are left with speculation on what it will be. In some people's minds at least, it is perhaps relevant to the question of terms. That question may ultimately come before us. If nothing more happens, is Bill S-4 great as it stands?

In any case, it will affect us — or it should. I may be wrong; we will see and decide as a committee, but it seems very relevant to me what that next step may be. It would be good if we could know a little bit about that, when it will come.

The other thing is would it be by ordinary legislation or by Order-in-Council? It is interesting to look at the provision of the Constitution that gives the Governor General the power to summon a senator. As best as I can tell, with the help of our clerk, the basis of the Prime Minister's prerogative is the 1935 Order-in-Council which says that it will be the Prime Minister's prerogative to put the name forward, and the convention has it that the Governor General accepts the Prime Minister's advice.

It might be done simply by Order-in-Council or by ordinary legislation, which I suspect is what you are in the process of doing. I would be interested in a comment on that, if you can give one.

This is relevant because if we are to have an elected Senate, even if it only binds a Prime Minister by virtue of legislation or an Order-in-Council, Canadians will see a very different decision-making dynamic with an elected Senate.

Mr. King: Mr. Chairman, in response I will revert to the comments made by the Prime Minister this afternoon. I believe that he said the government would like to introduce a bill in the House that would speak to the public or popular consultation process. I believe his exact words were "hopefully this fall." That speaks to a certain sense of urgency.

Anecdotally, I would note that this commitment is featured quite prominently in the government's 2006 platform. My colleagues at PCO and I have been working quite hard on it for a long time. I would take the Prime Minister's word that "hopefully this fall" means in the near future.

Senator Fraser: If a one-year term would change the fundamental characteristic but, in your view, an eight-year term would not change it, where is the dividing line between not affecting the fundamental nature of the Senate and affecting the fundamental nature of the Senate?

Mr. Newman: Senator, having blithely mentioned the one-year figure, the point was that there comes a time when what is being done appears to be arbitrary, capricious or simply an attempt to undermine the formal appointment power: "All right, we have to deal with the fact that senators are appointed, so we will ensure

Faute de savoir quelle approche sera adoptée, il ne nous reste plus qu'à faire des supputations. Pour certaines personnes du moins, c'est une question qui est peut-être pertinente en ce qui concerne celle du mandat. Il est possible que nous soyons finalement saisis de la question. À supposer que rien ne change, est-ce que le projet de loi S-4 est un bon projet de loi tel qu'il est actuellement?

De toute façon, il aura des répercussions en ce qui nous concerne — ou il le devrait, du moins. Je me trompe peut-être. Nous verrons et nous déciderons, mais j'estime qu'il serait pertinent d'avoir des informations sur la prochaine étape. Ce serait bien si nous pouvions avoir une idée plus précise du délai dans lequel on passera à cette étape.

L'autre question est la suivante : cela se fera-t-il par le biais d'une mesure législative ordinaire ou par le biais d'un décret? Il est intéressant d'examiner la disposition de la Constitution qui accorde au gouverneur général le pouvoir de mander un sénateur. Pour autant que je sache, avec l'aide de notre greffier, la base de la prérogative du premier ministre est le décret de 1935 indiquant que le premier ministre aura la prérogative de proposer le nom; la coutume veut d'ailleurs que le gouverneur général accepte son avis.

Ce ne serait peut-être pas uniquement par voie de décret ou par le biais d'une mesure législative ordinaire, ce que vous êtes en train de faire, je présume. J'aimerais entendre un commentaire à ce sujet, si vous pouviez en faire un.

C'est pertinent, car s'il faut que nous ayons un Sénat élu, même si cela lie uniquement un premier ministre en vertu d'une mesure législative ou d'un décret, les Canadiens constateront que la dynamique du processus décisionnel sera très différente avec un Sénat élu.

M. King : Monsieur le président, je reviens aux commentaires qu'a faits cet après-midi le premier ministre. Je pense qu'il a dit que le gouvernement aimerait présenter à la Chambre un projet de loi relatif au processus de consultation publique ou populaire. Je pense qu'il a dit plus précisément qu'on espérait le présenter cet automne. Ce commentaire dénote que cette affaire est considérée comme urgente.

À ce propos, je signale que ce commentaire est mis en évidence dans le programme électoral de 2006 du gouvernement. Mes collègues du BCP et moi-même y avons consacré beaucoup de temps. Je présume que si le premier ministre a dit qu'il espérait que ce soit pour cet automne, c'est que ce sera pour bientôt.

Le sénateur Fraser : Si, à votre avis, un mandat d'une durée d'un an modifierait les caractéristiques essentielles du Sénat mais qu'un mandat d'une durée de huit ans ne le modifierait pas, quelle est la ligne de démarcation entre un mandat qui ne compromettrait pas la nature fondamentale du Sénat et un qui la modifierait?

M. Newman : Sénateur, j'ai mentionné avec insouciance le mandat d'un an, mais ce que je voulais dire, c'est qu'à un certain moment, ce que l'on fait est interprété comme un acte arbitraire, capricieux ou être tout simplement comme une tentative de saper le pouvoir officiel de nomination : « Très bien, nous devons

that they are appointed for an ineffective amount of time." In other words, it is a bad faith example that we are looking at and the one-year example is simply a proxy for that. Something longer than six years would seem to be lengthier than sitting in the House of Commons and, thus, more consonant with the mandates of other upper houses. Thus, we have the comparator as to what would be reasonable and effective, while always bearing in mind the role of sober second thought, independence and effectiveness of the Senate — all the reasons that we have an upper house.

The one-year example is not a mathematical cut-off but rather simply a proxy for saying the government cannot come forward with something that would undermine, in the eyes of all, including the courts, the effectiveness and independence of the Senate. If such a minimum were chosen, it would be problematic, but if it were kept within the range of what parliamentary committees in the fullness of their studies and deliberations have recommended in a non-partisan way as being an appropriate length of tenure, then it would be much more reasonable because it would be contextualized.

Senator Fraser: In other words, no answer. That is fine. It seems that a distinction should be drawn between tenure in elected chambers, where the popular mandate must be renewed, and tenure in those few appointed chambers that remain because of the different nature of the beast, which leads to my second question.

I understood the Prime Minister to say that he shares the view that he cannot go to a direct, explicit and open method of appointing senators without going to the general amending formula to achieve that. I understood him to propose, therefore, a consultative and permissive process, which is interesting. Clearly, the point of the consultation in such a case is to accept the results of that consultation, which is to say, move in all but narrow form to an elected Senate. I am not a lawyer, but I thought it was a basic principle of law that you cannot do indirectly what you were not allowed to do directly.

Mr. King: I believe that the Prime Minister said earlier that his preference would be to have a directly elected Senate at some time in the future. If you look again to the government's platform in its last election, it was pretty unambiguous language. The language was "effective, independent and democratically elected body." Clearly, as we have established, that would trigger the general amending formula.

With respect to a popular consultation process, you could draw the conclusion that political forces would be such that a Prime Minister would feel obliged to appoint someone who came out at the head of that process. Again, senator, that would

accepter le fait que les sénateurs soient nommés et, par conséquent, nous veillerons à ce qu'ils soient nommés pour une durée inefficace ». En d'autres termes, c'est un exemple concernant une initiative prise de mauvaise foi et cet exemple d'un an n'a été mentionné qu'à titre indicatif. Un mandat d'une durée de plus de six ans serait perçu comme un mandat plus long que celui des députés et, par conséquent, il serait davantage conforme au mandat des membres d'autres chambres hautes. Nous avons cependant un point de repère en ce qui concerne une durée qui serait raisonnable et efficace, sans toutefois perdre de vue le rôle du Sénat, à titre de lieu de réflexion indépendante, sereine et attentive, bref toutes les raisons pour lesquelles nous avons une Chambre haute.

L'autre exemple n'est pas un seuil mathématique, mais plutôt une simple indication signifiant que le gouvernement ne peut pas proposer une durée qui, aux yeux de tous, y compris des tribunaux, ferait entrave à l'efficacité et à l'indépendance du Sénat. Si l'on choisissait ce type de seuil minimal, cela poserait des problèmes, mais si l'on restait dans la fourchette des périodes que les comités parlementaires ont recommandées de façon non partisane dans le cadre de leurs nombreuses études et délibérations en matière de durée de mandat appropriée, ce serait beaucoup plus raisonnable car cela s'inscrirait dans un contexte.

Le sénateur Fraser : En d'autres termes, il n'y a pas de réponse. C'est bien. Il semblerait qu'il faille faire une distinction entre le mandat des chambres élues, où le mandat populaire doit être renouvelé, et la durée du mandat des quelques chambres non élues qui subsistent à cause de la nature différente du monstre, ce qui m'amène à poser ma deuxième question.

Je pense que le premier ministre a dit qu'il partageait l'opinion qu'il ne pouvait pas passer par une méthode directe, explicite et ouverte de nomination des sénateurs sans avoir recours à la formule générale de modification. J'ai cru comprendre qu'il proposait par conséquent un processus consultatif et habilitant, ce qui est intéressant. De toute évidence, le but de la consultation en l'occurrence serait d'accepter les résultats de cette consultation, c'est-à-dire d'opter pour une forme très étroite de Sénat élu. Je ne suis pas avocat, mais je pensais qu'un principe fondamental du droit est que l'on ne peut pas tenter d'atteindre de façon indirecte un objectif que l'on n'était pas autorisé à atteindre de façon directe.

M. King : Je pense que le premier ministre a mentionné tout à l'heure que sa préférence serait qu'un jour, les membres du Sénat soient élus au suffrage direct. C'était indiqué également dans le programme électoral du gouvernement, dans un langage qui ne laissait pratiquement aucune place à l'ambiguïté. Les termes étaient « rendre le Sénat plus efficace et en faire un organisme indépendant dont les membres sont élus démocratiquement ». D'après ce que nous avons pu constater, cela déclencherait la procédure générale de modification.

En ce qui concerne un processus de consultation populaire, on pourrait tirer la conclusion que les forces politiques seraient telles qu'un premier ministre se sentirait obligé de nommer quelqu'un qui viendrait en tête de liste à la suite de ce processus. Cela

depend very much on how the process is structured and how it is featured in the bill. It is the position of the Government of Canada that, absent a formal amendment that would lead to a directly elected Senate, the key provision is to ensure that the power of the Governor General to appoint remains unfettered and that it can be done. How it will be done and what it will look like, I believe, will be spelled out in some detail in the proposed legislation to which the Prime Minister referred.

Senator Fraser: I am walking with my next and last question into areas where it would be hard for you to give detailed answers. However, you heard Senator Murray refer to the exchange with Dr. Leslie Seidle yesterday. I am a senator from Quebec so I am perhaps more interested than many Canadians in the matter of the Quebec divisions, which as they stand are widely disparate. One of my colleagues told me yesterday that to the best of his knowledge his division contains between 1 million and 2 million Canadians. I would be surprised if my division contains as many as 100,000 Canadians, although it might be slightly over that. Since we do not know the precise boundaries of the divisions, it is difficult to know for certain. In addition, as I understand, there are no divisions for the North because the North was not part of Quebec in 1867. How does one square popular consultations in Quebec with the constitutional requirement for divisional representation on the one hand and the Charter's equality rights on the other hand? I am beginning to have concerns about this.

Mr. King: Senator, you have set out the challenge very ably. It will be considered in the context of the proposed legislation that will ultimately be introduced in the House. Obviously, it will need to be done and positioned in a way that meets the existing constitutional requirements. I am not in a position to say too much now about how that positioning might take place.

Senator Fraser: In other words, watch this space. Can you tell me whether, at the current stage of reflection, you believe this particular circle can be squared or does something else have to be done, such as the abolition of the divisions?

Mr. King: It would be better for us, as officials, to not try to respond to that question now. A great deal of interesting work is underway but not enough of this has been put before ministers, and there are choices to be made. I do not think it would be fair for us to delve into anything that would cast a particular light on the potential choices, not only in this area but in many other areas as well.

Senator Fraser: I am sure. Thank you very much.

dépendrait encore une fois dans une large mesure de la façon dont le processus serait structuré et de la façon dont il serait mis en évidence dans le projet de loi. Le gouvernement du Canada pense qu'en l'absence d'une modification officielle concernant un Sénat élu au suffrage direct, la disposition clé est de s'assurer que le pouvoir de nomination du gouverneur général demeure total et que ce soit possible. Je pense que la façon dont on procédera et l'aspect que cela prendra seront exposés de façon précise dans le projet de loi mentionné par le premier ministre.

Le sénateur Fraser : Avec ma prochaine question, qui est aussi la dernière, je m'aventure dans des domaines où vous auriez de la difficulté à donner des réponses précises. Vous avez toutefois entendu les commentaires qu'a faits le sénateur Murray au sujet de la discussion que nous avons eue avec M. Leslie Seidle hier. Je suis un sénateur du Québec et, par conséquent, je m'intéresse peut-être davantage que de nombreux Canadiens à la question des divisions québécoises qui sont actuellement très disparates. Un de mes collègues m'a signalé hier que la population de sa division était, au mieux de sa connaissance, de un à deux millions de personnes. Il serait étonné d'apprendre que ma division ne compte que 100 000 Canadiens, quoique ce pourrait peut-être être légèrement plus. Étant donné que nous ne connaissons pas les limites précises des divisions, certains d'entre nous ont de la difficulté à le savoir. En outre, je pense qu'il n'y a pas de division pour le Nord, car le Nord ne faisait pas partie du Québec en 1867. Comment peut-on concilier des consultations populaires au Québec avec l'obligation constitutionnelle concernant la représentation des divisions d'une part et les droits à l'égalité énoncés dans la Charte d'autre part? Cela commence à me préoccuper.

M. King : Sénateur, vous avez très bien exposé la nature du défi. La question sera examinée dans le contexte du projet de loi qui sera présenté à la Chambre. De toute évidence, il sera essentiel que cela se fasse d'une façon conforme aux exigences constitutionnelles actuelles. Je ne suis pas en mesure de donner actuellement beaucoup d'information au sujet de la façon dont ce positionnement pourrait se dérouler.

Le sénateur Fraser : En d'autres termes, c'est une question à suivre. Pouvez-vous me dire si à cette étape actuelle de réflexion, vous estimez qu'il est possible de faire la quadrature de ce cercle ou s'il faudra prendre d'autres mesures, comme la suppression des divisions?

M. King : À titre de fonctionnaires, il serait préférable pour nous que nous ne tentions pas de répondre à cette question maintenant. Un travail d'envergure intéressant est en cours, mais nous n'avons pas encore fait suffisamment de propositions aux ministres et il faut faire des choix. Il ne serait pas juste de notre part de donner des informations qui mettraient en évidence les choix possibles, pas seulement dans ce domaine, mais aussi dans bien d'autres domaines.

Le sénateur Fraser : J'en suis sûr. Merci beaucoup.

Senator Austin: On the last point, any change to the districts in Quebec sets up the whole question of a constitutional amendment required to deal with the elections process. That is not a change that I believe would be constitutional under section 44. That is my opinion. However, I leave that.

The issue I wanted to raise and ask for your guidance relates to the process of consultative referenda or consultative elections or whatever that bill that you are drafting might be described to be.

The Prime Minister has the prerogative of making his own terms of reference and deciding whom to recommend for elevation to the Senate. However, to use a parallel argument to that of Mr. Newman, a repetitive act now begins to suggest an attempt to make an end-run around the Constitution. There are Supreme Court and Privy Council decisions in regard to delegation of power that say that you cannot do with the Constitution indirectly that which you cannot do directly. The New Brunswick trucking case is sort of the arch case in the line of cases.

I am wondering about the constitutionality of a purely federal process which suggests a fundamental amendment to the selection process by a method that provides for choosing all the senators. Are we not really creating something we cannot do except by an amendment that requires the provinces to participate?

Mr. King: The answer to your question and what I should think would be a very lengthy and serious debate around that question, needs to take place when legislation is produced. I do not think the three of us are in a position today to go any further than we have.

Senator Austin: Mr. King, here is our conundrum: We have just a piece of the jigsaw puzzle in Bill S-4. When we ask the question, "What happens next?" the Prime Minister has indicated he has legislation under preparation. What it seems to suggest to us is that we need to see the whole picture of Senate reform before we conclude our dealings with Bill S-4 otherwise it is a leap of faith or a jump into the dark. We do not know what, fundamentally, is being suggested in terms of changing the nature of this institution. I am not asking you to answer the question, I just want to make you aware that in our debates as a committee your answers are leading us — and I do not think you could give other answers, quite frankly — to ask that question. The Prime Minister has said, "This is a part of what I am going to do." The question is: Should we not, as a committee, see the proposed legislation to be introduced this fall? The Prime Minister referred in his text to this fall; there is no great hurry for this legislation. Should we see the whole of the scheme before we jump into this?

Le sénateur Austin : En ce qui concerne le dernier commentaire, une modification des divisions au Québec soulève la question d'une modification constitutionnelle nécessaire en ce qui concerne le processus électoral. Je ne pense pas que ce changement serait constitutionnel en vertu de l'article 44. C'est mon avis. Je laisse toutefois la question en suspens.

La question que je voulais poser et sur laquelle je voulais vous demander de l'information concerne le processus de référendum ou d'élections consultatives ou tout autre processus que pourrait représenter le projet de loi que vous êtes en train de rédiger.

Le premier ministre a la prérogative d'établir lui-même les paramètres et de décider qui recommander pour une nomination au Sénat. Cependant, pour utiliser un argument parallèle à celui de M. Newman, un acte répétitif laisse entrevoir la possibilité d'une tentative de contournement de la Constitution. D'après certaines décisions de la Cour suprême et du Conseil privé concernant la délégation des pouvoirs, en matière de Constitution, on ne peut pas atteindre de façon détournée l'objectif que l'on ne peut pas atteindre de façon directe. L'affaire du camionnage au Nouveau-Brunswick est en quelque sorte l'affaire type en la matière.

Je me pose des questions au sujet de la constitutionnalité d'un processus strictement fédéral visant à apporter un changement fondamental au processus de sélection selon un mode applicable à l'ensemble des sénateurs. Ne mettrions-nous pas en place un processus que nous ne pouvons pas mettre en place si ce n'est par le biais d'une modification nécessitant la participation des provinces?

M. King : Pour répondre à votre question, j'estime qu'il serait nécessaire de tenir un débat long et sérieux sur cette question lorsque le projet de loi sera prêt. Je ne pense pas que nous soyons tous les trois aujourd'hui en mesure de pousser la discussion plus loin.

Le sénateur Austin : Monsieur King, voici l'énigme que nous avons à déchiffrer : le projet de loi S-4 ne représente qu'un morceau du casse-tête. Lorsque nous lui avons demandé quelle était la prochaine étape, le premier ministre a signalé qu'un projet de loi était en cours de préparation. Ce que cela nous indique, c'est qu'il serait nécessaire que nous ayons une vue d'ensemble de la réforme du Sénat avant de conclure notre examen du projet de loi S-4, sinon ce serait faire un saut dans l'inconnu. Nous ignorons la nature exacte des changements que l'on propose d'apporter à la nature de cette institution. Je ne vous demande pas de répondre à la question, mais je veux tout simplement que vous preniez conscience du fait que, dans le cadre des délibérations de ce comité, ce sont vos réponses qui nous incitent à poser cette question, et je ne pense pas que vous puissiez donner d'autres réponses. Le premier ministre a dit que c'était notamment ce qu'il comptait faire. La question que nous nous posons est la suivante : ne serait-il pas opportun que le comité voie le projet de loi qui doit être présenté cet automne? Le premier ministre a mentionné cet automne dans son texte; ce projet de loi n'a rien de très urgent. Ne serait-il pas opportun que nous ayons une vue d'ensemble avant de nous lancer dans l'aventure?

Mr. King: Senator, both of my colleagues want to make a brief comment in response, but before they do I would point out that the Prime Minister, I thought, was equally clear this afternoon in the merit of considering Bill S-4 as a stand-alone bill worthy of its own consideration. I thought that he made the case that, yes, there are clear linkages to the two issues, in an evolutionary way. When that evolution is set out clearly in the government's platform, it really is important to stress that in and of itself that it has merit.

Mr. McDougall: I was simply going to reinforce the same thing. The other element of this is the Prime Minister did indicate clearly that he would like this committee and the Senate to consider Bill S-4 on its own merits as well.

Supplementary to that, Bill S-4 works as a stand-alone bill with respect to the current appointments process as it could work, should the Senate approve a future elections type consultative type bill that would provide other guidance to the Prime Minister in that appointment process. It works within the existing scheme as it is within the Constitution now. It is just that you do not need necessarily to wait for anything else to happen in order to deal with the bill in and of itself.

Mr. Newman: My comment takes a step back, and it is in relation to what both senators said in terms of this principle of not being able to do indirectly what one cannot do directly. Our Constitution is rife with examples, and our jurisprudence as well, of that principle being honoured in the breach rather than the observance. The reason we can say we have a constitutional democracy is not because there is anything in the text that says that our monarch is anything other than an absolute one, but it is through convention, democratic principle and practices that we have tempered the exercise of legal and constitutional powers in a way that befits a modern democracy.

Even in the interdelegation cases it is true that the Supreme Court, for example, said that Parliament could not delegate to a provincial legislature or vice versa its powers. Within a year, however, the court turned around and said it was constitutional for Parliament to delegate to a provincial body, like the Lieutenant Governor-in-Council, regulatory powers.

There are examples that go both ways. What one concludes is: What is, in pith and substance, the legislation about? What is its effect? Is it an incidental effect and one that we can live with or one that is so fundamental that there is a real problem to it?

There is room for formalism, and formalism is important in the constitutional amending formula, and in the provisions of the Constitution, but there is also room for advancement through various legislative and other techniques, and principles of interpretation, without necessarily modifying or undermining the formal constitutional structure.

M. King : Sénateur, mes deux collègues veulent faire un bref commentaire, mais j'aimerais signaler auparavant que le premier ministre a signalé clairement cet après-midi qu'il est opportun que le projet de loi S-4 soit examiné seul. Je pensais qu'il avait mentionné l'existence de liens indéniables entre les deux questions, dans un contexte évolutif. Lorsque cette évolution est clairement exposée dans le programme du gouvernement, il est très important de signaler que ce projet de loi a une valeur intrinsèque.

M. McDougall : Je compte abonder dans le même sens. L'autre facteur dans cette affaire est que le premier ministre a indiqué clairement qu'il aimerait que ce comité et le Sénat examinent le projet de loi S-4 également pour sa valeur intrinsèque.

En outre, le projet de loi S-4 est un projet de loi autonome en ce qui concerne le fonctionnement possible du processus de nomination actuel, si le Sénat approuvait un autre projet de loi de type consultatif concernant les élections qui donnerait d'autres instructions au premier ministre dans le contexte de ce processus de nomination. Cela fonctionne dans le cadre du système actuel comme dans celui de la Constitution. Il n'est pas absolument nécessaire d'attendre une autre initiative pour examiner le projet de loi comme tel.

M. Newman : Mon commentaire nous ramène en arrière et concerne les commentaires qu'ont faits les deux sénateurs sur le principe de l'impossibilité de faire de façon détournée ce que l'on ne peut pas faire de façon directe. Notre Constitution est truffée d'exemples, et notre jurisprudence également, indiquant que ce principe n'est généralement pas respecté, d'une façon générale. La raison pour laquelle nous pouvons dire que nous avons une démocratie constitutionnelle n'est pas que la loi contienne des dispositions indiquant que notre monarque n'est pas un monarque absolu, mais c'est par le biais des conventions, des principes et des pratiques démocratiques que nous avons tempéré l'exercice des pouvoirs légaux et constitutionnels d'une façon qui sied à une démocratie moderne.

Même dans les cas d'interdélégation, il est vrai que la Cour suprême, par exemple, a dit que le Parlement ne pouvait pas déléguer ses pouvoirs à une assemblée législative provinciale ou réciproquement. Cependant, dans un délai d'un an, la Cour a fait volte-face et a signalé que la délégation de pouvoirs de réglementation à un organisme provincial, comme le lieutenant-gouverneur en conseil, était constitutionnelle.

On a des exemples de délégation dans les deux sens. On peut donc en tirer la conclusion suivante : quelle est l'essence même de ce projet de loi? Quelle est son incidence? S'agit-il d'une incidence acceptable ou d'une incidence tellement fondamentale que cela pose vraiment un problème?

Il y a de la place pour le formalisme et le formalisme est important dans la formule de modification de la Constitution et dans les dispositions de la Constitution, mais il y a également de la place pour le progrès par le biais de diverses techniques législatives et d'autres techniques et des principes de l'interprétation, sans forcément modifier ou saper la structure constitutionnelle formelle.

The Chairman: Mr. McDougall, Mr. Newman, Mr. King, we have benefited a great deal from your assistance this afternoon. On behalf of the committee and the Senate I wish to thank you very much for being with us. You have been available to us earlier for a briefing, and I know that if we have further questions we will be able to contact your offices and seek additional help.

The committee adjourned.

Le président : Monsieur McDougall, monsieur Newman et monsieur King, votre concours nous a été d'une grande aide. Au nom du comité et du Sénat, je vous remercie pour votre participation. Vous vous étiez déjà mis à notre disposition pour une séance d'information et je sais que si nous avons d'autres questions à vous poser, nous pourrons communiquer avec vos bureaux et demander des informations supplémentaires.

La séance est levée.

Second Session
Thirty-ninth Parliament, 2007-08

SENATE OF CANADA

Proceedings of the Standing Senate Committee on

Legal and Constitutional Affairs

Chair:
The Honourable JOAN FRASER

Wednesday, April 16, 2008
Thursday, April 17, 2008

Issue No. 15

Fifth (final) meeting on:
Bill S-210, An Act to amend the Criminal Code (suicide bombings)

and

Fourth meeting on:
A comprehensive review of the amendments made by An Act to amend the Canada Elections Act and the Income Tax Act (S.C. 2004, c. 24)

and

First meeting on:
Bill S-224, An Act to amend the Parliament of Canada Act (vacancies)

INCLUDING:
THE NINTH REPORT OF THE COMMITTEE
(Special Study Budget 2008-09 — Canada Elections Act)

THE TENTH REPORT OF THE COMMITTEE
(Bill S-210)

WITNESSES:
(*See back cover*)

Deuxième session de la
trente-neuvième législature, 2007-2008

SÉNAT DU CANADA

Délibérations du Comité sénatorial permanent des

Affaires juridiques et constitutionnelles

Présidente :
L'honorable JOAN FRASER

Le mercredi 16 avril 2008
Le jeudi 17 avril 2008

Fascicule n° 15

Cinquième (dernière) réunion concernant :
Le projet de loi S-210, Loi modifiant le Code criminel (attentats suicides)

et

Quatrième réunion concernant :
L'examen complet des modifications apportées par la Loi modifiant la Loi électorale du Canada et la Loi de l'impôt sur le revenu (L.C. 2004, ch. 24)

et

Première réunion concernant :
Le projet de loi S-224, Loi modifiant la Loi sur le Parlement du Canada (sièges vacants)

Y COMPRIS :
LE NEUVIÈME RAPPORT DU COMITÉ
(Budget pour étude spéciale 2008-2009 — Loi électorale du Canada)

LE DIXIÈME RAPPORT DU COMITÉ
(Projet de loi S-210)

TÉMOINS :
(*Voir à l'endos*)

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The Chair: I expect that these points are likely to be made in speeches on third reading.

For the record, the articles to which we refer are two chapters from a recent Australian book entitled *Law and Liberty in the War on Terror*, published by The Federation Press, Sydney, 2007. Included in that book are two articles, one by Ben Saul and the other written by Kent Roach. These articles were forwarded to us by the Department of Justice.

I think that concludes our proceedings on this bill, colleagues. It has been an interesting experience. Congratulations, Senator Grafstein.

Senator Grafstein: If you will forgive me, I have another private member's bill that I have to attend to across the street.

I just want to point out to those who are supporting the government, the reason why we are filling the Order Paper with private members' bills is we want government business but absent that, we have to keep ourselves busy.

Senator Stratton: My father had a saying for that. We tried, you guys would not vote.

The Chair: Colleagues, there is a great deal of material awaiting this committee's attention. You will notice that the second item on the agenda for today is that the committee will go in camera to consider a draft report on our reference from the Senate to conduct a review of amendments to amend the Canada Elections Act and the Income Tax Act.

We will now pause while everything that is necessary is done to take us in camera.

The committee continued in camera.

OTTAWA, Thursday, April 17, 2008

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill S-224, An Act to amend the Parliament of Canada Act (vacancies), met this day at 10:50 a.m. to give consideration to the bill.

Senator Joan Fraser (*Chair*) in the chair.

[*English*]

The Chair: Colleagues, welcome to this meeting of the Standing Senate Committee on Legal and Constitutional Affairs, which is commencing its study of Bill S-224. This is a private senator's bill presented by Senator Moore. As the sponsor of the bill, he will be our first witness this morning.

Welcome, Senator Moore. You are no stranger to this committee, but perhaps this is a new capacity for you.

Hon. Wilfred P. Moore, sponsor of the bill: Yes, it is a very unusual capacity for me. Thank you, chair and members of the committee, for inviting me here this morning.

La présidente : Je m'attends à ce que ces points fassent l'objet de discours en troisième lecture.

Je tiens à préciser que les articles dont nous parlons sont tirés d'un livre intitulé *Law and Liberty in the War on Terror* (The Federation Press, Sydney, 2007) publié récemment en Australie. Ce livre comprend deux articles, l'un de Ben Saul et l'autre de Kent Roach, qui nous ont été transmis par le ministère de la Justice.

Je crois que cela met fin notre examen du projet de loi, chers collègues. Nous avons eu un débat intéressant. Félicitations, sénateur Grafstein.

Le sénateur Grafstein : Si vous voulez bien m'excuser, je dois participer à l'examen d'un projet de loi d'intérêt privé de l'autre côté de la rue.

Je ferais simplement remarquer à ceux qui appuient le gouvernement que nous voudrions bien examiner des projets du gouvernement, mais que nous mettons dans le *Feuilleton* de projets de loi d'intérêt privé pour nous tenir occupés.

Le sénateur Stratton : Mon père avait coutume de dire : « Tout vient à point à qui sait attendre. »

La présidente : Chers collègues, il y a beaucoup de questions qui requièrent notre attention. Vous remarquerez que le second point à l'ordre du jour d'aujourd'hui est l'examen à huis clos d'un rapport préliminaire qui nous a été renvoyé par le Sénat pour que nous procédions à l'examen des modifications relatives à la Loi électorale du Canada et la Loi de l'impôt sur le revenu.

Nous faisons maintenant une pause pour que l'on prépare la séance à huis clos.

Le comité poursuit ses travaux à huis clos.

OTTAWA, le jeudi 17 avril 2008

Le Comité sénatorial permanent des affaires juridiques et constitutionnelles, auquel a été renvoyé le projet de loi S-224, Loi modifiant la Loi sur le Parlement du Canada (sièges vacants), se réunit aujourd'hui à 10 h 50 pour examiner le projet de loi.

Le sénateur Joan Fraser (*présidente*) occupe le fauteuil.

[*Traduction*]

La présidente : Chers collègues, bienvenue à la séance du Comité sénatorial permanent des affaires juridiques et constitutionnelles, qui entame l'étude du projet de loi S-224. C'est un projet de loi émanant du sénateur Moore. En tant que parrain du projet de loi, il sera le premier à comparaître ce matin.

Bienvenue, sénateur Moore. Ce comité ne vous est pas inconnu, mais peut-être en êtes-vous à vos débuts dans ce rôle.

L'honorable Wilfred P. Moore, parrain du projet de loi : Oui, il s'agit d'un rôle très inhabituel pour moi. Je vous remercie, madame la présidente, mesdames et messieurs, de m'avoir invité à témoigner ici ce matin.

Senators, I will try to be brief. Under the existing law, the Prime Minister exercises broad discretion in respect of parliamentary vacancies. This discretion serves no legitimate purpose and is susceptible to abuse. In addition, the discretion of the Prime Minister is at odds with the notion of a properly functioning Parliament that is free from executive influence. Finally, the discretion interferes with the right of every Canadian to representation in Parliament by allowing the Prime Minister to delay or suspend that right selectively and, in the case of the Senate, indefinitely.

Canada is a mature democracy, and it is time we removed the Prime Minister's needless discretion in the area of filling vacancies in Parliament.

As you know, there are already provisions in the Parliament of Canada Act governing vacancies in the House of Commons. Generally speaking, by-elections must be called within six months of a vacancy. My bill would not alter those provisions. In fact, I am proposing a similar limitation on Senate vacancies.

The problem Bill S-224 seeks to address with respect to the House of Commons is the fact that a prime minister can be selective in calling by-elections. The Prime Minister can call a by-election within hours of one vacancy if he thinks his party will win the seat. Conversely, another seat that might have become vacant months earlier can be left to languish, contrary to the democratic rights of Canadians living in that riding who are without representation in the House of Commons.

Bill S-224 would bring an end to the selective calling of by-elections. It maintains the six-month window but would require by-elections to be called in the sequence in which vacancies occurred. Prime ministers would no longer be able to call a by-election in one seat while electing another that has been vacant longer.

Honourable senators, I do not want to take too long in my presentation. I outlined in my speech at second reading the most recent history in regard to the House of Commons vacancies in the current Parliament.

I will not elaborate those details here but, suffice it to say, we had some fairly extreme examples of by-elections being called within days of a vacancy while Canadians in other ridings went almost nine months without a representative. In a mature democracy such as ours, there is no reason the executive branch should be capable of such manipulations.

Let me turn to Senate vacancies. The legal obligation to fill Senate vacancies is clearly stated in the Constitution Act, 1867. The current Prime Minister chooses to disregard the Constitution and has left some seats vacant for more than two

Honorables sénateurs, je tâcherai d'être bref. En vertu de la loi actuelle, le premier ministre exerce un pouvoir discrétionnaire très vaste à l'égard des sièges vacants au Parlement, ce qui ne sert à aucune fin légitime et peut donner lieu à des abus. De plus, le pouvoir discrétionnaire du premier ministre va à l'encontre de la notion d'un Parlement efficace et exempt de toute influence ministérielle. Enfin, le pouvoir discrétionnaire brime le droit de tous les Canadiens d'être représentés au Parlement en permettant au premier ministre de retarder ou de suspendre l'application de ce droit de façon sélective et, dans le cas du Sénat, pour une période indéfinie.

Le Canada est une démocratie de longue date, et le temps est venu de retirer au premier ministre un pouvoir discrétionnaire inutile en ce qui a trait à la dotation des sièges vacants au Parlement.

Comme vous le savez, la Loi sur le Parlement du Canada contient déjà des dispositions régissant les sièges vacants à la Chambre des communes. En règle générale, les élections partielles doivent être déclenchées dans les six mois qui suivent une vacance. Mon projet de loi ne vise pas à modifier ces dispositions. En fait, je propose une restriction semblable pour les sièges vacants au Sénat.

Le problème que le projet de loi S-224 cherche à régler dans le cas de la Chambre des communes, c'est que le premier ministre peut choisir le moment où il déclenchera des élections partielles. Il peut déclencher des élections partielles à peine quelques heures après qu'un siège soit devenu vacant s'il croit que son parti le remportera. À l'inverse, il peut laisser vacant un autre siège qui s'est libéré plusieurs mois auparavant, ce qui va à l'encontre des droits démocratiques des Canadiens vivant dans les circonscriptions qui n'ont pas de représentant à la Chambre des communes.

Le projet de loi S-224 empêcherait le déclenchement sélectif d'élections partielles. Il conserve le délai de six mois, mais il exige que les élections partielles aient lieu dans l'ordre dans lequel les sièges sont devenus vacants. Le premier ministre ne pourrait alors plus déclencher une élection partielle pour un siège alors qu'un autre est demeuré vacant plus longtemps.

Honorables sénateurs, je ne veux pas prolonger mon exposé. À la deuxième lecture, j'ai mis en relief les faits récents concernant les sièges vacants à la Chambre des communes dans la présente législature.

Je n'entrerai pas dans les détails, mais je me contenterai de dire que nous avons été témoins de cas assez frappants où des élections partielles étaient déclenchées à peine quelques jours après une vacance alors que les Canadiens d'autres circonscriptions n'étaient pas représentés depuis près de neuf mois. Dans une démocratie bien développée comme la nôtre, il est inacceptable que l'organe exécutif puisse s'adonner à de telles manipulations.

Permettez-moi maintenant d'aborder la question des sièges vacants au Sénat. La Loi constitutionnelle de 1867 établit clairement l'obligation juridique de doter les sièges vacants au Sénat. Le premier ministre actuel choisit de faire abstraction de la

years. He has even gone so far as to say that he does not intend to fill vacancies.

I know that the current Prime Minister is not the first to let vacancies pile up. As others have pointed out, there are many examples in the past of seats having been left vacant for far too long. However, I think the current Prime Minister is the first to state openly as a matter of policy that he does not intend to fill vacancies. In any case, I do not see examples of past neglect as a reason for failing to act now.

Let me be very clear. In my view, the Constitution requires Senate vacancies to be filled as soon as possible. Obviously, the government disagrees with me. I introduced Bill S-224 to clarify the law and remove any doubt. My starting point was the provision in the Parliament of Canada Act that establishes an effective time limit on vacancies in the House of Commons.

Bill S-224 would add a similar provision for the Senate. In a sense, Bill S-224 defines the constitutional obligation to fill Senate vacancies by limiting the Prime Minister's discretion to six months.

With respect to Senate vacancies, we all know just how grave the situation is. The Senate is currently operating with 14 vacancies. There will be 3 more retirements this year. Next year, there will be 12 additional retirements. We also have to take into account the anticipated resignation of the Minister of Public Works, who has declared his intention to run for a seat in the House of Commons in the general election that must be called no later than next fall. By the end of 2009, if this Prime Minister persists in his stance, the Senate would have at least 30 vacancies, not counting possible resignations or, heaven forbid, deaths in office.

In conclusion, honourable senators, Bill S-224 is not about Senate reform. It is about ensuring adequate and timely representation for Canadians in both Houses of Parliament and removing the Prime Minister's ability to interfere with that. This issue needs to be addressed, regardless of what happens to Mr. Harper's Senate reform initiatives.

Bill S-224 seeks to remedy one of the many ways in which an overly-powerful Prime Minister's Office distorts the proper functioning of a constitutionally-balanced, responsible government in the parliamentary tradition of Westminster.

In addition to ensuring proper balance among constitutional institutions, the bill also serves the notion that representation in Parliament is a fundamental right that Canadians enjoy under the Constitution. It is not for a prime minister to interfere with that right for partisan purposes.

Constitution en laissant des sièges vacants pendant plus de deux ans. Il a même poussé l'audace jusqu'à dire qu'il n'a pas l'intention de doter ces sièges.

Je sais que le premier ministre actuel n'est pas le premier à laisser les sièges vacants s'accumuler. Comme certains l'ont fait remarquer, de nombreux sièges ont été laissés vacants pendant trop longtemps par le passé. Cependant, je crois que le premier ministre est le premier à déclarer ouvertement qu'il a choisi de ne pas combler les sièges vacants. Quoi qu'il en soit, je ne vois aucun exemple d'acte de négligence commis par le passé qui justifierait l'inaction actuelle.

Comprenez-moi bien. De mon point de vue, la Constitution exige que les sièges vacants au Sénat soient dotés le plus tôt possible. De toute évidence, le gouvernement n'est pas de cet avis. J'ai proposé le projet de loi S-224 pour clarifier la loi et faire disparaître toute ambiguïté. J'ai utilisé comme point de départ la disposition de la Loi sur le Parlement du Canada qui établit une limite de temps pour les sièges vacants à la Chambre des communes.

Le projet de loi S-224 viendrait ajouter une disposition semblable pour le Sénat. D'une certaine manière, le projet de loi S-224 définit l'obligation constitutionnelle de doter les sièges vacants du Sénat en imposant un délai de six mois au pouvoir discrétionnaire du premier ministre.

Pour ce qui est des sièges vacants au Sénat, nous savons tous à quel point la situation est grave. À l'heure actuelle, le Sénat compte 14 sièges vacants. On prévoit trois départs à la retraite cette année, et 12 autres l'année prochaine. Il faut également prendre en considération la démission éventuelle du ministre des Travaux publics, qui a déclaré son intention de se porter candidat à la Chambre des communes à l'occasion des élections générales qui doivent avoir lieu au plus tard l'automne prochain. D'ici la fin de 2009, si le premier ministre actuel ne revient pas sur sa position, il y aura au moins une trentaine de sièges vacants au Sénat, sans compter les démissions possibles ou, que Dieu nous en garde, les décès en service.

En conclusion, honorables sénateurs, le projet de loi S-224 ne repose pas sur la réforme du Sénat. Il vise à assurer rapidement une représentation adéquate des Canadiens dans les deux Chambres du Parlement et à empêcher le premier ministre de pouvoir s'en mêler. Il faut donner suite à cette question, peu importe l'issue des réformes du Sénat entreprises par M. Harper.

Le projet de loi S-224 supprimera l'un des nombreux moyens qui permettent au Cabinet trop puissant du premier ministre de fausser le fonctionnement d'un gouvernement responsable et équilibré sur le plan constitutionnel, qui est ancré dans la tradition parlementaire de Westminster.

En plus d'assurer l'équilibre entre les institutions constitutionnelles, le projet de loi respecte le principe selon lequel la représentation au Parlement est un droit fondamental accordé à tous les Canadiens en vertu de la Constitution. Le premier ministre ne doit pas s'immiscer dans l'application de ce droit à des fins partisanes.

The current law gives prime ministers too much discretion. The selective filling of vacancies in Parliament is indefensible on any principled ground, and we should put a stop to it once and for all.

The Chair: Thank you very much, Senator Moore.

Senator Andreychuk?

Senator Andreychuk: I will wait.

The Chair: We usually give the government — the party other than the party of the chair in other words — the first crack.

Senator Di Nino?

Senator Di Nino: I will be happy to commence. We said we would be easy on you. I am not sure I can keep that promise. I am just joking.

The first comment I would like to make is not unusual and not rare. I sow this, respectfully, as a bit of mischief-making more than trying to improve the situation.

Do you honestly believe that this legislation will improve the Senate and deal with some of the very difficult problems of the institution itself? How do you see that happening?

Senator Moore: This bill deals only with the filling of vacancies in the Senate. As you well know, senator, your party, in particular, could certainly use more members to fulfill your responsibilities.

Senator Di Nino: I agree with you. Some of you could come over.

Senator Moore: Well, I will be a little easy on you.

It is clear that your party could use more senators to fulfill your committee responsibilities and other work that you have to do within the Senate.

By putting a cap on the period of vacancy and ensuring that vacancies are filled within six months, we would see some continuity. These vacancies would be filled, and the Senate would work properly as it is intended to do under the Constitution.

Senator Di Nino: You quoted the Prime Minister as saying that he will not fill Senate seats.

Senator Moore: Yes, I did.

Senator Di Nino: That is not quite correct. He has said that he wants to fill Senate seats — as a matter of fact, there is legislation in the works with regard to this — but he wants to do it through a consultation process so that senators will be elected by the provinces, and he would appoint those chosen by the people of the provinces.

Therefore, it is not correct to say that the Prime Minister has said he will not fill Senate seats. He would like to fill Senate seats in what is, in his opinion, a more democratic way than the current

La loi actuelle confère au premier ministre un trop grand pouvoir discrétionnaire. La dotation sélective des sièges vacants au Parlement est indéfendable quel qu'en soit le motif, et nous devons y mettre un terme une fois pour toutes.

La présidente : Merci beaucoup, sénateur Moore.

Sénateur Andreychuk?

Le sénateur Andreychuk : Je vais attendre.

La présidente : Nous avons l'habitude de céder d'abord la parole au gouvernement — c'est-à-dire au parti autre que celui du président.

Sénateur Di Nino?

Le sénateur Di Nino : Je veux bien commencer, avec plaisir. Nous avions promis de faire preuve d'indulgence à votre égard, mais je crains de ne pouvoir tenir cette promesse. Je plaisante.

Le premier commentaire que je voudrais formuler ne sort pas de l'ordinaire. À mon humble avis, cette proposition risque peut-être davantage d'attiser la discorde que d'améliorer la situation.

Croyez-vous sincèrement que cette mesure législative permettra d'améliorer le Sénat et de résoudre certains des problèmes très complexes de l'institution proprement dite? Comment cela se ferait-il?

Le sénateur Moore : Ce projet de loi ne vise que la dotation des sièges vacants au Sénat. Comme vous le savez bien, sénateur, votre parti en particulier aurait certainement besoin d'autres membres pour s'acquitter de ses responsabilités.

Le sénateur Di Nino : Je suis de cet avis. Certains d'entre vous pourriez vous joindre à nous.

Le sénateur Moore : Eh bien, je me montrerai clément à votre égard.

Il est évident que votre parti pourrait bénéficier d'un plus grand nombre de sénateurs pour s'acquitter de ses responsabilités dans les comités et des autres travaux qui lui sont confiés au Sénat.

En imposant une limite à la période de vacance et en assurant la dotation des sièges vacants dans les six mois, on veillerait à une certaine continuité. Ces sièges seraient comblés, et le Sénat fonctionnerait conformément à la Constitution.

Le sénateur Di Nino : Vous avez cité le premier ministre, qui aurait affirmé qu'il ne dotera pas les sièges du Sénat.

Le sénateur Moore : En effet.

Le sénateur Di Nino : Ce n'est pas exactement ce qu'il a déclaré. Il a dit qu'il voulait doter les sièges du Sénat — en fait, des mesures législatives sont en préparation à cette fin — , mais qu'il tenait à passer par un processus de consultation, au terme duquel il nommerait les sénateurs élus par les provinces.

Par conséquent, il est incorrect de dire que le premier ministre a indiqué ne pas avoir l'intention de pourvoir les sièges du Sénat. Il aimerait le faire d'une façon plus démocratique selon lui que la

practice, that being through the choices made by the people of the provinces to whom these senators would be responsible and would represent.

Would you not at least agree with me that he did not say that he would not fill vacant seats?

Senator Moore: That legislation may or may not come to fruition. I am dealing with the law of the land as it now stands, and he has indicated that he is not prepared to fill Senate vacancies under the current provision of the Constitution.

Senator Di Nino: If we could expedite the passage of that bill —

Senator Moore: Of this bill, absolutely.

Senator Di Nino: No, the bill that the Prime Minister has proposed to consult the people.

Senator Stratton: Would you be in favour of that?

Senator Di Nino: We could fill the vacancies in that manner.

The Chair: That is outside this committee's present study.

Senator Di Nino: I defer to those who have more knowledge on these matters than I, but I understand that convention is an important part of how we operate our parliamentary institutions.

For a long time various prime ministers of all political stripes have chosen not to make appointments to the Senate, for a variety of reasons. This is nothing unusual; it happens from time to time. Would you agree with that?

Senator Moore: Yes, that is the fact, but it does not make it right.

I say that all those who did that were impinging on the rights of Canadians to have proper and timely representation in the both Houses of Parliament.

Senator Di Nino: That is fair enough. You have your opinion.

Senator Moore: It has happened, absolutely. Liberal and Progressive Conservative prime ministers have done that. That does not make it right and does not mean we should not address it today.

Senator Joyal: Can a prime minister refuse to exercise the convention of recommending candidates to the Governor General to the point where all seats in the Senate would become vacant? Going a step further, we would then be in breach of the section of the Constitution that provides that legislation is enacted by the concurrent consent and acceptance of both Houses of Parliament.

Senator Moore: Exactly.

Senator Joyal: That is taking it to the absurd.

pratique actuelle, c'est-à-dire grâce aux choix effectués par les citoyens des provinces, que ces sénateurs représenteraient et envers qui ils seraient responsables.

Peut-on du moins s'entendre sur le fait qu'il n'a pas dit qu'il ne pourvoirait pas les sièges vacants?

Le sénateur Moore : Cette loi verra peut-être le jour, peut-être pas. Je dois m'en tenir aux lois du pays comme elles existent, et il a indiqué ne pas être prêt à pourvoir les sièges vacants du Sénat en vertu de la disposition actuelle de la Constitution.

Le sénateur Di Nino : Si on pouvait accélérer l'adoption du projet de loi...

Le sénateur Moore : De ce projet de loi-ci, tout à fait.

Le sénateur Di Nino : Non, du projet de loi que le premier ministre a proposé de mettre de l'avant pour consulter la population.

Le sénateur Stratton : Seriez-vous en faveur de cette démarche?

Le sénateur Di Nino : Il serait possible de pourvoir les sièges vacants de cette façon.

La présidente : Cela ne relève pas des paramètres de la présente étude.

Le sénateur Di Nino : Je m'en remets à ceux qui en connaissent davantage que moi sur ces questions, mais je comprends que les conventions font partie intégrante du fonctionnement de nos institutions parlementaires.

Divers premiers ministres de toutes allégeances politiques ont longtemps choisi de ne nommer personne au Sénat, pour différentes raisons. Ce n'est pas inusité; cela se produit de temps à autre. Êtes-vous d'accord?

Le sénateur Moore : Oui, c'est un fait, mais ça ne rend pas la chose correcte.

Je suis d'avis que tous ceux qui ont agi ainsi ont porté atteinte aux droits des Canadiens d'être représentés de manière appropriée et sans un trop long délai tant au Sénat qu'à la Chambre des communes.

Le sénateur Di Nino : Soit. Vous avez votre opinion.

Le sénateur Moore : C'est arrivé, tout à fait. Des premiers ministres libéraux et conservateurs ont agi de la sorte. Ça ne justifie en rien la chose et ça ne veut pas dire qu'il n'est pas pertinent aujourd'hui d'examiner la question.

Le sénateur Joyal : Un premier ministre peut-il refuser d'appliquer la convention qui consiste à recommander des candidats au Gouverneur général, jusqu'au point où tous les sièges du Sénat seraient vacants? En poussant un peu plus loin cette logique, nous nous retrouverions alors en situation d'infraction à l'article de la Constitution qui stipule que les lois sont promulguées grâce au consentement et à l'acceptation des deux Chambres du Parlement.

Le sénateur Moore : Exactement.

Le sénateur Joyal : Voilà qu'on vire à l'absurde.

The Constitution is pretty clear. Section 91 reads as follows:

> It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada . . . .

Section 91 requires the consent of the House of Commons and the consent of the Senate.

Senator Moore: Yes.

Senator Joyal: To express a consent, there has to be a vote, a voice.

Senator Moore: Exactly.

Senator Joyal: The voice comes from the people appointed to the Senate.

To rephrase my question, would it be "constitutional" for a prime minister not to exercise the power under the Constitution to recommend appointments to the point that the Senate would no longer be in the position to express consent, thus making the legislative process moot?

Senator Moore: I am not a constitutional expert but, having read this section, it is clear to me that it would be a violation of or contrary to the Constitution of the country for the prime minister not to fill the vacancies.

You have taken it to the extreme. The regions have to be represented.

Senator Joyal: You take it a step further.

Senator Moore: If the regions are not represented, the chamber will not function as it is designed to do under the Constitution. We will not hear the voices and will be unable to get the consent required to move bills through to receive Royal Assent from the Crown. It is an integral part to the way the country functions.

Senator Joyal: I will take this to another dimension. The preamble to the Constitution says the following:

> Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:

The Supreme Court, in the Canada labour case in 1937, clearly stated that democratic debate is enshrined in the Constitution. By "democratic debate" we mean a proposal, a counterproposal, an argument, a counterargument, and so on, and then a vote. The Supreme Court of Canada has been very clear that this is enshrined in the Constitution.

If there is a depletion of membership in the Senate, how can the democratic principle function if there is only one party left?

Senator Moore: It cannot function.

La Constitution est assez claire. L'article 91 se lit comme suit :

> Il sera loisible à la Reine, de l'avis et du consentement du Sénat et de la Chambre des Communes, de faire des lois pour la paix, l'ordre et le bon gouvernement du Canada...

L'article 91 exige le consentement de la Chambre des communes et celui du Sénat.

Le sénateur Moore : Oui.

Le sénateur Joyal : Pour exprimer un consentement, il doit y avoir un vote, une voix.

Le sénateur Moore : Exactement.

Le sénateur Joyal : La voix est exprimée par les personnes nommées au Sénat.

Pour rephraser ma question, serait-il « constitutionnel » pour un premier ministre de ne pas exercer le pouvoir lui étant conféré par la Constitution de recommander des nominations, jusqu'au point où le Sénat ne serait plus en position d'exprimer son consentement, invalidant du coup le processus législatif?

Le sénateur Moore : Je ne suis pas un spécialiste des questions constitutionnelles mais, après avoir lu cet article, il est clair à mon avis que le premier ministre irait à l'encontre de la Constitution de ce pays s'il refusait de pourvoir les sièges vacants.

Vous avez poussé votre raisonnement à l'extrême. Les régions doivent être représentées.

Le sénateur Joyal : Vous faites un pas de plus que moi.

Le sénateur Moore : Si les régions ne sont pas représentées, la Chambre ne fonctionnera pas comme le prévoit la Constitution. Nous n'entendrons pas les voix et ne serons pas en mesure d'obtenir le consentement requis pour adopter les projets de loi afin qu'ils obtiennent la sanction royale. Cela fait partie intégrante de la façon de fonctionner du pays.

Le sénateur Joyal : Je vais aborder la question sous un autre angle. Voici ce que dit le préambule de la Loi constitutionnelle :

> Considérant que les provinces du Canada, de la Nouvelle-Écosse et du Nouveau-Brunswick ont exprimé le désir de contracter une Union Fédérale pour ne former qu'une seule et même Puissance (*Dominion*) sous la couronne du Royaume-Uni de la Grande-Bretagne et d'Irlande, avec une constitution reposant sur les mêmes principes que celle du Royaume-Uni :

La Cour suprême, dans la Convention sur le travail de 1937, a clairement indiqué que le débat démocratique fait partie intégrante de la Constitution. Par « débat démocratique », on entend une proposition, une contre-proposition, un argument, un contre-argument, et ainsi de suite, puis un vote. La Cour suprême du Canada a clairement indiqué que ça fait partie intégrante de la Constitution.

S'il y a une diminution du nombre de membres au Sénat, comment le principe démocratique peut-il être réalisé s'il ne reste qu'un parti?

Le sénateur Moore : Ça ne peut pas marcher.

Senator Joyal: In other words, who will make the counterarguments to government proposals?

Senator Moore: Exactly. There would be no other party to express the other side of the debate. In the final analysis, there is no Senate functioning to provide the consent necessary for legislation to be advanced and, in the interim, there is no one there looking after the regions or the minorities, which is a key function of the Senate of Canada.

Senator Joyal: You take it to another dimension, which is the protection of minority rights.

Senator Andreychuk: The discussion has been that it would leave only one party left, so where would the democratic voice be or the opposition to the government. Where does our structure recognizes parties in the Senate? We have, by our rules, enshrined a leader and an opposition leader but, as I understand it, and I will go back and review this, parties were not enshrined in any way. It is how we have chosen to function. We could, today, remove all of our rules and all sit as independents, and there would still be a functioning Senate.

Senator Moore: I am not sure that is entirely accurate. I do not think we came by the implementation and use of parties. You have to go back to the Constitution, similar in principle to that of the United Kingdom. That is where we got the idea. In Nova Scotia, when we started the first seat of responsible government, it was modelled on the system in the United Kingdom that existed at that time, and that has persevered over the years.

Senator Murray: Excuse me, but in 1867 I believe it is true to say that the first nominees to the Senate were distributed between the two parties then in existence. I think the Conservatives were given the right to nominate a certain number, and the other party, whatever it was called at the time, was also given the right to nominate a certain number of senators.

Senator Andreychuk: By convention.

The Chair: That is the way it is done in the United Kingdom, even today.

Senator Joyal, you were asking about minorities.

Senator Joyal: I want to take it to another level. In the succession reference, the Supreme Court clearly stated that there are four fundamental principles enshrined in the Constitution. There is constitutionalism and the rule of law; there is democracy in reference to the decision I mentioned earlier in the preamble to the Constitution; there is federalism; and then there is protection of minority rights. Protection of minority rights is a constitutional principle, according to the Supreme Court of Canada.

The protection of minority rights is enshrined in the Senate structure by the distribution of seats. As you know, the distribution of seats in the Senate is not on the basis of representation by population, as it is in the House of

Le sénateur Joyal : En d'autres termes, qui présentera les contre-arguments aux propositions du gouvernement?

Le sénateur Moore : Exactement. Il n'y aurait aucun autre parti pour défendre la position opposée dans un débat. Au bout du compte, il n'y a aucun Sénat en place pour fournir le consentement nécessaire pour adopter les lois et, entre-temps, il n'y a personne pour protéger les intérêts des régions et des minorités, ce qui est l'une des principales fonctions du Sénat du Canada.

Le sénateur Joyal : Vous soulignez un autre point, soit la protection des droits des minorités.

Le sénateur Andreychuk : Pour résumer le débat, il ne resterait qu'un parti et on se demande donc comment la voix démocratique ou l'opposition au gouvernement se feraient entendre. De quelle façon notre structure reconnaît-elle les partis au Sénat? Selon notre règlement, nous avons nommé un chef et un chef de l'opposition mais, si je comprends bien, et je vais aller vérifier cette information, les partis n'ont jamais été intégrés de quelque façon que ce soit. C'est comme ça que nous avons choisi de fonctionner. Nous pourrions, aujourd'hui, faire fi de l'ensemble de notre règlement et tous siéger comme membres indépendants, et nous aurions quand même un Sénat fonctionnel.

Le sénateur Moore : Je ne suis pas certain que ce soit tout à fait exact. Je ne crois pas que nous ayons réalisé la répartition des sièges selon les partis. Il faut remonter à la Constitution, dont les principes sont semblables à ceux du Royaume-Uni. C'est de là que nous est venue l'idée. En Nouvelle-Écosse, lorsque le premier gouvernement responsable a commencé à siéger, son système était inspiré du modèle du Royaume-Uni qui existait à l'époque et qu'on a continué d'appliquer durant toutes ces années.

Le sénateur Murray : Je m'excuse, mais je crois qu'il est vrai de dire qu'en 1867, les premières personnes nommées au Sénat étaient réparties entre les deux partis qui existaient alors. Je crois que les Conservateurs ont eu le droit de nommer un certain nombre de sénateurs, tout comme l'autre parti, peu importe comment il s'appelait à l'époque.

Le sénateur Andreychuk : Par convention.

Le président : C'est la façon dont les choses fonctionnent encore aujourd'hui au Royaume-Uni.

Sénateur Joyal, vous parliez des minorités.

Le sénateur Joyal : J'aimerais aborder un autre point. Dans le renvoi sur la succession, la Cour suprême a clairement indiqué qu'il existe quatre principes fondamentaux consacrés par la Constitution. Il s'agit du constitutionnalisme et de la primauté du droit, de la démocratie en ce qui a trait à la décision dont j'ai parlé plus tôt relativement au préambule de la Constitution, du fédéralisme et enfin de la protection des droits des minorités. La protection des droits des minorités est un principe constitutionnel selon la Cour suprême du Canada.

La protection des droits des minorités est intégrée à la structure du Sénat par la répartition des sièges. Comme vous le savez, la répartition des sièges au Sénat n'est pas fondée sur la représentation de la population, comme c'est le cas à la

Commons. In other words, smaller provinces are over-represented in the Senate, and some provinces are not represented well enough in the Senate. Our colleague, Senator Murray, introduced a motion that had some merit in terms of rebalancing the regional representation in the Senate. The representation of minorities in the Senate is through the regional structure of representation in the Senate.

If regions where minorities are concentrated are not represented in the Senate because of depletion, are we not in breach of another constitutional principle, which is the protection of minority rights and their voice in the legislative process as it is structured in the present Constitution?

Senator Moore: I think we are; I said that earlier. The Senate, in the system of government we have today, is the one institution where opportunity is available to ensure that minorities have a representative to speak for them in the backup chamber that governs the country. There is an opportunity to put people in the Senate who represent the various minority groups from all regions. To not do that, to not fill these vacancies, is absolutely irresponsible and is contrary to the Constitution.

Senator Joyal: If it were the case that the Senate was depleted of its membership, what is the constitutional remedy?

Senator Moore: What is the constitutional remedy?

Senator Joyal: Yes. How can we force a prime minister to make recommendations to the Governor General to appoint senators to a level such that those principles could be satisfied?

Senator Stratton: They should be elected.

Senator Moore: That is a good question. The ultimate authority is the Governor General. Convention has been for the prime minister to advise her. If he or she does not advise the Governor General, the Governor General still has responsibility, under the Constitution, to fill the vacancies.

Senator Joyal: That is under section 24 of the Constitution.

Senator Moore: The Governor General is the ultimate authority. I would suggest that it would be incumbent upon the person occupying the office of Governor General to use whatever authorities are available in that office to make the appointments.

If there is no advice given ever, there is nothing in the Constitution that says the Governor General is relieved from making an appointment because he or she has not received advice from someone. The responsibility still remains under the Constitution. That is the ultimate guarantee that the Senate would not be allowed to wither away in the supposition that you proposed.

Chambre des communes. En d'autres termes, les petites provinces sont surreprésentées au Sénat, tandis que certaines ne le sont pas suffisamment. Notre collègue, le sénateur Murray, a présenté une motion qui avait certains mérites pour ce qui est de rééquilibrer la représentation régionale au Sénat. La représentation des minorités au Sénat dépend de la structure qui y est appliquée en matière de représentation des régions.

Si des régions où se concentrent des minorités ne sont pas représentées au Sénat à cause de la réduction du nombre des membres, ne s'agit-il pas d'un manquement à un autre principe constitutionnel, soit la protection des droits des minorités et de leur droit de s'exprimer dans le processus législatif tel qu'il est structuré dans la présente Constitution?

Le sénateur Moore : Je crois que c'est le cas, comme je l'ai dit plus tôt. Le Sénat, dans le régime politique que nous avons aujourd'hui, est la seule institution qui assure aux minorités qu'un représentant parlera en leur nom à la chambre haute qui participe à l'administration du pays. Il est possible de faire siéger au Sénat des personnes qui représentent les divers groupes minoritaires provenant de toutes les régions. Le fait de ne pas respecter ce principe, de ne pas pourvoir les postes vacants, est tout à fait irresponsable et contraire à la Constitution.

Le sénateur Joyal : Si on venait effectivement à observer une diminution du nombre de sénateurs, quel serait le recours constitutionnel?

Le sénateur Moore : Quel serait le recours constitutionnel?

Le sénateur Joyal : Oui. Comment pourrions-nous obliger le premier ministre à recommander à la Gouverneure générale de nommer des sénateurs de façon à ce que ces principes soient respectés?

Le sénateur Stratton : Ils devraient être élus.

Le sénateur Moore : C'est une bonne question. C'est la Gouverneure générale qui est l'autorité suprême. Selon les conventions, le premier ministre la conseille. S'il ne la conseille pas, la Gouverneure générale a quand même toujours la responsabilité de pourvoir les postes vacants, conformément à la Constitution.

Le sénateur Joyal : C'est ce qui est dit à l'article 24 de la Loi constitutionnelle.

Le sénateur Moore : La Gouverneure générale est l'autorité suprême. Je suggère qu'il incombe à la personne qui occupe la fonction de Gouverneur général d'utiliser les pouvoirs qui lui sont conférés pour faire des nominations.

Si personne ne conseille la Gouverneure générale, rien dans la Constitution n'indique qu'elle est déchargée de son obligation de faire des nominations parce que personne ne l'a conseillée. Sa responsabilité reste en vigueur aux termes de la Constitution. C'est la dernière disposition qui garantit que le Sénat ne pourra pas disparaître si la situation que vous décrivez devait survenir.

Senator Joyal: In other words, in your opinion, one of the options would be for the Governor General to breach the convention and to make appointments to the Senate, and face the political price for it.

Senator Moore: Yes, that is correct.

Senator Stratton: Welcome, Senator Moore. This is an interesting debate. You have brought forward quite an interesting proposal. Do you believe in electing senators?

Senator Moore: Do I believe in electing senators?

Senator Stratton: Yes.

Senator Moore: That depends on a lot of things.

Senator Stratton: You said "a lot of things." Can you name one or two?

Senator Moore: I do not want to get into a protracted debate about this. You are talking about Senate reform here. One would have to reform the whole institution that governs the country. It would require looking at Parliament, the House of Commons and the Senate. It is not a simple thing.

Senator Stratton: Alberta does it today. We have a member in the chamber, right now, who was elected in Alberta. He is there.

Senator Moore: Yes, he is there, but not under any law of the Government of Canada.

Senator Stratton: It is a law of Alberta.

Senator Moore: It is intra vires Alberta, and that is it. He did not have to be appointed. He could have been ignored.

Senator Stratton: I would be surprised if a prime minister would do that.

I am concerned about your talk about the power of the prime minister. It really is of some concern to all of us. In over four Parliaments, I put forward a bill on the appointment of senators through a different process. The process I described was that there would be a select committee of four former parliamentarians, who were Privy Councillors, or five Privy Councillors, who would put an advertisement in the paper for the position of senator in a particular region, for example, Nova Scotia. The citizens of that province could apply. There would be a selection process and a list of four or five names chosen by that select committee. Those four or five names would be reviewed by the prime minister and the premier of the province.

In part, that takes the power away from the prime minister.

Why would you not want to include that as a part of this bill to reduce the power of the prime minister? Perhaps you have not thought of it, but that seems to be a logical step as well, to make the process at least more democratic in the sense that anyone in that province could apply. The selected list would be discussed and the candidate chosen between the premier of the province and

Le sénateur Joyal : En d'autres termes, selon vous, l'une des options serait que la Gouverneure générale ignore les conventions, qu'elle fasse des nominations au Sénat et qu'elle paie le prix politique de sa décision.

Le sénateur Moore : Oui, c'est exact.

Le sénateur Stratton : Bienvenue, sénateur Moore. Il s'agit d'un débat intéressant. Vous avez présenté une proposition fort intéressante. Est-ce que vous croyez à l'élection des sénateurs?

Le sénateur Moore : Si je crois à l'élection des sénateurs?

Le sénateur Stratton : Oui.

Le sénateur Moore : Ça dépend de bien des choses.

Le sénateur Stratton : Vous dites « bien des choses ». Pouvez-vous en nommer une ou deux?

Le sénateur Moore : Je ne veux pas me lancer dans un long débat à ce sujet. Vous parlez ici de la réforme du Sénat. Il faudrait réformer toute l'institution qui gouverne le pays. Ce qui veut dire qu'il faudrait examiner le Parlement, la Chambre des communes et le Sénat. Ce n'est pas une mince tâche.

Le sénateur Stratton : L'Alberta le fait aujourd'hui. Nous avons actuellement au Sénat un membre qui a été élu en Alberta. Il est là.

Le sénateur Moore : Oui, il est là, mais pas aux termes de la loi édictée par le gouvernement du Canada.

Le sénateur Stratton : Il s'agit d'une loi de l'Alberta.

Le sénateur Moore : C'est dans les limites des compétences de l'Alberta et c'est tout. Il n'avait pas à être nommé. On aurait pu l'ignorer.

Le sénateur Stratton : Je serais surpris qu'un premier ministre agisse ainsi.

Vos affirmations sur le pouvoir du premier ministre me préoccupent. En réalité, la question nous préoccupe tous. Pendant plus de quatre législatures, j'ai présenté un projet de loi sur la nomination des sénateurs par un processus différent. Je décrivais un processus selon lequel un comité restreint formé de quatre anciens parlementaires, soit des conseillers privés, ou de cinq conseillers privés publierait une annonce dans les journaux pour le poste de sénateur dans une région donnée, par exemple la Nouvelle-Écosse. Les citoyens de cette province pourraient présenter leur candidature. Il y aurait un processus de sélection, puis le comité restreint choisirait quatre ou cinq personnes dont la candidature sera ensuite examinée par le premier ministre ainsi que par le premier ministre de la province concernée.

Cela enlève en partie tout pouvoir au premier ministre.

Pourquoi ne voudriez-vous pas inclure cela dans le projet de loi pour réduire le pouvoir du premier ministre? Peut-être n'y avez-vous pas pensé, mais ça semble aussi être une étape logique, c'est-à-dire rendre le processus à tout le moins plus démocratique au sens où tout le monde dans la province concernée pourrait se présenter. La liste des personnes

the prime minister. That would be a logical next step to take with your bill. Would you agree with that?

Senator Moore: That, again, is another type of Senate reform. I did not prepare the bill thinking of various suppositions or possible reforms of the Senate of Canada or the House of Commons of Canada. I approached the bill on the basis of the law that is in place now, trying to improve it and improve the representation in the law that exists now.

Senator Stratton: I understand and appreciate that. I would like someone on your side to put forward the bill that I used to put forward, because, with your majority, we could actually get this bill through. I could not even get it into committee for study when I put it forward.

At any rate, there will be 29 vacancies by the end of 2009. It would be nice if some of them were Conservative — such as all 29.

Senator Joyal: Why do you not introduce your bill, Senator Stratton?

Senator Stratton: It would not go through with you chaps in the driver's seat when you were in government. I do not see why it would go through now.

Senator Joyal: Sometimes wisdom takes time to soften people's minds.

The Chair: May I observe, Senator Stratton, that this committee has not usually had the luxury that it has in this session of being able to study a large number of senators' private member's bills because we have not, to date, received many government bills that have required study. You might have a window of opportunity.

Senator Andreychuk: Senator Joyal indicated that if this went on and the Prime Minister did not exercise his discretion, we would end up with no senators.

Senator Moore: That is regardless of who the prime minister is.

Senator Andreychuk: Yes, and that would be violating the Constitution. That has been rebutted by you by saying that the Governor General has certain responsibilities that he or she could exercise that would not bring us to that brink of constitutionality.

Why did you pick 180 days? The Constitution in this area was crafted — and I think our Constitution was ingeniously crafted — to give this wide discretion to a prime minister. It was there for a reason. It was not there by accident.

You have chosen to say that you want to fetter a prime minister's discretion to 180 days. Why do you think that is fair? Why do you think that his or her powers should be fettered to

sélectionnées ferait l'objet d'une discussion entre le premier ministre de la province et le premier ministre fédéral, et ceux-ci choisiraient ensemble le candidat. Ce serait là une étape logique à inscrire dans le cadre de votre projet de loi. Êtes-vous d'accord?

Le sénateur Moore : Il s'agit encore ici d'un autre type de réforme du Sénat. Je n'ai pas préparé le projet de loi en pensant aux diverses suppositions ou réformes possibles du Sénat du Canada ou de la Chambre des communes du Canada. J'ai conçu le projet de loi en fonction de la loi qui est en place actuellement, en essayant de l'améliorer et d'améliorer la représentation sous le régime de la loi existante.

Le sénateur Stratton : Je comprends et je saisis cela. J'aimerais que quelqu'un de votre côté présente le projet de loi que j'avais l'habitude de présenter, car vu votre majorité, nous pourrions vraiment le faire adopter. Je ne suis même pas arrivé à le faire étudier en comité lorsque je l'ai présenté.

Quoi qu'il en soit, 29 sièges seront vacants d'ici la fin de 2009. Ce serait bien si certains d'entre eux étaient occupés par des conservateurs — l'ensemble des 29 sièges, par exemple.

Le sénateur Joyal : Pourquoi ne présentez-vous pas votre projet de loi, sénateur Stratton?

Le sénateur Stratton : Il n'a pas pu être adopté quand vous étiez aux commandes et que votre parti était au pouvoir. Je ne vois pas pourquoi il serait adopté maintenant.

Le sénateur Joyal : Il faut parfois donner le temps à la sagesse de faire son chemin dans l'esprit des gens.

La présidente : Permettez-moi de faire remarquer, sénateur Stratton, que le comité a rarement eu le luxe qu'il a aujourd'hui d'être en mesure d'étudier un grand nombre de projets de loi d'initiative parlementaire de sénateurs, parce qu'à ce jour, nous n'avons pas reçu beaucoup de projets de loi émanant du gouvernement qui nécessitaient une étude. La conjoncture vous est peut-être favorable.

Le sénateur Andreychuk : Le sénateur Joyal a souligné que si ça continuait ainsi et que le premier ministre n'exerçait pas son pouvoir discrétionnaire, nous nous retrouverions sans sénateurs.

Le sénateur Moore : Et cela peu importe qui est premier ministre.

Le sénateur Andreychuk : Oui, et ça serait en violation de la Constitution. Vous avez réfuté cela en disant que le Gouverneur général ou la Gouverneure générale pourrait exercer certaines responsabilités qui nous éviteraient d'en arriver aux limites de la validité constitutionnelle.

Pourquoi 180 jours? La Constitution à cet égard a été conçue — et je crois que notre Constitution a été ingénieusement conçue — de manière à confier ce pouvoir discrétionnaire considérable à un premier ministre. Il y avait une raison à cela. Ce n'était pas là par hasard.

Vous avez choisi de limiter le pouvoir discrétionnaire du premier ministre à 180 jours. Pourquoi croyez-vous que c'est équitable? Pourquoi croyez-vous que ses pouvoirs devraient être

that extent when, in fact, history points out that many prime ministers, for whatever reasons, have not exercised their discretion within 180 days?

Senator Moore: I acknowledge your last statement. I have said that in my own remarks. I, again, repeat, that I do not think that makes it right. Regardless of what political stripe the person holding the office of prime minister may be, it is still a denial of the constitutional right of Canadian citizens to have timely and proper representation in each House of Parliament.

I chose 180 days to be consistent with section 31(1) in the Parliament of Canada Act, which states the following:

> Where a vacancy occurs in the House of Commons, a writ shall be issued between the 11th day and the 180th day after the receipt by the Chief Electoral Officer of the warrant.

Obviously, a bit of a breathing period after the actual vacancy is required, hence the eleventh day. That act was the basis of my thinking in proposing that time period.

Senator Andreychuk: The underlying premise of all of this is that you say that people will be denied their representation. You have canvassed some reasons.

In a democracy, the will of the people should come through in one form or another, and I will not go into a political science debate. If this is such a crisis of lack of representation, first, how have you consulted with the people of Canada about this, and, second, would the people not express their satisfaction or dissatisfaction with the prime minister and his or her exercise of powers and office through an election?

Because of an act, now it will be every four years, but it used to be at least once within five years, that people could express whether they were dissatisfied with a particular prime minister for not acting, if this was of fundamental importance to their representation.

Can you answer either of those questions?

Senator Moore: I will try to answer.

With regard to the last part of your comment, this is consulting the people of Canada. You are representing the public. The Senate Chamber is a voice of the public. I suggest to you that that is a fair response to the point that you raise.

In terms of reacting to any prime minister's decision to play with the calling of by-elections, do you think the people in Toronto Centre feel good about having to wait 8 months and 15 days, where the people in Roberval—Lac-Saint-Jean wait 1 month and 19 days? There is something fundamentally wrong with that.

limités ainsi, alors que dans les faits, l'histoire nous montre que bon nombre de premiers ministres, pour une raison ou une autre, n'ont pas exercé leur pouvoir discrétionnaire dans un délai de 180 jours?

Le sénateur Moore : Je reconnais le bien-fondé de votre dernière affirmation. Je l'ai mentionné dans mes propres remarques. Je répète, encore une fois, que je ne crois pas que ce soit pour autant acceptable. Peu importe l'allégeance politique de la personne qui exerce les fonctions de premier ministre, cela reste un déni du droit constitutionnel des citoyens canadiens d'avoir une représentation opportune et adéquate dans chaque chambre du Parlement.

J'ai choisi 180 jours pour être cohérent avec le paragraphe 31(1) de la Loi sur le Parlement du Canada, qui stipule que :

> En cas de vacance à la Chambre des communes, le bref relatif à une élection partielle doit être émis entre le onzième jour et le cent quatre-vingtième jour suivant la réception, par le directeur général des élections, de l'ordre officiel.

Évidemment, un certain délai est nécessaire après l'annonce de la vacance, d'où le 11e jour. Cette loi était à la base de mon raisonnement pour proposer ce délai.

Le sénateur Andreychuk : La trame de fond de tout cela, c'est que vous dites que les gens se verront refuser d'être représentés. Vous avez examiné quelques raisons.

En démocratie, la volonté du peuple devrait ressortir d'une façon ou d'une autre, mais je n'amorcerai pas un débat politique à ce sujet. S'il s'agit vraiment d'une crise concernant le manque de représentation, premièrement, comment avez-vous fait pour consulter les Canadiens à ce sujet, et deuxièmement, les gens n'exprimeraient-ils pas, à la faveur d'une élection, leur satisfaction ou insatisfaction envers le premier ministre et la façon dont il exerce ses pouvoirs et fonctions?

Les gens pouvaient auparavant exprimer leur insatisfaction face à l'inaction d'un premier ministre au moins une fois tous les cinq ans, si c'était d'importance fondamentale pour leur représentation, et maintenant, en raison d'une loi, ils le feront tous les quatre ans.

Pouvez-vous répondre à l'une ou l'autre de ces questions?

Le sénateur Moore : J'essaierai de répondre.

En ce qui concerne la dernière partie de votre commentaire, il s'agit de consulter les Canadiens. Vous représentez la population. Le Sénat donne une voix à la population. À mon avis, c'est une réponse honnête au point que vous soulevez.

Pour ce qui est de réagir à la décision d'un premier ministre de jouer avec le déclenchement d'élections partielles, pensez-vous que les gens de Toronto-Centre sont contents d'avoir à attendre 8 mois et 15 jours, tandis que ceux de Roberval—Lac-Saint-Jean attendent 1 mois et 19 jours? Il y a là quelque chose de foncièrement inadmissible.

I am trying to bring balance or sense of uniformity to this situation so that, regardless of what riding you live in, you will have an elected person representing you in the House of Commons or an appointed person representing you in the Senate of Canada.

Senator Andreychuk: I am pleased that I am not presenting the bill because I would have to answer questions.

I am serious about this point. I am from Western Canada where people have made their views known to all of their political parties that they do not approve of the way senators are appointed. They want a different process. Many people want an elected process. Many others have said that they do not want the partisanship to be in those appointments. Some people would prefer some other process, such as that voiced by Senator Stratton.

If a prime minister is listening to that and is attempting to work out some way to answer the voice of the people and, in so doing, takes more time making appointments, what is wrong with that? Why should the representation and consultation only be amongst us in the Senate? That is one valid way of hearing people, but only one way.

Senator Moore: You have started out asking me again about Senate reform. I am not here to talk about that. I am here to give a fairer structure as under the current law.

Senator Andreychuk: You feel very comfortable in putting limits on the discretion of a prime minister. Do you also have the same comfort level in putting limits on the discretion of judges?

Senator Moore: I never thought about that.

Senator Murray: As you know, I am not a member of this committee. Therefore, I thank you for your indulgence and recognizing me.

The Chair: No indulgence is required.

Senator Murray: I am here to offer moral support to Senator Moore in his endeavour. I believe he is on the right track, subject to a couple of comments that I intend to make.

Other issues have arisen, so I should declare myself in answer to Senator Stratton's question about the elected Senate. Am I in favour of an elected Senate with the same powers as the present Senate, equal to those of the House of Commons? No, I am definitely not. We can only have one confidence chamber, and that is the House of Commons. Am I in favour of an elected Senate with the present imbalance of regional representation? Again, the answer is an emphatic, "No."

I am slightly more sympathetic to Senator Stratton's view about changes in the appointments process. I would examine his suggestions or his forthcoming bill, if there is one, with an open mind.

J'essaie de trouver un équilibre ou d'assurer une certaine uniformité dans cette situation afin que, peu importe votre circonscription, une personne élue vous représente à la Chambre des communes ou qu'une personne nommée vous représente au Sénat du Canada.

Le sénateur Andreychuk : Je suis heureuse de ne pas présenter le projet de loi parce que j'aurais à répondre aux questions.

Je suis sérieuse sur ce point. Je viens de l'Ouest du Canada, où les gens ont fait connaître leur point de vue à tous les partis politiques, à savoir qu'ils n'approuvent pas la façon dont les sénateurs sont nommés. Ils veulent un processus différent. Bon nombre veulent un processus électoral. Beaucoup d'autres ont dit qu'ils ne voulaient pas que la partisannerie soit présente dans ces nominations. Certains préféreraient avoir recours à un autre processus, comme celui dont parlait le sénateur Stratton.

Si un premier ministre écoute cela et essaie de trouver une façon de répondre au souhait du peuple et, ce faisant, prend plus de temps pour procéder à des nominations, que peut-on lui reprocher? Pourquoi la représentation et la consultation ne devraient-elles se faire qu'entre nous au Sénat? C'est une façon valable d'entendre les gens, mais une seule parmi d'autres.

Le sénateur Moore : Vous recommencez à me poser des questions au sujet de la réforme du Sénat. Je ne suis pas ici pour parler de cela. Je suis ici pour présenter une structure qui soit plus équitable sous le régime de la loi actuelle.

Le sénateur Andreychuk : Vous vous sentez très à l'aise d'imposer des limites au pouvoir discrétionnaire du premier ministre. Avez-vous le même degré d'aisance pour imposer des limites au pouvoir discrétionnaire des juges?

Le sénateur Moore : Je n'y ai jamais songé.

Le sénateur Murray : Comme vous le savez, je ne suis pas membre du comité. Je vous remercie donc de m'accorder votre indulgence et de me donner la parole.

La présidente : Je vous en prie.

Le sénateur Murray : Je suis ici pour apporter mon soutien moral au sénateur Moore dans le cadre de son initiative. Je crois qu'il est dans la bonne voie, si ce n'est que de quelques commentaires que j'ai l'intention de formuler.

D'autres questions ont été soulevées, alors je me dois de répondre au sénateur Stratton concernant le Sénat élu. Suis-je en faveur d'un Sénat élu disposant des mêmes pouvoirs que le Sénat actuel et que la Chambre des communes? Non, je ne le suis pas du tout. Nous ne pouvons avoir qu'une seule chambre habilitée à prendre un vote de confiance, et c'est la Chambre des communes. Suis-je en faveur d'un Sénat élu, compte tenu du déséquilibre actuel dans la représentation des régions? Encore ici, la réponse est un « non » catégorique.

Je serais enclin à partager le point de vue du sénateur Stratton quant aux changements à apporter au processus de nomination. Je suis prêt à faire preuve d'ouverture dans l'examen de ses propositions ou de son projet de loi à venir, le cas échéant.

Having said that, I am conscious of the comments made by Senator Andreychuk about the dissatisfaction with the way senators are appointed. I certainly recall the consternation among Progressive Conservatives in Saskatchewan on the day that she was appointed to the Senate, not having had a partisan background. I hasten to say that it is the case, as Senator Joyal points out, that she is a fine senator. Whether she is the exception to the rule or whether she proves the present system of appointment is a good one, I leave to others.

Senator Moore, I appreciate and support what you are doing. I have one or two issues that are rather technical. The first issue is with respect to the House of Commons. The law, as I understand it now, requires a prime minister to issue a writ for a by-election six months after a vacancy has been registered in the House of Commons.

Prime ministers seem to have a good deal of latitude, however, as to setting the actual date for the by-election. For example, the constituency of Roberval—Lac-Saint-Jean became vacant with the resignation, in this case, of Michel Gauthier on July 29, 2007. The Prime Minister acted swiftly. Thirteen days later, he issued a writ. Thirty-seven days later, the by-election was held. The total time that elapsed between Mr. Gauthier's resignation and the election of a successor in Roberval—Lac-Saint-Jean was 50 days.

On the other hand, in that same month on July 2, 2007, the Honourable Bill Graham resigned as the MP for Toronto Centre. The Prime Minister waited just a few days short of the full six months before issuing a writ for a by-election. He did so on December 21, 2007. He called the election for March 17. The by-election campaign lasted for 87 days therefore. The total time elapsed between Mr. Graham's resignation and voting day was 259 days.

One problem that has arisen with the calling of by-elections is that when the vacancy occurs in the fourth year of a Parliament's mandate, prime ministers, trying to avoid a situation in which a by-election is held within a few days, weeks or a month of a general election, call a by-election for a date that they know will be beyond such a time, and the eventual writ of dissolution for a general election, of course, cancels out the by-election.

I wonder whether a way could be found, through an amendment to the Canada Elections Act, to provide that, in the fourth or fifth year of a Parliament's existence, a vacancy occurring would not be subject to the requirement that a by-election be called within six months.

The second issue, with respect to the Senate — and this is getting a bit picky but I do want to mention it — you would require the prime minister to recommend to the Governor General, within 180 days after the vacancy occurring, a fit and qualified person. There are conventions in regard to the recommendation. For example, a prime minister whose

Cela dit, je suis sensible aux commentaires formulés par le sénateur Andreychuk à propos de l'insatisfaction entourant la nomination des sénateurs. Je me souviens certes de la consternation qui a gagné les progressistes-conservateurs en Saskatchewan le jour où elle a été nommée au Sénat, en dépit de son allégeance politique. Je m'empresse de dire qu'effectivement, comme le sénateur Joyal le souligne, elle est un bon sénateur. Fait-elle exception à la règle ou est-elle la preuve vivante que le système actuel de nominations est un bon système? Je laisse la réponse aux autres.

Sénateur Moore, j'apprécie ce que vous faites et vous avez mon appui. J'ai une ou deux questions qui sont plutôt techniques. La première concerne la Chambre des communes. La loi, comme je la comprends aujourd'hui, prévoit qu'en cas d'élection partielle, le premier ministre doit émettre un bref d'élection six mois après qu'un siège soit devenu vacant à la Chambre des communes.

Il semble, cependant, que les premiers ministres aient beaucoup de latitude quand vient le temps de fixer la date réelle de l'élection partielle. Par exemple, la circonscription électorale de Roberval—Lac-Saint-Jean est devenue vacante avec la démission, dans le cas présent, de Michel Gauthier, le 29 juillet 2007. Le premier ministre a agi promptement en émettant un bref d'élection 13 jours plus tard. Trente-sept jours après, l'élection partielle avait lieu. Au total, 50 jours se sont donc écoulés entre la démission de M. Gauthier et l'élection de son successeur dans Roberval—Lac-Saint-Jean.

Par ailleurs, le même mois, soit le 2 juillet 2007, l'honorable Bill Graham démissionnait de son siège de député de la circonscription de Toronto-Centre. Le premier ministre a attendu qu'on ne soit plus qu'à quelques jours du délai de six mois prévu, avant d'émettre le bref d'élection partielle, soit le 21 décembre 2007. Il a fixé l'élection au 17 mars suivant. La campagne relative à l'élection partielle s'est donc étendue sur 87 jours, de sorte qu'au total, la période comprise entre la démission de M. Graham et le jour de l'élection a été de 259 jours.

L'un des problèmes que pose le déclenchement d'élections partielles vient du fait que, lorsqu'un siège se libère au Parlement au cours de la quatrième année du mandat du gouvernement, les premiers ministres, souhaitant éviter une situation où une élection partielle serait tenue à quelques jours, à quelques semaines ou à un mois d'une élection générale, annoncent la tenue d'une élection partielle à une date ultérieure à celle-ci, et l'annonce de la dissolution de la Chambre en prévision de l'élection générale vient, bien sûr, annuler l'élection partielle.

Je me demande si on ne pourrait pas, en apportant une modification à la Loi électorale du Canada, prévoir que lorsqu'un siège se libère au cours de la quatrième ou de la cinquième année du mandat d'un gouvernement, l'obligation de tenir une élection partielle dans les six mois est levée.

Mon deuxième point, en ce qui concerne le Sénat — et la question devient un peu délicate mais je ne peux m'empêcher d'en faire mention — c'est que vous exigeriez que le premier ministre recommande au Gouverneur général, dans les 180 jours suivant l'avis de vacance, une personne capable et ayant les qualifications voulues. Or, des conventions existent en ce qui a trait à la

government has lost the confidence of the House of Commons may not, according to convention, try to fill a Senate vacancy until that situation has been corrected.

Senator Moore: That is happened. They have been denied.

Senator Murray: As you know, in at least one case, a prime minister who tried to fill some Senate vacancies was sent packing, and rightly so, by the Governor General.

I do not know whether an amendment would be required to meet a situation in which the six months came up after the prime minister had lost the confidence of the House or, indeed, after he or she had lost the election. However, the prime minister obviously could not, under those circumstances, properly recommend a senator, nor would the Governor General accept such a recommendation. I will leave those picky points for your consideration.

Senator Moore: Those are interesting points. I am open to ideas that would improve this bill.

You mentioned a real possibility, especially in view of the fact that we now have set dates for federal general elections, that if there was a vacancy in a constituency within six months of the date for a federal election — and I use that number simply because I have been using it throughout — then setting that by-election would be waived pending the general election.

On your second point, the person in the situation you mentioned would be prime minister by title but not by authority, so I do not believe the Governor General would be required to accept the advice of such a person.

Senator Murray: It would not be necessary to amend the bill in that respect.

Senator Moore: I do not think it would be necessary.

Senator Joyal: If I recollect constitutional history correctly, once Parliament has been dissolved, a prime minister who has tendered the resignation of the government to the Governor General has refrained from making recommendations to the Governor General. That seems to me to be a convention. In other words, no appointments are made once a government has tendered its resignation to the Governor General.

Senator Murray: It happens seldom, at any rate.

Senator Joyal: That is the convention.

Senator Moore: I believe it was tried once, and the Governor General declined the advice.

Senator Joyal: I will have to look in the history books, but that has traditionally been the practice.

recommandation. Par exemple, un premier ministre dont le gouvernement a perdu la confiance de la Chambre des communes ne peut, en vertu des conventions, tenter de combler un siège vacant au Sénat avant que la situation n'ait été corrigée.

Le sénateur Moore : Cela est arrivé. Ils ont essuyé un refus.

Le sénateur Murray : Comme vous le savez, dans au moins un cas, un premier ministre qui voulait combler certains sièges vacants au Sénat a été renvoyé à ses devoirs, et à juste titre, par la Gouverneure générale.

Je ne sais pas s'il faudrait apporter un amendement dans l'éventualité où la période de six mois survienne après que le premier ministre a perdu la confiance de la Chambre ou, en fait, après qu'il ou elle a perdu l'élection. Il est évident, toutefois, que le premier ministre ne pourrait pas, dans ces circonstances, recommander dûment la nomination d'un sénateur, pas plus que le Gouverneur général ne pourrait accepter une telle recommandation. Je vous laisse réfléchir à ces points délicats.

Le sénateur Moore : Ce sont là des points intéressants. Je suis réceptif aux idées qui sont susceptibles d'améliorer le projet de loi.

Vous avez évoqué la possibilité réelle, notamment en raison du fait que nous avons maintenant des dates fixes pour la tenue des élections générales fédérales, qu'en cas de vacance dans une circonscription électorale qui surviendrait à moins de six mois de la date d'une élection fédérale — et j'utilise ce chiffre simplement parce que c'est celui que j'ai utilisé depuis le début — l'obligation de tenir une élection partielle serait levée dans l'attente de l'élection générale.

Quant à votre deuxième point, la personne se trouvant dans une telle situation serait premier ministre de titre mais sans son autorité, de sorte que je ne crois pas que le Gouverneur général serait tenu d'accepter son avis.

Le sénateur Murray : Il ne serait pas nécessaire d'amender le projet de loi à cet égard.

Le sénateur Moore : Je ne crois pas que cela serait nécessaire.

Le sénateur Joyal : Si je me souviens bien de mon histoire constitutionnelle, une fois que le Parlement est dissous, le premier ministre qui remet la démission du gouvernement au Gouverneur général s'abstient de lui faire des recommandations. Il me semble que ce sont les conventions. En d'autres mots, aucune nomination n'est faite une fois qu'un gouvernement a remis sa démission au gouverneur général.

Le sénateur Murray : Quoi qu'il en soit, cela se produit rarement.

Le sénateur Joyal : Ce sont les conventions.

Le sénateur Moore : Je crois qu'on a essayé une fois, et la Gouverneure générale a rejeté l'avis.

Le sénateur Joyal : Il faudra que je vérifie dans les livres d'histoire, mais c'est toujours ce qu'on a fait.

Senator Murray: I am aware of the appointment of a fairly senior judge to the Federal Court of Canada by a prime minister who had lost the confidence of the House, but he consulted the then-leader of the opposition before making that recommendation.

Senator Joyal: That is one way of serving the principle.

Senator Stratton, I am on record as having supported the principle of your suggestion in a book entitled *Protecting Canadian Democracy: The Senate You Never Knew*, which was first published in 2003 and reprinted in 2005 and 2007. All royalties from the book are given to the Canada School of Public Service.

I quote from page 298 as follows:

> The most effective way to establish a transparent process for appointing senators would be for Parliament to enact a law that would:
>
> . . .
>
> establish an independent Board of Review, appointed for the life of each Parliament.[99]

Referring to the notes on page 313, note 99 states:

> . . . such a board could be composed of: 1) a retired senator from each of the two main parties represented in the Senate; 2) a retired member of Parliament representing the party with the largest number of members in the House of Commons that is not represented in the Senate; and 3) two other Canadians of good report, whose achievements have caused them to be honoured as Companions of the Order of Canada.

We are not greatly divided in our opinions, Senator Stratton. It could be an interesting discussion.

Returning to this bill, would it not be possible for a province whose Senate seats were left vacant for a while to seek an opinion through a reference to the Court of Appeal on the obligation to fill seats in the Senate? Have you thought of that?

Senator Moore: I thought about some of these aspects when, earlier in the session, I had a motion on the Order Paper asking the Governor General to make the appointments in the absence of advice from the Office of the Prime Minister. I reflected no further on it. There is nothing to prevent any person or province from asserting rights under the Constitution. I expect they would be heard.

You are talking about a situation where a region's numbers have been depleted in the Senate. We are getting close to that now. British Columbia has three vacant seats out of six. That is 50 per cent.

Senator Campbell: There is a massive weight on my shoulders.

Senator Moore: That is a very real example. I hope someone is looking at that.

Le sénateur Murray : Je suis au courant de la nomination d'un juge de rang plutôt élevé à la Cour fédérale du Canada par un premier ministre à qui la Chambre avait retiré sa confiance, mais il avait consulté, à l'époque, le chef de l'opposition avant de faire cette recommandation.

Le sénateur Joyal : C'est une façon de respecter le principe.

Sénateur Stratton, j'ai appuyé publiquement le principe qui sous-tend votre proposition, dans un livre intitulé *Protéger la démocratie canadienne : Le Sénat en vérité*..., qui a été publié une première fois en 2003 et réédité en 2005 et en 2007. Tous les droits découlant de la vente du livre ont d'ailleurs été remis à l'École de la fonction publique du Canada.

Permettez-moi de citer l'extrait suivant que l'on trouve à la page 318 :

> Pour établir un processus transparent régissant la nomination des sénateurs, le mieux serait que le Parlement adopte une loi qui :
>
> [...]
>
> établirait une commission indépendante d'examen des candidatures nommée pour la durée de chaque législature.

Puis, à la page 335, la note 99 se lit comme suit :

> Par exemple, cette commission pourrait être composée des éléments suivants : 1) deux anciens sénateurs provenant l'un du gouvernement et l'autre de l'opposition; 2) un ancien député du parti qui a le plus de sièges à la Chambre des communes mais qui n'est pas représenté au Sénat; et 3) deux citoyens éminents à qui leurs réalisations ont valu d'être nommés compagnons de l'Ordre du Canada.

Nous ne sommes pas tellement divisés quant à nos opinions, sénateur Stratton. Nous pourrions avoir une discussion intéressante.

Pour revenir au projet de loi, ne serait-il pas possible pour une province dont les sièges au Sénat sont vacants depuis un certain temps d'obtenir un avis par le biais d'un renvoi à la Cour d'appel en ce qui concerne l'obligation de combler les sièges vacants au Sénat? Avez-vous pensé à cela?

Le sénateur Moore : J'ai réfléchi à certains de ces aspects quand, plus tôt pendant la session, j'ai inscrit une motion au *Feuilleton* pour demander à la Gouverneure générale de faire des nominations en l'absence d'avis du cabinet du premier ministre. Je n'ai pas poussé plus loin ma réflexion. Rien ne peut empêcher une personne ou une province de faire valoir ses droits en vertu de la Constitution. J'imagine qu'on accepterait de les entendre.

Vous parlez d'une situation où une région verrait le nombre de sièges dont elle dispose au Sénat réduit. Nous nous rapprochons d'une telle situation aujourd'hui. La Colombie-Britannique a trois sièges vacants sur six. Cela veut dire 50 p. 100.

Le sénateur Campbell : J'ai un lourd fardeau sur les épaules.

Le sénateur Moore : C'est un exemple très concret. J'espère que quelqu'un s'en occupe.

Senator Joyal: I know of two decisions of the Supreme Court of Canada wherein the court recognized that the exercise of a prerogative power by the executive is not beyond review by the court.

In 1983, in *Thorne's Hardware Limited et al. v. Her Majesty the Queen*, Justice Dixon said:

> Decisions made by the Governor in Council in matters of public convenience and general policy are final and not reviewable in legal proceedings.

Justice Estey, in *Attorney General v. Inuit Tapirisat of Canada* of 1980, said that the mere fact that a statutory power is vested in the Governor-in-Council does not mean that it is beyond judicial review.

In other words, to give the Governor General a base to act *proprio moto* according to section 24 of the Constitution, would it not help for a province to get a declaration from the Court of Appeal of its province, through a reference, that a region is, according to constitutional principles, entitled to have its voice heard in the legislative process of Canada?

Senator Moore: I believe they would be absolutely entitled to do that and that it would be irresponsible for them not to pursue that.

Senator Joyal: Is there not a way to bring the Governor General to act in the absence of action of a prime minister in order to satisfy the constitutional principles entrenched in the legislative structure of Canada?

Senator Moore: Short of the Governor General taking it upon himself or herself to act as authorized under the Constitution of the country, if he or she needed another authority, and I do not think he or she would, but if that person did, such a declaration could be sought and obtained. Also, I expect it would have to include a provision requiring the Governor General to act pursuant to the Constitution.

This is getting away from the bill, but it is an interesting discussion. I am not sure how much you can tell the Crown what to do in terms of Her Majesty or her representative in Canada. I would have to do some research. There is a provision in the Constitution that seats are to be filled. I do not know why the person in the Governor General's office could not be approached by another means, and I do not know what it would be, but something other than going to court. Surely the person in that office would have, I would expect, legal counsel and does not sit there in a bubble unaware of what is going on in the country. They would know that the situation is not in keeping with the Constitution and is not tenable. It has to be fixed, and the vacancies have to be filled, and that person would exercise his or her responsibility under the Constitution of Canada.

Le sénateur Joyal : Je connais deux décisions de la Cour suprême du Canada où les juges ont reconnu que l'exercice d'une prérogative par le pouvoir exécutif n'échappe pas au contrôle du tribunal.

En 1983, dans *Thorne's Hardware Limited et al. c. Sa Majesté la Reine,* le juge Dixon déclarait :

> Les décisions prises par le gouverneur en conseil sur des questions de commodité publique et de politique générale sont sans appel et ne peuvent être examinées par voie de procédures judiciaires.

En 1980, dans l'affaire *Procureur général du Canada c. Inuit Tapirisat of Canada,* le juge Estey indiquait que le simple fait qu'une décision soit prise en vertu d'un pouvoir conféré par la Loi au gouverneur en conseil ne signifie pas que son exercice échappe à toute révision judiciaire.

En d'autres termes, pour que le Gouverneur général soit fondé à agir de son propre chef, en conformité avec l'article 24 de la Constitution, ne serait-il pas utile, pour une province, d'adresser un renvoi à sa cour d'appel en vue d'obtenir une déclaration selon laquelle une région a le droit, en vertu des principes constitutionnels, de faire entendre sa voix dans le cadre du processus législatif au Canada?

Le sénateur Moore : Je crois qu'elles seraient tout à fait habilitées à le faire et qu'il serait irresponsable de leur part de ne pas agir.

Le sénateur Joyal : N'y a-t-il pas une façon d'amener le Gouverneur général à agir devant l'inaction d'un premier ministre, en vue de satisfaire aux principes constitutionnels qui sont enchâssés dans le système législatif au Canada?

Le sénateur Moore : Hormis le fait que la ou le Gouverneur général puisse agir de son propre chef comme le prévoit la Constitution du pays, elle ou il pourrait exiger une telle déclaration si elle ou il avait besoin d'une autre source faisant autorité, ce qui, à mon avis, n'est pas le cas. Je suppose également que cette déclaration devrait comporter une disposition exigeant que la ou le Gouverneur général agisse en conformité avec la Constitution.

Nous nous écartons du projet de loi, mais la question est intéressante. Je me demande jusqu'à quel point on peut dire quoi faire à la Couronne, c'est-à-dire à Sa Majesté ou à son représentant au Canada. Il faudrait que je fasse certaines recherches. Une disposition de la Constitution prévoit que les sièges doivent être occupés. Je me demande pourquoi la personne occupant le poste de Gouverneur général ne pourrait pas être sollicitée par un autre moyen, et j'ignore quel serait ce moyen, mais en excluant le recours aux tribunaux. Il va de soi que la personne occupant ce poste peut compter, j'imagine, sur les services de conseillers juridiques et ne vit pas dans une tour d'ivoire, inconsciente de ce qui se passe dans le pays. Cette personne verrait que la situation n'est pas conforme aux dispositions de la Constitution et n'est pas défendable. Elle doit être réglée et les sièges vacants comblés, et cette personne se trouverait à exercer sa responsabilité en vertu de la Constitution du Canada.

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Second Session
Thirty-ninth Parliament, 2007-08

SENATE OF CANADA

Proceedings of the Standing Senate Committee on

Legal and Constitutional Affairs

Chair:
The Honourable JOAN FRASER

Wednesday, April 30, 2008
Thursday, May 1, 2008

Issue No. 16

Fifth meeting on:

A comprehensive review of the amendments made by An Act to amend the Canada Elections Act and the Income Tax Act (S.C. 2004, c. 24)

and

Second meeting on:

Bill S-224, An Act to amend the Parliament of Canada Act (vacancies)

WITNESSES:
(*See back cover*)

Deuxième session de la
trente-neuvième législature, 2007-2008

SÉNAT DU CANADA

Délibérations du Comité sénatorial permanent des

Affaires juridiques et constitutionnelles

Présidente :
L'honorable JOAN FRASER

Le mercredi 30 avril 2008
Le jeudi 1er mai 2008

Fascicule no 16

Cinquième réunion concernant :

L'examen complet des modifications apportées par la Loi modifiant la Loi électorale du Canada et la Loi de l'impôt sur le revenu (L.C. 2004, ch. 24)

et

Deuxième réunion concernant :

Le projet de loi S-224, Loi modifiant la Loi sur le Parlement du Canada (sièges vacants)

TÉMOINS :
(*Voir à l'endos*)

45348-45363

THE STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

The Honourable Joan Fraser, *Chair*

The Honourable A. Raynell Andreychuk, *Deputy Chair*

and

The Honourable Senators:

Baker, P.C.	* LeBreton, P.C.
Campbell	(or Comeau)
Di Nino	Merchant
* Hervieux-Payette, P.C.	Milne
(or Tardif)	Oliver
Joyal, P.C.	Stratton
	Watt

*Ex officio members

(Quorum 4)

Changes in membership of the committee:

Pursuant to rule 85(4), membership of the committee was amended as follows:

The name of the Honourable Senator Peterson is substituted for that of the Honourable Senator Campbell (*April 30, 2008*).

The name of the Honourable Senator Moore is substituted for that of the Honourable Senator Merchant (*April 30, 2008*).

The name of the Honourable Senator Campbell is substituted for that of the Honourable Senator Peterson (*May 1, 2008*).

The name of the Honourable Senator Merchant is substituted for that of the Honourable Senator Moore (*May 1, 2008*).

LE COMITÉ SÉNATORIAL PERMANENT DES AFFAIRES JURIDIQUES ET CONSTITUTIONNELLES

Présidente : L'honorable Joan Fraser

Vice-présidente : L'honorable A. Raynell Andreychuk

et

Les honorables sénateurs :

Baker, C.P.	* LeBreton, C.P.
Campbell	(ou Comeau)
Di Nino	Merchant
* Hervieux-Payette, C.P.	Milne
(ou Tardif)	Oliver
Joyal, C.P.	Stratton
	Watt

*Membres d'office

(Quorum 4)

Modifications de la composition du comité :

Conformément à l'article 85(4) du Règlement, la liste des membres du comité est modifiée, ainsi qu'il suit :

Le nom de l'honorable sénateur Peterson est substitué à celui de l'honorable sénateur Campbell (*le 30 avril 2008*).

Le nom de l'honorable sénateur Moore est substitué à celui de l'honorable sénateur Merchant (*le 30 avril 2008*).

Le nom de l'honorable sénateur Campbell est substitué à celui de l'honorable sénateur Peterson (*le 1er mai 2008*).

Le nom de l'honorable sénateur Merchant est substitué à celui de l'honorable sénateur Moore (*le 1er mai 2008*).

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MINUTES OF PROCEEDINGS

OTTAWA, Wednesday, April 30, 2008
(34)

[*English*]

The Standing Senate Committee on Legal and Constitutional Affairs met this day at 4:15 p.m., in room 257, East Block, the chair, the Honourable Joan Fraser, presiding.

Members of the committee present: The Honourable Senators Andreychuk, Fraser, Joyal, P.C., Milne, Moore, Peterson, Stratton and Watt (8).

Other senator present: The Honourable Senator Murray, P.C. (1).

In attendance: Michel Bédard, Analyst, Parliamentary Information and Research Services, Library of Parliament.

Also in attendance: The official reporters of the Senate.

Pursuant to the order of reference adopted by the Senate on Tuesday, March 4, 2008, the committee continued its consideration of Bill S-224, An Act to amend the Parliament of Canada Act (vacancies) (*For complete text of the order of reference, see proceedings of the committee, Issue No. 15.*)

WITNESSES:

As individuals:

C.E.S. (Ned) Franks, Professor Emeritus, Department of Political Studies, Queen's University;

Jennifer Smith, Professor, Department of Political Science, Dalhousie University;

Don Desserud, Professor, Department of Political Science, University of New Brunswick;

David Smith, Professor Emeritus, Department of Political Studies, University of Saskatchewan.

Mr. Franks and Ms. Smith each made opening statements and, together, answered questions.

Mr. Desserud and Mr. Smith each made opening statements and, together, answered questions.

At 6:45 p.m., the committee adjourned to the call of the chair.

ATTEST:

PROCÈS-VERBAUX

OTTAWA, le mercredi 30 avril 2008
(34)

[*Traduction*]

Le Comité sénatorial permanent des affaires juridiques et constitutionnelles se réunit aujourd'hui, à 16 h 15, dans la salle 257 de l'édifice de l'Est, sous la présidence de l'honorable Joan Fraser (*présidente*).

Membres du comité présents : Les honorables sénateurs Andreychuk, Fraser, Joyal, C.P., Milne, Moore, Peterson, Stratton et Watt (8).

Autre sénateur présent : L'honorable sénateur Murray, C.P. (1).

Aussi présent : Michel Bédard, analyste, Service d'information et de recherche parlementaires, Bibliothèque du Parlement.

Également présents : Les sténographes officiels du Sénat.

Conformément à l'ordre de renvoi adopté par le Sénat le mardi 4 mars 2008, le comité poursuit son examen du projet de loi S-224, Loi modifiant la Loi sur le Parlement du Canada (sièges vacants). (*Le texte complet de l'ordre de renvoi figure au fascicule n^o^ 15 des délibérations du comité.*)

TÉMOINS :

À titre personnel :

C.E.S. (Ned) Franks, professeur émérite, Département d'études politiques, Université Queen's;

Jennifer Smith, professeure, Département de science politique, Université Dalhousie;

Don Desserud, professeur, Département de science politique, Université du Nouveau-Brunswick

David Smith, professeur émérite, Département d'études politiques, Université de la Saskatchewan.

M. Franks et Mme Smith font chacun une déclaration liminaire puis, ensemble, répondent aux questions.

MM. Desserud et Smith font chacun une déclaration liminaire puis, ensemble, répondent aux questions.

À 18 h 45, le comité suspend ses travaux jusqu'à nouvelle convocation de la présidence.

ATTESTÉ :

OTTAWA, Thursday, May 1, 2008
(35)

[*English*]

The Standing Senate Committee on Legal and Constitutional Affairs met this day at 10:50 a.m., in room 257, East Block, the chair, the Honourable Joan Fraser, presiding.

OTTAWA, le jeudi 1^er^ mai 2008
(35)

[*Traduction*]

Le Comité sénatorial permanent des affaires juridiques et constitutionnelles se réunit aujourd'hui, à 10 h 50, dans la salle 257 de l'édifice de l'Est, sous la présidence de l'honorable Joan Fraser (*présidente*).

Members of the committee present: The Honourable Senators Andreychuk, Di Nino, Fraser, Joyal, P.C., Milne, Moore, Oliver, Peterson, Stratton and Watt (10).

Other senator present: The Honourable Senator Murray, P.C. (1).

In attendance: Michel Bédard, Analyst, Parliamentary Information and Research Services, Library of Parliament.

Also in attendance: The official reporters of the Senate.

Pursuant to the order of reference adopted by the Senate on Tuesday, March 4, 2008, the committee continued its consideration of Bill S-224, An Act to amend the Parliament of Canada Act (vacancies) (*For complete text of the order of reference, see proceedings of the committee, Issue No. 15.*)

WITNESSES:

As individuals:

Gérald R. Tremblay, Partner, McCarthy Tétrault LLP;

Errol P. Mendes, Professor, Common Law Section, Faculty of Law, University of Ottawa.

Mr. Tremblay made an opening statement and answered questions.

Mr. Mendes made an opening statement and answered questions.

Pursuant to the order of reference adopted by the Senate on Thursday, December 6, 2007, the committee continued its consideration of a comprehensive review of the amendments made by An Act to amend the Canada Elections Act and the Income Tax Act (S.C. 2004, c. 24) (*For complete text of the order of reference, see proceedings of the committee, Issue No. 12.*)

At 12:57 p.m., pursuant to rule 92(2)(f), the committee proceeded in camera to consider a draft report.

At 1:06 p.m., the committee adjourned to the call of the chair.

ATTEST:

Membres du comité présents : Les honorables sénateurs Andreychuk, Di Nino, Fraser, Joyal, C.P., Milne, Moore, Oliver, Peterson, Stratton et Watt (10).

Autre sénateur présent : L'honorable sénateur Murray, C.P. (1).

Aussi présent : Michel Bédard, analyste, Service d'information et de recherche parlementaires, Bibliothèque du Parlement.

Également présents : Les sténographes officiels du Sénat.

Conformément à l'ordre de renvoi adopté par le Sénat le mardi 4 mars 2008, le comité poursuit son examen du projet de loi S-224, Loi modifiant la Loi sur le Parlement du Canada (sièges vacants). (*Le texte complet de l'ordre de renvoi figure au fascicule n° 15 des délibérations du comité.*)

TÉMOINS :

À titre personnel :

Gérald R. Tremblay, partenaire, McCarthy Tétrault LLP;

Errol P. Mendes, professeur, Section de common law, faculté de droit, Université d'Ottawa.

M. Tremblay fait une déclaration liminaire puis répond aux questions.

M. Mendes fait une déclaration liminaire puis répond aux questions.

Conformément à l'ordre de renvoi adopté par le Sénat le jeudi 6 décembre 2007, le comité poursuit son examen complet des modifications apportées par la Loi modifiant la Loi électorale du Canada et la Loi de l'impôt sur le revenu (L.C. 2004, ch. 24). (*Le texte complet de l'ordre de renvoi figure au fascicule n° 12 des délibérations du comité.*)

À 12 h 57, conformément à l'alinéa 92(2)f) du Règlement, le comité poursuit ses travaux à huis clos pour examiner une ébauche de rapport.

À 13 h 6, le comité suspend ses travaux jusqu'à nouvelle convocation de la présidence.

ATTESTÉ :

Le greffier du comité,

Adam Thompson

Clerk of the Committee

EVIDENCE

OTTAWA, Wednesday, April 30, 2008

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill S-224, An Act to amend the Parliament of Canada Act (vacancies), met this day at 4:15 p.m. to give consideration to the bill.

Senator Joan Fraser (*Chair*) in the chair.

[*English*]

The Chair: Welcome to this meeting of the Standing Senate Committee on Legal and Constitutional Affairs. We begin today our consideration of Bill S-224, An Act to amend the Parliament of Canada Act (vacancies), which is a bill that has been presented to the Senate by Senator Moore. I am delighted to see he is with us today.

Our first witnesses today will be people familiar to members of this committee, C.E.S. (Ned) Franks, Professor Emeritus, Department of Political Studies, Queen's University; and Jennifer Smith, Professor, Department of Political Science, Dalhousie University.

Jennifer Smith, Professor, Department of Political Science, Dalhousie University, as an individual: Thank you for inviting me here this afternoon.

The government of Canada is required to uphold the Constitution. It seems odd to even have to say that. On the matter of Bill S-224, this means that under section 32 of the Constitution Act, 1867, the Governor General needs to fill vacancies in the Senate when they arise and, "shall by summons to a fit and qualified person fill the vacancy."

The Government of Canada certainly is not supposed to sabotage the Constitution by undermining existing national government institutions like the Senate. The Senate is a foundational institution that if it "belongs" to anyone, it belongs to the people of Canada. It is not the play thing of political elites and until the people are consulted about the proposed change, then they have every right to expect that it serve them in the way that it is designed to do.

The current government is not discharging its responsibilities under section 32. Instead, it insists that it will recommend to the Governor General that she will appoint only those individuals to the Senate who have been selected in a particular way. The result is hardly any appointments and a growing number of vacancies.

What are the consequences of these vacancies? First, they are impairing the capacity of the Senate to discharge its function of sober second thought. This is a serious problem in a bicameral parliamentary system.

A second consequence of these vacancies is the impairment of the Senate's function of representing the provinces and territories, and in an uneven fashion. Most of the provinces have not taken up the Prime Minister's suggestion that they hold Senate elections, nor has there been a groundswell of public opinion that they do so. It has been the contrary.

TÉMOIGNAGES

OTTAWA, le mercredi 30 avril 2008

Le Comité sénatorial permanent des affaires juridiques et constitutionnelles, auquel a été renvoyé le projet de loi S-224, Loi modifiant la Loi sur le Parlement du Canada (sièges vacants), se réunit aujourd'hui à 16 h 15 pour examiner le projet de loi.

Le sénateur Joan Fraser (*présidente*) occupe le fauteuil.

[*Traduction*]

La présidente : Bienvenue à la séance du Comité sénatorial permanent des affaires juridiques et constitutionnelles. Nous commençons à étudier le projet de loi S-224, Loi modifiant la Loi sur le Parlement du Canada (sièges vacants), proposé au Sénat par le sénateur Moore. Je suis ravie de le compter parmi nous aujourd'hui.

Nos premiers témoins sont des gens que les membres du comité connaissent bien : C.E.S. (Ned) Franks, professeur émérite au Département d'études politiques de l'Université Queen's, et Jennifer Smith, professeure au Département de science politique de l'Université Dalhousie.

Jennifer Smith, professeure, Département de science politique, Université Dalhousie, à titre personnel : Je vous remercie de m'avoir invitée à témoigner aujourd'hui.

Le gouvernement du Canada est tenu de respecter la Constitution. Il me semble étrange d'avoir à le dire. Pour ce qui est du projet de loi S-224, l'article 32 de la Loi constitutionnelle de 1867 prévoit que le Gouverneur général doit combler les sièges vacants dès qu'ils se libèrent « en adressant un mandat à quelque personne capable et ayant les qualifications voulues ».

Le gouvernement du Canada n'est pas censé saboter la Constitution en minant l'intégrité des institutions gouvernementales nationales actuellement en place comme le Sénat. Le Sénat est une institution fondamentale et, s'il appartient à qui que ce soit, ce doit être à la population canadienne. Ce n'est pas le jouet des élites politiques et, tant que la population ne sera pas consultée au sujet des changements proposés, elle est en droit de s'attendre à ce qu'il les serve de la manière dont il a été conçu.

Le gouvernement actuel ne s'acquitte pas des responsabilités prévues à l'article 32. Il soutient qu'il recommandera au Gouverneur général de nommer au Sénat uniquement les personnes qui seront sélectionnées au terme d'un processus particulier. En conséquence, il y a très peu de nominations et un nombre grandissant de sièges vacants.

Quelles sont les conséquences de ces vacances? D'abord, elles empêchent le Sénat de s'acquitter de ses responsabilités à l'égard du second examen objectif. C'est un problème grave pour un régime parlementaire bicaméral.

De plus, ces vacances ont pour effet de nuire à la fonction du Sénat consistant à représenter les provinces et les territoires, et cet impact se manifeste de façon inégale. La plupart des provinces n'ont pas donné suite à la suggestion du premier ministre de tenir des élections sénatoriales, ce qui par ailleurs n'a pas suscité un grand intérêt de la part du public, bien au contraire.

In the meantime, the federal government is unable to establish such elections because it lacks support among the opposition members of the House of Commons. As a result, the only people who can look to regional representation in the Senate are those in the odd province that is prepared to hold Senate elections.

Bill S-224 is the result of the problem this government has caused by not filling vacancies. The bill is a reasonable effort to fix the problem. However, there are questions about the need to preclude appointments following a government's loss of confidence in the House of Commons.

The third consequence of the growing number of Senate vacancies might not be amenable to such a fix as Bill S-224. If the government allows the number of vacancies to grow, it will have the effect of de-legitimizing the existing Senate. The government itself will have contrived such a result, using illegitimate means by not discharging its function under the Constitution in terms of appointments.

The government has not developed anything remotely like a consensus in the country on its model of Senate change. The government is not on solid constitutional ground in the procedures it is using to make the changes it prefers. It is simply trying to kick-start some change in a unilateral fashion. It is likely to fail, either on constitutional grounds or because there is no consensus for the changes at which it aims, or both. However, if it should succeed in making partial changes on the selection process in term but nothing else, it will have driven the country toward an institutional mess. I think the result of that is to undermine governing institutions in the eyes of Canadians.

To conclude, everyone has to follow the Constitution. The Constitution mandates that Senate vacancies be filled. The spirit of the Constitution mandates that they be filled in a timely fashion. In the meantime, anyone who seeks to change the Senate needs to consult widely with the Canadian people on the options available and then follow the rules of the Constitution on constitutional change.

C.E.S. (Ned) Franks, Professor Emeritus, Department of Political Studies, Queen's University, as an individual: Thank you. I prepared a written presentation. The clerk has that. I will reduce it for the purposes of this presentation.

Bill S-224 would require that the Prime Minister fill Senate seats within 180 days of their becoming vacant. It has been argued that the bill is not an issue of Senate reform, but the subject it deals with — the timely appointment of senators — has been linked with Senate reform by the Prime Minister.

I support the intent of Bill S-224. Canada's Parliament has two chambers, and each has a function to perform. The Senate's strengths lie in the high quality and experience of it members, and its ability to provide thorough and less partisan investigations

Pendant ce temps, le gouvernement fédéral est incapable de déclencher ces élections parce qu'il n'a pas l'appui des membres de l'opposition à la Chambre des communes. Par conséquent, seules les rares provinces qui se préparent à élire des sénateurs peuvent compter sur la représentation régionale au Sénat.

Le projet de loi S-224 est le résultat du problème que le gouvernement actuel a causé en laissant des sièges vacants. Il représente une mesure raisonnable pour remédier au problème. Cependant, il y a lieu de remettre en question la nécessité de retarder les nominations lorsque le gouvernement perd la confiance de la Chambre des communes.

La troisième conséquence du nombre croissant des vacances au Sénat est un problème qui se règle peut-être moins bien avec une solution comme le projet de loi S-224. Si le gouvernement ne freine pas l'augmentation du nombre de vacances, cela aura pour effet de saper la légitimité du Sénat actuel. Le gouvernement lui-même aura contribué à ce résultat par des moyens illégitimes, en ne s'acquittant pas des responsabilités prévues par la Constitution à l'égard des nominations.

Le gouvernement est loin d'avoir établi un consensus au pays sur son modèle de réforme du Sénat. Les procédures qu'il applique pour apporter les changements souhaités ne reposent pas sur des assises constitutionnelles solides. Il essaie simplement d'amorcer certains changements de manière unilatérale. Il est fort probable que cette tentative se solde par un échec, que ce soit pour des raisons d'ordre constitutionnel ou parce que les changements visés n'ont pas fait l'objet de consensus, ou les deux. Cependant, s'il réussit à apporter des changements partiels au processus de sélection, ne serait-ce que par rapport au mandat, le pays sera aux prises avec un désordre institutionnel. Je pense que cela minera la crédibilité des institutions gouvernementales aux yeux des Canadiens.

En conclusion, tout le monde doit se conformer à la Constitution. Elle prévoit que tous les sièges vacants au Sénat doivent être comblés. Dans l'esprit de la Constitution, ils doivent l'être dans les meilleurs délais. En attendant, quiconque cherche à changer le Sénat doit mener de vastes consultations auprès de la population canadienne pour déterminer les options possibles, puis appliquer les règles de la Constitution ayant trait aux changements constitutionnels.

C.E.S. (Ned) Franks, professeur émérite, Département d'études politiques, Université Queen's, à titre personnel : Merci. J'ai préparé un document pour accompagner mon témoignage. Le greffier en a une copie. Je vais en résumer le contenu pour les fins de mon exposé.

Le projet de loi S-224 obligerait le premier ministre à combler les postes vacants au Sénat dans les 180 jours suivant la date où ils deviennent vacants. On a fait valoir que le projet de loi ne vise pas à réformer le Sénat, mais le sujet sur lequel il porte — la nomination des sénateurs dans les meilleurs délais — est en lien avec la réforme du Sénat amorcée par le premier ministre.

J'appuie l'objectif du projet de loi S-224. Le Parlement du Canada est constitué de deux chambres, qui ont chacune un rôle à jouer. Les forces du Sénat reposent sur la grande qualité et l'expérience de ses membres, et sur sa capacité d'effectuer des

into issues and studies of legislation than can the House of Commons, with its all-too-frequently highly-charged partisan atmosphere and short-term membership — which still averages less than five years.

I was reminded of the high quality of Senate committee work recently when I looked at the committee hearings of the House and the Senate on the appointment of the Parliamentary Budget Officer, which had been delayed because the Library of Parliament and Privy Council Office had different views on classification and level of pay for the position. The review by the House committee was, to put it kindly, not enlightening, while the review by the Senate committee produced an informed and intelligent examination of the problems.

The Senate cannot perform its functions as a chamber of "sober second thought" if it does not have members.

I am not clear on what functions the Senate is expected to perform under the incremental approach of the current government. The people of Canada already have elected members in the House of Commons, and I have grave doubts about the need for another elected chamber. Provinces and provincial governments are already more than adequately represented in the complex institutions and processes of federal-provincial relations. I believe that the powers of the Senate — equal to those of the House of Commons save for the introduction of money bills — would have to be reduced if the Senate were to gain the legitimacy of being "elected." Its powers to revise and delay legislation would have to be limited. Perhaps this can be done through changes to procedure in the House and Senate. If not, constitutional amendment will be needed to ensure that the House of Commons retains its dominant role and the Senate remains, as it should be, a second chamber.

The functions of the Senate intended by the Fathers of Confederation were far clearer than those intended by current reforms. The founding fathers intended the Senate to represent wealth and provinces. The constitutional property qualification of $4,000 in 1867 would be equivalent to about $1.5 million in today's terms. It was an exacting requirement.

Senator Moore: Should I leave now?

Mr. Franks: I am simply saying what it was. The average wage in 1867 for a person employed in Canada was about $100. The $4,000 is 40 times $100. Nowadays, the average wage is over $30,000. If you multiply that by 40, you get $1.2 million. Another factor is housing generally more expensive. A house in 1867 would cost roughly $100.

The other factor that enters in is the fact that, in 1867, most salaries were clustered around $100 and very few were in the higher level. We have a bigger lump now in the middle. There is a different distribution of salary ranges today.

études et des analyses législatives plus approfondies et plus objectives que ne le fait la Chambre des communes, où l'atmosphère est souvent trop partisane et dont les membres ne sont que de passage — soit pour une période moyenne de moins de cinq ans.

Dernièrement, j'ai pu de nouveau constater la grande qualité des travaux des comités sénatoriaux en examinant les séances des comités de la Chambre et du Sénat portant sur la nomination d'un directeur parlementaire du budget, qui avait été reportée parce que la Bibliothèque du Parlement et le Bureau du Conseil privé n'arrivaient pas à s'entendre sur la classification du poste et l'échelle de traitement. L'examen du comité de la Chambre n'était pas très édifiant, c'est le moins qu'on puisse dire, alors que celui du comité du Sénat présentait une analyse éclairée et intelligente des problèmes.

Le Sénat ne peut assumer ses fonctions de « second examen objectif » s'il n'a pas de membres.

Je ne sais pas précisément quelles fonctions le Sénat est censé remplir dans le contexte de l'approche progressive du gouvernement actuel. Les Canadiens élisent déjà des députés à la Chambre des communes, et je doute fort de la nécessité d'une autre Chambre élue. Les provinces et les gouvernements provinciaux sont déjà amplement représentés dans les institutions et les processus complexes associés aux relations fédérales-provinciales. Je crois que les pouvoirs du Sénat — qui sont égaux à ceux de la Chambre des communes sauf pour le dépôt des projets de loi de finances — devraient être réduits si le Sénat devenait élu en toute légitimité. Son pouvoir d'examiner les lois et d'en retarder l'adoption devrait être restreint. À cette fin, il serait peut-être possible d'apporter des changements à la procédure applicable au Sénat et à la Chambre. Autrement, il sera nécessaire de mettre en œuvre des changements constitutionnels pour s'assurer que la Chambre des communes conserve son rôle dominant et que le Sénat demeure une chambre secondaire, comme il se doit.

Les fonctions du Sénat prévues par les Pères de la Confédération étaient beaucoup plus claires que celles qui sont visées par les réformes actuelles. Les pères fondateurs voulaient que le Sénat représente le patrimoine et les provinces. L'exigence constitutionnelle relative à la possession d'une propriété d'une valeur de 4 000 $ en 1867 équivaudrait aujourd'hui à environ 1,5 million de dollars. C'était là une exigence très rigoureuse.

Le sénateur Moore : Dois-je me retirer maintenant?

M. Franks : J'explique simplement ce qu'il en était. Le salaire moyen d'un travailleur au Canada, en 1867, était d'environ 100 $. Le montant de 4 000 $ équivaut à 40 fois ce salaire. De nos jours, le salaire moyen s'élève à plus de 30 000 $. Si on multiplie ce montant par 40, on obtient 1,2 million de dollars. Le coût élevé de l'habitation est un autre facteur. Une maison coûtait à peine 100 $ en 1867.

Il faut également tenir compte du fait qu'en 1867, la plupart des salaires se situaient autour de 100 $ et très peu atteignaient les niveaux supérieurs. Il y en a davantage au milieu de l'échelle aujourd'hui. L'échelle des salaires est différente aujourd'hui.

I will now speak to the timing of by-elections. Current statutory provisions require that the writ for a by-election must be issued between 11 and 180 days of a vacancy occurring. Then a minimum of at least 36 days must elapse before the by-election is held. The statutes do not set a maximum time before an election must be held.

These provisions allow prime ministers to pick and choose when a by-election is held and to cluster, hasten or delay by-elections to maximize political advantage. As a result, Canada has a peculiar and I believe unique approach to by-elections — I hesitate to call it a system — in which, for example, Prime Minister Trudeau in 1978 had 15 by-elections held on the same day, October 15. If this was intended as a seat-maximizing strategy, it was not successful. His government lost all but 2 of the 15. Prime Minister Harper set three by-elections in Quebec for September 17, 2007, but delayed setting dates for by-elections for two other then-vacant seats until March 17, 2008. Other prime ministers have played similar games with by-election timing. Some constituencies and constituents have been without representation in Canada's Parliament for close to nine months, perhaps longer.

Canadian practice differs from other Westminster-style parliamentary democracies. In Britain convention demands that a writ for a by-election be issued within three months of the vacancy occurring. The polling day is between 15 and 19 days after the writ is issued; 15 days is the normal rule. A by-election will normally be held about 100 days after a vacancy occurs, though the time can be significantly longer. The key difference between British and Canadian practice is that the date of the by-election in Britain is determined by the party to which the seat belonged, not by the Prime Minister.

In Australia there is no prescribed time limit within which a by-election writ must be issued, but this has not become a matter of political concern. The time from a vacancy until polling day has varied considerably, with the maximum number of days being 82 days for Moreton in 1983 and the minimum being 17 days for East Sydney in 1903. The average in recent years has been about 51 days. When a general election has been imminent, however, seats may remain vacant for longer. Australian by-elections are governed by the principle that electors should not be left without representation any longer than necessary.

Unfortunately, the same principle does not govern by-elections in Canada. The current government established fixed election dates so that prime ministers could not fiddle with the timing of general elections to their party's advantage, but it has

Je vais maintenant parler du moment des élections partielles. Actuellement, les dispositions législatives prévoient que le bref d'une élection partielle doit être délivré de 11 à 180 jours après qu'un siège est devenu vacant. Ensuite, un délai d'au moins 36 jours doit s'écouler avant que l'élection partielle soit tenue, mais aucun délai maximal n'est prévu par la loi.

Ces dispositions permettent aux premiers ministres de choisir à quel moment une élection partielle sera tenue et de regrouper, de précipiter ou de retarder des élections partielles afin que les circonstances soient aussi avantageuses que possible pour leur parti. Il s'ensuit qu'en ce qui concerne les élections partielles, le Canada a adopté une approche particulière et que je crois unique — je ne suis pas sûr qu'on puisse parler d'un système —, qui a par exemple permis au premier ministre Trudeau de tenir 15 élections partielles le même jour, le 15 octobre 1978. S'il s'agissait d'une stratégie visant à obtenir un maximum de sièges, elle a échoué, son gouvernement n'ayant remporté que 2 de ces 15 sièges. Le premier ministre Harper a, quant à lui, fait tenir trois élections partielles au Québec le 17 septembre 2007, mais il a repoussé au 17 mars 2008 les élections partielles relatives à deux autres sièges qui étaient vacants au même moment. D'autres premiers ministres ont eu recours à des stratagèmes similaires pour déterminer le moment où des élections partielles seraient tenues. Certaines circonscriptions et certains électeurs ne sont pas représentés au Parlement du Canada depuis près de neuf mois, et peut-être depuis plus longtemps.

Les usages du Canada diffèrent de ceux des autres démocraties parlementaires inspirées de Westminster. En Grande-Bretagne, la coutume veut que le bref relatif à une élection partielle soit délivré dans les trois mois suivant le jour où le siège est devenu vacant. L'élection est tenue de 15 à 19 jours après que le bref a été délivré, le délai étant habituellement de 15 jours. Une élection partielle est habituellement tenue environ 100 jours après qu'un siège est devenu vacant, bien que le délai puisse être passablement plus long. La principale différence entre les usages britannique et canadien, c'est qu'en Grande-Bretagne, la date de l'élection partielle est choisie par le parti qui détenait le siège, et non par le premier ministre.

En Australie, la loi ne prévoit pas de délai à respecter pour la délivrance d'un bref d'élection partielle, mais cette situation n'est jamais devenue un enjeu politique. La période qui s'écoule entre le jour où un siège devient vacant et celui où l'élection partielle est tenue varie considérablement, le délai maximal ayant été de 82 jours pour Moreton en 1983, et le plus court, de 17 jours pour East Sydney en 1903. Ces dernières années, la moyenne a été d'environ 51 jours. Cependant, lorsqu'une élection générale est imminente, les sièges peuvent demeurer vacants plus longtemps. En Australie, les élections partielles sont régies par un principe qui veut que les électeurs ne doivent pas demeurer sans représentant plus longtemps que nécessaire.

Malheureusement, les élections partielles ne sont pas régies par ce principe au Canada. Le gouvernement en place a établi des dates d'élections fixes pour que les premiers ministres ne puissent pas se livrer à des combines afin que le moment des élections

left the timing of by-elections open to prime ministerial machinations.

I have two proposals. Regardless of whether one likes or dislikes the present Senate, it has a constitutional existence, role and responsibility. Failure to fill Senate seats constrains its ability to serve its constitutional and legislative roles. The 180-day maximum proposed in Bill S-224 for filling Senate vacancies is too long. It should be shorter, at almost 90 days.

In addition, the timing of by-elections should observe the fundamental democratic principle that every Canadian is entitled to representation in the House of Commons. The present practices regarding by-elections subordinate this principle to partisan manipulation. My second proposal is that the statutes should be amended to require that by-elections normally be held within 90 days of a vacancy occurring.

Senator Andreychuk: Professor Smith, you commented that the existing situation makes the selection of the Senate, particularly as to timing, the plaything of the Prime Minister. Do you believe that previous prime ministers viewed the Senate as a plaything if they went beyond the dates that this act prescribes?

Ms. Smith: We have seen generations of prime ministers criticized for making partisan appointments. We have not seen a prime minister taking an action that has the effect of diminishing and discrediting an institution and if this continues, and I am thinking of the figures that were bandied about in one of your earlier discussions, it will be an institution that will have a difficult time discharging its functions.

I talk to my neighbours about these things and I realize that they are under the assumption that the Parliament or Canada, the Senate and House of Commons, are operating more or less in the institutional fashion institutionally under which they are supposed to operate. They have no idea, because this issue has not been publicized in the press. Certainly, in the East, they really do not realize the situation that is developing. They certainly have not been consulted about it. Yet, when I think about it, I think, "Wait a minute here. Whose institution is this?" There has to be some accountability. Ordinary citizens have not taken this action, but the political elites, in this case, in the form of the Government of Canada. I am trying to make that point.

Senator Andreychuk: The provisions in this bill would curtail the discretion of the Prime Minister. Do you believe the people of Canada wish it to be curtailed?

Ms. Smith: The people of Canada simply have to expect that the political actors are following the Constitution, so if there is supposed to been an operative Senate, then there is supposed to

générales soit avantageux pour leurs partis, mais le choix de la date des élections partielles est demeuré vulnérable aux machinations des premiers ministres.

J'ai deux propositions. Que l'on aime ou non le Sénat dans son état actuel, son existence, ses rôles et ses responsabilités sont prévus par la Constitution. Le fait de ne pas combler les vacances au Sénat réduit sa capacité d'assumer ses fonctions constitutionnelles et législatives. Le projet de loi S-224 prévoit une période maximale trop longue pour combler les vacances au Sénat, soit 180 jours. Il faut que cette période soit plus courte, qu'elle s'établisse à 90 jours environ.

En outre, le moment des élections partielles devrait être établi en fonction du principe démocratique fondamental selon lequel tous les Canadiens ont le droit d'être représentés à la Chambre des communes. L'usage actuel concernant les élections partielles assujettit ce principe à la manipulation partisane. Ma seconde proposition, c'est que la loi soit modifiée de manière que les élections partielles soient normalement tenues dans les 90 jours suivant la date où un siège devient vacant.

Le sénateur Andreychuk : Madame Smith, vous avez dit que, dans la situation actuelle, le premier ministre peut jouer à sa guise sur le choix des membres du Sénat, particulièrement en ce qui concerne le moment des nominations. Croyez-vous que les premiers ministres antérieurs ont considéré le Sénat comme leur jouet lorsqu'ils ont dépassé les délais prescrits par cette loi?

Mme Smith : Pendant des décennies, les premiers ministres ont été accusés de nominations partisanes. Aucun premier ministre n'avait cependant pris de mesures qui auraient eu pour effet de dégrader et de discréditer une institution. Or, si la tendance se maintient — et je pense aux chiffres que vous avez mentionnés au cours de discussions antérieures —, l'institution dont nous parlons aura de la difficulté à assumer ses fonctions.

Lorsque je discute de ces questions avec mes voisins, je constate qu'ils tiennent pour acquis que le Parlement du Canada, le Sénat et la Chambre des communes fonctionnent plus ou moins selon la procédure institutionnelle qu'ils sont censés suivre. Ils n'ont aucune idée de ce qui se passe, parce que les médias ne se sont pas attardés sur cette question. Il est certain que, dans l'est du pays, les gens ne sont pas conscients de la situation qui se crée. Ils n'ont certainement pas été consultés à ce sujet. Cependant, quand j'y pense, je me dis : « Un petit instant. À qui appartient vraiment cette institution? » Il faut qu'il y ait une certaine reddition de comptes. Ce ne sont pas les citoyens ordinaires qui ont adopté cette ligne de conduite, mais les élites politiques, soit, en l'occurrence, le gouvernement du Canada. C'est là le message que j'essaie de faire passer.

Le sénateur Andreychuk : Les dispositions de ce projet de loi réduiraient le pouvoir discrétionnaire du premier ministre. Croyez-vous que les Canadiens souhaitent que ce pouvoir soit réduit?

Mme Smith : Les Canadiens ne doivent s'attendre à rien d'autre qu'à ce que les acteurs politiques respectent la Constitution, ce qui signifie que si nous sommes censés avoir

be an operative Senate. It is unfortunate that there is a need for a bill like this. It is extraordinary that this kind of a bill is required to remedy a problem that the government is creating.

As to what the Canadian people know or do not know, I have no idea. The assumption that I am making is that they are operating under the expectation that until they are advised or consulted on a change to one of the main institutions under the Constitution of Canada, that they would expect that it is operating as usual. If its membership is in decline, I do not see how that can occur.

Senator Andreychuk: You seem to have come to the conclusion that it is not functioning well. I think you said that the Senate is not performing its duties. You are saying that I am not performing my duties as a senator. What are you basing that on when in fact there have been delays, if you want to call them delays, or discretion of prime ministers not appointing immediately when a vacancy occurs? Why are you telling me that I am not performing my duties?

Ms. Smith: I read the discussion that you had about the various occurrences in the past when years have gone by and senators were not appointed. I am not sure that we are talking about that today. We seem to be talking now about volume. According to your own discussion, with every passing year, more vacancies will occur.

Let us talk about the representation function, for example. If a province has half its senators, is that as good as all of its senators? That is one idea that I had in the back of my mind. I am obviously not referring to any particular senator, and for the remaining senators, as the numbers decline, your workload must grow. That is one point.

Secondly, on the other function of sober second thought, how easy can that be with declining numbers? It cannot be getting easier, so I can only assume it is getting more difficult. I am trying to make a very clear point.

Senator Andreychuk: You say that, constitutionally, if you have three vacancies out of six, a province or a region is not being represented. The Constitution, as Professor Franks pointed out, was based on wealth and provincial representation. There is a case to be made by some provinces out west that, as their population grows, they are under-represented by virtue of the Constitution as it is now. I am not speaking about my own province yet, although we are optimistic that we will soon be in the same category as Alberta and British Columbia.

Senator Murray: I have a resolution to amend the Constitution.

un Sénat efficace, il devrait il y avoir un Sénat efficace. Il est regrettable que le besoin d'un tel projet de loi se fasse sentir. Il est très singulier qu'un projet de loi de ce genre soit nécessaire pour remédier à un problème que le gouvernement est en train de créer.

En ce qui concerne ce que les Canadiens savent ou ne savent pas, je n'en ai aucune idée. Mon hypothèse est que, tant qu'ils n'auront pas été avisés d'un changement apporté à l'une des institutions principales régies par la Constitution du Canada, ou consultés à ce sujet, ils présumeront que cette institution continue de fonctionner comme avant. Mais je ne vois pas comment cela pourrait se produire si le nombre de ses membres décline.

Le sénateur Andreychuk : Vous semblez en être arrivée à la conclusion que l'institution ne fonctionne pas bien. Je crois que vous avez dit que le Sénat ne s'acquitte pas de ses fonctions. Vous affirmez donc que je ne m'acquitte pas de mes fonctions en tant que sénateur. Sur quoi vous fondez-vous pour affirmer cela alors qu'on tarde à combler des sièges, si je peux dire, ou que les premiers ministres ont exercé leur pouvoir discrétionnaire en choisissant de ne pas procéder à des nominations sur-le-champ lorsque des sièges sont devenus vacants? Qu'est-ce qui vous permet de me dire que je ne m'acquitte pas de mes fonctions?

Mme Smith : J'ai lu les délibérations que vous avez tenues au sujet des divers cas où des années se sont écoulées sans que des vacances au Sénat soient comblées. Je ne suis pas certaine que c'est de cela que nous parlons aujourd'hui. Nous semblons plutôt nous attarder sur la question du volume. Selon vos propres débats, à mesure que les années passeront, de plus en plus de sièges deviendront vacants.

Prenons par exemple la question de la représentation. Si seuls la moitié des sénateurs d'une province ont été nommés, cela a-t-il la même valeur que si elle disposait de tous ses sénateurs? C'est une idée qui me trotte depuis longtemps derrière la tête. Je ne fais évidemment référence à aucun sénateur en particulier. Du reste, la charge de travail des sénateurs en place doit augmenter à mesure que les nombres diminuent. Voilà un premier point.

Par ailleurs, en ce qui concerne le second examen objectif que doit effectuer le Sénat, dans quelle mesure cette tâche peut-elle être exécutée aisément dans un contexte où le nombre de sénateurs décline? Cette tâche ne peut pas devenir plus aisée, et je ne peux que présumer qu'elle devient plus difficile. J'espère que l'on me comprend très clairement.

Le sénateur Andreychuk : Vous dites que, d'un point de vue constitutionnel, une province ou une région est mal représentée si trois de ses sièges sur six sont vacants. Comme l'a souligné M. Franks, la Constitution prévoyait à l'origine la représentation de la richesse et des provinces. Certaines provinces de l'Ouest auraient lieu de faire valoir que, compte tenu de la croissance de leur population, elles sont devenues sous-représentées, en raison du régime constitutionnel actuel. Je ne parle pas encore de ma province, bien que nous ayons bon espoir de nous retrouver bientôt dans la même catégorie que l'Alberta et la Colombie-Britannique.

Le sénateur Murray : J'ai une résolution visant à modifier la Constitution.

Ms. Smith: That goes to the question of change and proposed change to the Senate. There are all kinds of possibilities on that front. That is fine.

Senator Joyal: Thank you, Professor Smith and Professor Franks, for your contribution to this reflection and debate we are having on Bill S-224.

Professor Smith, we are in a very different scenario than we were with former prime ministers, whether Liberal or Conservative. Former prime ministers never stated publicly that they would not appoint new senators. We have a situation where our Prime Minister has made this statement adding that he will not appoint senators unless the provincial governments adopt legislation, as Alberta did.

The odd situation in which we find ourselves as legislators is that, according to the Constitution, section 32, the provinces have no say in the selection of senators. The Constitution provides that the Governor General appoint senators based on the recommendation of the Prime Minister himself. That is the law of the land today.

The Prime Minister wants to compel the provinces to adopt legislation to provide for the selection of senators or candidates for senatorship, and the Prime Minister has said that he will not uphold the Constitution if the provinces do not do it.

That is a very twisted kind of reality and we see the consequence of a depleted Senate, especially of senators from the government side. Those senators remaining do an admirable job because they have to cover committees and all kinds of parliamentary functions. The Prime Minister told the Senate that is the way it will be and it will become worse in the years to come because, according to the list of predictability of retirement, by the end of 2009, there will be 29 vacancies.

The predictability of vacancies in the Senate does not exist in the House of Commons. By-elections in the House of Commons are triggered by either resignation or death. In the Senate, a senator reaching the age of retirement, which is 75 years, triggers a vacancy. It is an odd phenomenon for a senator to die while serving in the Senate. I would have to consult the statistics on the number of senators who have died while in service. In addition, a senator may resign for health or personal reasons; this happens but it is also an exception. The rule in the Senate is predictability.

When you read the section 32 of Constitution it says clearly "when a vacancy happens." As I said, we experience a vacancy when a senator reaches the age of retirement, resigns or dies.

It seems clear to me that we are in a difficult situation whereby we are compelled to accept the Prime Minister's commitment to uphold the law of the land by compelling provincial government legislatures and other levels of government to adopt legislation to

Mme Smith : Cela renvoit à la question du changement et des changements que l'on propose d'apporter au Sénat. Il y a toutes sortes de possibilités de ce côté-là. C'est bien.

Le sénateur Joyal : Merci, madame Smith et monsieur Franks, pour votre participation à notre réflexion et au débat relatif au projet de loi S-224.

Madame Smith, nous nous trouvons dans une situation très différente de celle que nous avons connue avec les anciens premiers ministres, qu'ils aient été libéraux ou conservateurs. Aucun d'entre eux n'a dit publiquement qu'il ne nommerait pas de nouveaux sénateurs. Nous nous trouvons dans une situation où le premier ministre a fait cette affirmation et a ajouté qu'il ne nommerait pas de sénateurs à moins que les administrations provinciales adoptent une loi à cet égard, comme l'a fait l'Alberta.

Nous vivons une situation particulière en tant que législateurs. En effet, selon l'article 32 de la Loi constitutionnelle, les provinces n'ont pas voix au chapitre du choix des sénateurs. En vertu de la Constitution, c'est le Gouverneur général qui nomme les sénateurs sur la recommandation du premier ministre. C'est la loi du pays aujourd'hui.

Le premier ministre veut obliger les provinces à adopter une loi selon laquelle elles choisiraient les sénateurs ou les candidats aux postes de sénateurs. De plus, le premier ministre a dit qu'il ne respecterait pas la Constitution si les provinces ne le faisaient pas.

C'est une réalité très déformée, et nous constatons les conséquences d'avoir un Sénat où siègent moins de sénateurs, particulièrement s'il y a moins de sénateurs du côté du parti au pouvoir. Les sénateurs qui restent font un travail remarquable parce qu'ils doivent œuvrer au sein des comités et s'acquitter de toutes sortes de fonctions parlementaires. Le premier ministre a indiqué au Sénat que c'était la façon dont ça allait fonctionner. Les choses vont empirer dans les années à venir parce que, selon la liste des prévisions de départs à la retraite d'ici la fin 2009, le Sénat comptera 29 sièges vacants.

Contrairement au Sénat, il n'est pas possible de prévoir le nombre de sièges vacants à la Chambre des communes. Les élections partielles à la Chambre des communes deviennent nécessaires soit par suite d'une démission, soit par suite d'un décès. Au Sénat, un siège devient vacant lorsqu'un sénateur atteint l'âge de la retraite, soit 75 ans. Il est plutôt rare qu'un sénateur meure dans l'exercice de ses fonctions. Il faudrait que je consulte les statistiques sur le nombre de sénateurs qui sont décédés dans l'exercice de leurs fonctions. En outre, un sénateur peut démissionner pour des raisons personnelles ou de santé; ça arrive, mais c'est aussi une exception. Au Sénat, la règle qui s'applique est celle de la prévisibilité.

À l'article 32 de la Loi constitutionnelle, il est clairement dit : « Quand un siège deviendra vacant. » Comme je l'ai mentionné, un siège devient vacant quand un sénateur atteint l'âge de la retraite, qu'il démissionne ou qu'il meure.

Manifestement, nous sommes devant une situation difficile où nous sommes obligés d'accepter l'engagement du premier ministre, qui, pour respecter la loi du pays, veut forcer les administrations provinciales et les autres ordres de gouvernement

provide for selection of senators. I have remarked that the provinces and other governments have nothing to say on the Constitution according to Senate appointments. It seems that this is twisted legal thinking.

Ms. Smith: I find it an extraordinary situation in two ways. First, if it continues, it will be a rare old situation. I noticed in one of your discussions you were broaching this issue by saying if this should continue — meanwhile there is no reform or change process per se under way and this described situation continues —, then what. How long can it go on before you do have an institution in crisis and, in fact, it starts to become an issue in throughout the country? What happens then?

You have spoken about the role of the Governor General. I presume that you want to look ahead to figure out how long this can go on and what kind of situation ultimately would you find yourselves in.

Senator Joyal: Would it not be absurd to have more than 50 per cent of the seats vacant?

Ms. Smith: If that were to happen, I assume people would start scanning options and one could run through them. You discuss the issue with the Governor General, and I have thought about that. I think that one probably might have to be set aside, and I can explain why I think that. Another option, of course, is the court. A third option is that in engendering a kind of institutional crisis one starts to drive parties towards finding a solution. Someone might say the government already has a solution in the form of bill this and bill that. The problem is there is no consensus on those ideas and yet, this is the Senate. It is interesting this way.

Nova Scotia, many decades ago, was like many of the other provinces; it had a bicameral legislature. Over a long period of time, the effort was made to abolish the upper chamber, and eventually it was. It required, among other things, a court case to do that. When the court gave the all clear, as it were, eventually the Conservative government, in fact, was able to effect that change.

There is one huge difference between the situation in a province and the situation in Canada. When you speak about the Senate, it is a nation-wide institution and, therefore, not one for which a change can be made on a unilateral basis. That is a huge difference. When I say option 3, discrediting an institution to the point where you drive a crisis, you are into a political situation and trying to find your way out of that.

That is about as far as I have been able to go in my thinking because I do not like to think ahead in those ways.

à adopter une loi leur permettant de choisir les sénateurs. J'ai remarqué que, selon la Constitution, les provinces et les autres ordres de gouvernement n'ont rien à dire sur les nominations au Sénat. Cela me paraît un peu tordu sur le plan juridique.

Mme Smith : Selon moi, c'est une situation exceptionnelle pour deux raisons. Premièrement, si ça continue, ça deviendra une situation exceptionnelle chronique. J'ai remarqué que, dans une de vos discussions, vous avez abordé la question en disant que si ça devait continuer — en attendant, il n'y a aucun processus de réforme ou de changement en tant que tel, qui soit en cours, et la situation décrite perdure —, qu'est-ce que ça changerait? Pendant combien de temps est-ce que ça durera avant qu'une crise institutionnelle éclate et que ça devienne en fait un problème à la grandeur du pays? Qu'est-ce qui se passera alors?

Vous avez parlé du rôle du Gouverneur général. Je suppose que vous essayez d'imaginer ce qui va se passer pour déterminer pendant combien de temps ça va durer et dans quelle situation on risque de se retrouver en définitive.

Le sénateur Joyal : Ne serait-il pas absurde que plus de 50 p. 100 des sièges soient vacants?

Mme Smith : Si cette situation devait survenir, je suppose que les gens commenceraient à chercher des solutions et que quelqu'un pourrait les examiner. Vous avez parlé de la question concernant le Gouverneur général, et j'y ai réfléchi. Je crois qu'une solution devra peut-être être mise de côté, et je peux expliquer pourquoi je pense ainsi. Une autre solution, évidemment, consiste à recourir aux tribunaux. Une troisième option serait de provoquer une espèce de crise institutionnelle qui pousserait les parties à trouver une solution. Certains diront probablement que tel ou tel projet de loi constitue déjà une solution pour le gouvernement. Le problème, c'est qu'il n'y a aucun consensus sur ces idées et pourtant, on parle du Sénat. Ce point de vue est intéressant.

Il y a plusieurs décennies, la Nouvelle-Écosse était comme beaucoup d'autres provinces : elle était gouvernée selon un système bicaméral. Pendant longtemps, on a essayé d'abolir la Chambre haute, et on y est finalement parvenu. Il a fallu, entre autres choses, s'adresser aux tribunaux pour y arriver. Lorsque la cour a donné son autorisation, pour ainsi dire, le gouvernement conservateur a finalement été en mesure d'appliquer le changement.

Par contre, il y a une énorme différence entre la situation dans une province et la situation au Canada. Lorsqu'il est question du Sénat, on parle d'une institution pancanadienne et, par conséquent, il n'est pas possible d'y apporter un changement de façon unilatérale. C'est là une énorme différence. Lorsque j'ai parlé de la troisième solution, soit le fait de discréditer une institution au point de provoquer une crise, on se retrouve alors dans une situation politique d'où l'on tente de sortir.

Voilà à peu près où s'est arrêtée ma réflexion, parce que je n'aime pas envisager l'avenir de cette façon.

Mr. Franks: In some ways, I think the Senate is already feeling the pinch. My understanding is that some senators wanted to create an arts and culture committee and there was a shortage of members on one side. The demands on the time of senators exceeded the ability to fill the positions.

We have that problem in the House of Commons. I have not looked at Senate committees, but I do not believe that members of the House of Commons adequately prepare themselves for committee work. The demands of their time far exceed their ability to meet the demands of committee. Every senator that you lose, the bell is tolling for the rest of you. It is tolling for thee. I think the problem is already here.

Senator Joyal: At what point in time do you draw the line? When does the situation become untenable?

Mr. Franks: The Senate has to do that itself. I cannot say. That is one of the places where the real strength of the Senate should come in as the capacity of the two sides of the house to work together and come to an agreement.

The burden will increase, and some day I think that this committee or another committee will say, "It is not working. The Senate is not doing what it should and we cannot do it." You might find a broad consensus amongst members, and at that point I hope you are all sober and you give thought to it and give some suggestions to the government.

To put it another way, I do not think there is any absolute place where it becomes unbearable. It is something that you as senators will have to feel as a collegial body, when are we no longer able to do our work, when has this rather silly approach become too much for the Parliament of Canada to fulfill its function?

Senator Stratton: My question evolves around the appointment in a timely fashion to which Professor Smith referred. Historically, there have been vacancies for quite a period of time, as Senator Murray had pointed out in a small brief speech when Senator Moore was introducing this, and Senator Murray went into the history.

Senator Murray: It was related to another motion.

Senator Stratton: One of the positions in Manitoba was vacant for over five years. In 1979, and Senator Murray can correct me on this, there were only a dozen or so Conservative senators. It got down that low and it operated, albeit with difficulty, but it operated. Historically, the argument is that the Senate has operated legitimately for a number of years at times since Confederation with much diminished numbers on one side or another. Therefore, I really wonder whether this "timely fashion" issue exists.

Currently we have 22 Conservatives, 60 Liberals, 6 or 7 independents and 14 vacancies. The place seems to be operating, although we admit that it is difficult, but it is

M. Franks : D'une certaine façon, je crois que le Sénat paie déjà le prix. Je crois savoir que certains sénateurs voulaient créer un comité sur les arts et la culture, mais qu'il n'y avait pas assez de membres d'un côté. Le temps que les sénateurs auraient dû consacrer au comité dépassait leur capacité.

Nous avons le même problème à la Chambre des communes. Je n'ai pas examiné la situation en ce qui concerne les comités du Sénat, mais je ne crois pas que les membres de la Chambre des communes se préparent suffisamment pour le travail qu'ils doivent effectuer en comité. Le temps qu'ils doivent y consacrer dépasse de loin leur capacité à répondre aux demandes du comité. Chaque fois que l'on perd un sénateur, le glas sonne pour le reste du Sénat. Il sonne pour toi. Je crois que nous sommes déjà face au problème.

Le sénateur Joyal : Où fixez-vous la limite? À quel moment est-ce que la situation devient intenable?

M. Franks : Les membres du Sénat doivent le faire eux-mêmes. Je ne peux pas me prononcer. C'est l'une des situations où la véritable force du Sénat devrait se manifester dans la capacité des deux côtés de la Chambre à travailler de pair pour en arriver à une entente.

Le fardeau s'alourdit, et un jour, je crois que ce comité ou un autre dira : « Ça ne fonctionne pas. Le Sénat ne fait pas ce qu'il devrait faire, et nous ne pouvons pas le faire. » Il se peut qu'il y ait un vaste consensus parmi les membres, et lorsque ça arrivera, j'espère que vous serez tous réalistes, que vous y réfléchirez et que vous formulerez des suggestions au gouvernement.

En d'autres termes, je ne crois pas qu'il y ait une limite absolue où la situation devienne insupportable. C'est quelque chose que vous, les sénateurs, devrez établir d'instinct dans un esprit de collégialité. Vous devrez vous demander : quand ne serons-nous plus capables de faire notre travail, quand est-ce que cette approche plutôt ridicule empêchera le Parlement du Canada de remplir ses fonctions?

Le sénateur Stratton : Ma question tourne autour du délai raisonnable de nomination auquel a fait référence Mme Smith. Par le passé, il y a eu des postes vacants pendant assez longtemps, comme le sénateur Murray l'a souligné dans un bref exposé lorsque le sénateur Moore a présenté ce projet de loi. Le sénateur Murray s'est alors attardé à l'aspect historique.

Le sénateur Murray : Ça concernait une autre motion.

Le sénateur Stratton : L'un des postes au Manitoba est resté vacant pendant plus de cinq ans. En 1979, et le sénateur Murray peut me corriger à ce sujet, il n'y avait qu'environ une douzaine de sénateurs conservateurs. Le nombre était aussi bas mais ça fonctionnait, même si c'était difficile, ça fonctionnait. Historiquement, le raisonnement c'est que, depuis la Confédération, le Sénat a exercé ses activités en toute légitimité pendant des périodes de plusieurs années avec un effectif très réduit d'un côté ou de l'autre. Par conséquent, je me demande vraiment si cette question des « meilleurs délais » existe.

Actuellement, nous avons 22 conservateurs, 60 libéraux, 6 ou 7 indépendants et 14 postes vacants. Le Sénat semble fonctionner, même si nous admettons que c'est difficile, mais il

operating and the committee structure is operating, albeit with some difficulty. However, being whip on the government side, I see the opposition whip substituting in committees as often as I am because with the 60 Liberal senators, they still have difficulty getting people to a attend committees.

Senator Milne: We do not have to come any more.

Senator Andreychuk: That is true.

Senator Stratton: That is true, but why put the onus on the poor whip? He is the guy running around like I am.

When I look at the historical picture of that period around 1979 and I look at how the Senate is operating today, I do not see the urgency of suddenly deciding we have to make appointments. In my view, the argument is not there. The Senate has operated under these conditions for some time.

The vast majority of Canadians want an elected Senate. In addition, a growing number of Canadians want the place abolished. Alberta has had two elected senators. What happens in a situation with nothing other than more provinces deciding to elect Senators? Where are you then?

Ms. Smith: I want to respond to your timely fashion comment. In the past, when appointments were not made, undoubtedly there were reasons for it. I am sure some of them would be partisan reasons having to do with the difficulty of making decisions when there was more demand than supply.

Second, I think that Senator Joyal's point is the critical one. The Prime Minister has thrown down the gauntlet in stipulating his intention. He is taking a very dramatic stand on this issue in declining to make appointments unless the individuals have won a consultative Senate election. That is the key point and is the difference between this current situation and previous situations.

On your point about the vast number of Canadians who want an elected Senate, I do not know what we can make of any of these figures. If you ask people whether they want taxes lowered, you may get a strong favourable response. If you ask them whether they want to reform the Senate, why not? Reform has the implication of being a good thing. We have no idea what that reform means. There could be a very strong component within that who would simply like to see abolition. When an issue is not openly, publicly and widely discussed and when options are not put to people so they can see the possibility, you really have no idea what these polls may mean.

Mr. Franks: I think the Senate can operate with a lot fewer people. However, your committee work would suffer and I think that is the most important thing the Senate does. I have a very high respect for Senate committee work. As I have worked a great deal on House of Commons committee work as well, I say that very sincerely.

exerce ses activités et la structure des comités fonctionne, même s'il y a quelques difficultés. Toutefois, en tant que whip du gouvernement, je constate que le whip de l'opposition fait office de remplaçant à des comités aussi souvent que moi, car malgré les 60 sénateurs libéraux, il est quand même difficile d'amener les gens à assister aux séances des comités.

Le sénateur Milne : Nous ne sommes plus tenus d'y aller.

Le sénateur Andreychuk : C'est vrai.

Le sénateur Stratton : C'est vrai, mais pourquoi le fardeau repose-t-il sur le pauvre whip? C'est lui qui court partout comme je le fais.

Quand je pense à la situation qui existait vers 1979 et que je regarde la façon dont le Sénat exerce ses activités aujourd'hui, je ne vois pas l'urgence de décider soudainement que nous devons faire des nominations. À mon avis, ce n'est pas fondé. Le Sénat exerce ses activités dans ces conditions depuis longtemps.

La grande majorité des Canadiens veut un Sénat élu. De plus, un nombre croissant de Canadiens veut que l'institution soit abolie. L'Alberta a eu deux sénateurs élus. Qu'arrive-t-il si davantage de provinces décident d'élire des sénateurs? Où en est-on à ce moment-là?

M. Smith : J'aimerais répondre à votre commentaire sur les meilleurs délais. Dans le passé, quand on ne procédait pas à des nominations, il y avait sans aucun doute des raisons pour cela. Je suis sûr que c'était parfois par partisanerie, à cause de la difficulté de prendre des décisions lorsque la demande était plus grande que l'offre.

Deuxièmement, je crois que le point du sénateur Joyal est fondamental. Le premier ministre a jeté le gant en faisant connaître son intention. Il prend une position très radicale sur cette question en refusant de procéder à des nominations, sauf si les individus ont gagné une élection consultative du Sénat. C'est ce qu'il faut retenir et c'est la différence entre la situation actuelle et les situations antérieures.

Vous avez parlé du grand nombre de Canadiens qui veulent un Sénat élu; je ne sais pas quoi penser de ces données. Si vous demandez à la population si elle veut une baisse d'impôt, il se peut que vous obteniez une réponse des plus favorables. Si vous lui demandez si elle veut une réforme du Sénat, pourquoi pas? Le terme « réforme » sous-entend une bonne chose. Nous ne savons pas du tout ce qu'on entend par réforme. Une très grande partie de la population pourrait tout simplement vouloir l'abolir. Si une question ne fait pas l'objet d'une discussion ouverte, publique et à grande échelle et que des options ne sont pas offertes à la population afin qu'elle puisse voir les possibilités, on ne peut pas vraiment connaître la signification de ces sondages.

M. Franks : Je crois que le Sénat peut exercer ses activités avec beaucoup moins de gens. Toutefois, les travaux de votre comité en souffriraient et je crois que c'est la chose la plus importante que le Sénat accomplit. J'ai le plus grand respect pour les travaux des comités sénatoriaux. Ayant pris part à de nombreux travaux des comités de la Chambre des communes également, je le dis en toute sincérité.

I do not get excited about this because it will sort out. I am not personally in favour of an elected Senate, but I can see it working. My main concern would be that the people elected are of similar quality to the people who have been selected.

Figures show that if you take the average senator, by-and-large, he or she has had more political experience and has been more successful in his or her previous career. Certainly, they have more experience within the legislature than have members of the House of Commons. That is something you bring to bear.

I want to push my own agenda a bit. In my view, the by-election issue is more important at this point than the Senate one. Senate reform is underway here and there. However, the by-election issue is one of those unreformed parts the Parliament that has been ignored for far too long. That is why I put those detailed comments in my paper. I think that needs close attention.

Senator Stratton: It will be interesting if we go to the end of 2009 with 29 vacancies. That will about an election issue if nothing else.

Mr. Franks: There will be many slathering, ambitious, drooling politicos out there.

Senator Milne: Senator Joyal largely covered my point. In spite of the fact that Senator Stratton does not think our committee work is suffering currently, I believe it is. This committee itself should have five Conservative members.

Senator Stratton: It should have four.

Senator Milne: It should have four Conservatives and eight Liberals. I would say that we have an average of about 1.5 Conservatives at every meeting.

An Hon. Senator: Point of order. Look around the room and see how many senators are on the Liberal side. How many are there?

Senator Milne: I am quite aware of that today.

Senator Stratton: That is normal.

Senator Milne: No, it is not.

Attendance in committee is severely hampered by the fact that we simply do not have a full roster of Conservatives. I think it is important and it is important to government legislation that there be a full roster of Conservatives able to come to these committees.

I think it should be referred to the Supreme Court, but the Senate does not have the power to make a reference to the Supreme Court. That can only come, I believe, from the Prime Minister through the government. Therefore, we do not have that recourse.

Je ne m'emporte pas à ce sujet parce que ça va s'arranger. Personnellement, je ne suis pas en faveur d'un Sénat élu, mais je peux voir que ça fonctionnerait. Ce qui importe surtout, je crois, c'est que les personnes qui sont élues soient aussi compétentes que les personnes qui ont été sélectionnées.

Les données montrent que, si on prend le sénateur moyen, de façon générale, il possède une plus grande expérience politique et a connu plus de succès dans sa carrière précédente. Les sénateurs ont certainement plus d'expérience au sein de l'assemblée législative que les membres de la Chambre des communes. C'est quelque chose dont on doit se servir.

Je veux aller un peu plus loin dans mon raisonnement. À mon avis, la question de l'élection partielle est plus importante en ce moment que celle du Sénat. La réforme du Sénat est en cours ici et là. Toutefois, la question de l'élection partielle constitue l'une des parties non réformées du Parlement qu'on ignore depuis beaucoup trop longtemps. C'est pourquoi j'ai inclus ces commentaires détaillés dans mon document. Je crois qu'il faut l'examiner de près.

Le sénateur Stratton : Ce sera intéressant si nous avons 29 postes vacants à la fin de 2009. Ça va poser un problème d'élection, pour le moins qu'on puisse dire.

M. Franks : On verra saliver de nombreux politiciens ambitieux.

Le sénateur Milne : Le sénateur Joyal a en grande partie abordé mon point. En dépit du fait que le sénateur Stratton ne pense pas que les travaux des comités sont négligés en ce moment, je crois qu'ils le sont. Notre comité devrait compter cinq membres conservateurs.

Le sénateur Stratton : Il devrait y en avoir quatre.

Le sénateur Milne : Il devrait y avoir quatre conservateurs et huit libéraux. Je dirais qu'en moyenne il y a 1,5 conservateur à chaque réunion.

Une voix : J'invoque le Règlement. Regardez dans la salle et voyez combien de sénateurs sont du côté libéral. Combien y en a-t-il?

Le sénateur Milne : Je suis tout à fait au courant de la situation aujourd'hui.

Le sénateur Stratton : C'est habituel.

Le sénateur Milne : Non, ça ne l'est pas.

La présence aux séances du comité est sérieusement réduite en raison du fait que tous les conservateurs ne sont pas présents. Je crois que c'est important et qu'il est important pour les projets de loi du gouvernement que tous les conservateurs qui siègent aux comités puissent assister aux séances.

Je crois que la question devrait être soumise à la Cour suprême, mais le Sénat n'a pas le pouvoir de renvoyer une question à la Cour suprême. Cela ne peut venir, je crois, que du premier ministre par le biais du gouvernement. Par conséquent, nous ne pouvons exercer ce recours.

It comes down to the consequences involved with these vacancies. There will be 29 vacancies by the end of next year. I will be the last one to go at the end of next year. In January, Senator Grafstein will leave. That will make the 13 who will leave next year. I think it will have a severe effect on how this place operates, how it can operate and how government legislation can pass.

The Chair: Do you have a question?

Senator Milne: I am making a political statement just as Senator Stratton did.

My question has to do with Ms. Smith's sixth point. In your outside opinion, what are the consequences of these vacancies? What will happen when this place becomes dysfunctional? Is that perhaps a goal the Prime Minister quietly has in mind?

Ms. Smith: So much of this is contingent on the political situation, who is in charge of the government, and so on. One interesting consideration is my third point when I spoke about the legitimacy of an institution. You are reaching something quite serious. If, for example, the government were to change and a government came in that did not have Senate change as an item on its agenda, do we really think that such a government could turn around and make a slew of appointments easily? At one time, a lot of attention might not have been paid to that. However, I am not sure that would be the case now.

In other words, I think that with the decision that the Prime Minister has made and the action he has taken, it actually has moved the goalposts on the issue of the Senate and Senate change. I am not sure there is the option to go back. I am not sure where we are going moving ahead, but I think there will be ramifications of this decision and the action he has taken. Pieces are moving on the chessboard, the terrain has shifted and we cannot really be all that certain of what we will see. However, I do not think it is business as usual.

Mr. Franks: If I knew what Senate elections were supposed to achieve I would be much happier. However, apart from saying that elected officials are better than appointed officials are, I do not know what an elected Senate supposed to achieve; therefore, my views on Senate reform are not terribly helpful in the present atmosphere.

I do have a concern that, over time, we cannot let the Senate atrophy. It either has to be abolished or it has to be a functioning part of Parliament. Death by 100 cuts is not the way to go.

Senator Watt: I very much enjoyed both of your presentations. I have dealt with a number of constitutional violations, especially as it relates to my people, probably more than any other senator.

I was encouraged by your presentation. I was looking for an answer on how we get out of the mess we are in now. I have been listening carefully to the responses that each of you have made to

Tout cela se résume aux conséquences résultant de ces postes vacants. Il y aura 29 postes vacants d'ici la fin de la prochaine année. Je serai la dernière à partir à la fin de l'an prochain. En janvier, le sénateur Grafstein partira. Cela donnera les 13 sénateurs qui partiront l'an prochain. Je crois que les départs auront de graves conséquences sur la façon dont le Sénat exerce ses activités, sur la façon dont il pourra les exercer et sur l'adoption des projets de loi du gouvernement.

La présidente : Avez-vous une question?

Le sénateur Milne : Je fais une déclaration politique, tout comme le sénateur Stratton vient de faire.

Ma question se rapporte au sixième point de Mme Smith. À votre avis, selon un point de vue externe, quelles sont les conséquences de ces postes vacants? Qu'arrivera-t-il lorsque le Sénat deviendra dysfonctionnel? Est-ce là peut-être un objectif auquel le premier ministre songe secrètement?

Mme Smith : Cela dépend en grande partie de la situation politique, de la personne qui dirige le gouvernement, notamment. Mon troisième point est particulièrement intéressant : j'ai parlé de la légitimité d'une institution. On touche quelque chose de très sérieux. Si, par exemple, le gouvernement était remplacé et que le nouveau gouvernement n'avait pas comme priorité les modifications à apporter au Sénat, croyons-nous réellement que le gouvernement pourrait changer de cap et procéder à une foule de nominations facilement? À une certaine époque, cela n'aurait peut-être pas attiré beaucoup d'attention. Toutefois, je ne suis pas certaine que ce serait le cas aujourd'hui.

En d'autres termes, je crois que la décision du premier ministre et les mesures qu'il a prises brouillent les cartes dans le dossier du Sénat et des modifications à apporter au Sénat. Je ne suis pas certaine que nous avons l'option de retourner en arrière. Je ne suis pas certaine de savoir où nous allons, mais je crois qu'il y aura des conséquences à la suite de la décision et des mesures qu'il a prises. Les pièces se déplacent sur l'échiquier, le contexte a changé et nous ne pouvons pas vraiment être certains de ce que nous verrons. Toutefois, je ne crois pas que ça s'inscrit dans l'ordre normal des choses.

M. Franks : Si je connaissais l'objectif visé par les élections au Sénat, je serais beaucoup plus heureux. Toutefois, outre le fait de dire que des représentants élus valent mieux que des représentants nommés, je ne sais pas à quoi on s'attend d'un Sénat élu; par conséquent, mes opinions sur la réforme du Sénat ne sont pas vraiment utiles dans le présent contexte.

Le fait que le Sénat puisse s'atrophier au fil des ans me préoccupe. Il faut soit l'abolir, soit en faire une entité fonctionnelle du Parlement. La mort à petit feu n'est pas la voie à suivre.

Le sénateur Watt : J'ai beaucoup aimé vos deux exposés. J'ai été témoin de certaines infractions à la Constitution, tout particulièrement en ce qui concerne mon peuple, et ce probablement plus que tout autre sénateur.

Votre exposé m'a encouragé. Je cherchais une réponse quant à la façon de nous sortir de ce bourbier. J'ai écouté attentivement les réponses que chacun de vous avez données aux différentes

a number of our senators' questions. However, there is still an area that remains grey in my mind: We cannot go to court as an instrument. Only the Prime Minister, a government, can go to court.

I know for a fact that the provinces, if they disagree with the action that is taken by the central government, can also challenge that matter in the court. However, I have never heard of a matter as important as this is. I do not know whether the individual or a group of individuals can take this matter seriously. In my opinion, this is a people's government, as you have indicated; it is the people who need to be consulted. Not only consulted but they have to be engaged in the discussion on what will be tomorrow.

They have not had that opportunity, as you have rightly state. I concur with that strongly. I always believe that the Constitution is there for a good purpose and good reasons; it is to be followed until there is public engagement or until the public outcry is asking for the government to make a change.

That is my problem.

Given this is where we are, what is your opinion regarding the predicament we are now in on how to get out of it while at the same time stopping or preventing a politician or a government taking up by his own hand, moving ahead, operating above the Constitution or operating above the rule of law?

That is the crux of the issue. I feel that needs to be answered. I have not heard that answer. If we are to continue to keep talking without getting to the bottom of the problem, we are wasting our time and we are wasting money.

Mr. Franks: I think at this point, it is bending the law rather than breaking it. As the point has been made before, Senate positions remain vacant for a long time. I have never seen a thorough study on how long they have remained vacant, but we all know there have been vacancies for well over months and into years.

The question that faces the Senate is when does the accumulation of vacancies reach a point that you feel prevents this institution from doing what it must do? By that I do not mean what you would like it to do, but what it must do.

I do not know the answer to that question. However, at some point something will have to give on this. I do not know when or how it will happen. It might be that Bill C-20 moves through the House of Commons and comes to the Senate and you say, "Fine, we will agree to this, provided that we have some assurance that the other branch of this reform — the term limits — is done to our satisfaction." However, I think that one would wind up as a reference to the Supreme Court.

questions posées par nos sénateurs. Toutefois, il subsiste une zone grise dans mon esprit : nous n'avons pas la possibilité de nous adresser aux tribunaux. Seuls le premier ministre ou un gouvernement peuvent s'adresser aux tribunaux.

Il s'avère que les provinces, si elles ne sont pas d'accord avec les mesures prises par le gouvernement central, peuvent également présenter des contestations judiciaires. Toutefois, je n'ai jamais entendu parler d'une affaire aussi importante que celle-ci. Je ne sais pas si une personne ou si un groupe de personnes peuvent prendre cette question au sérieux. À mon avis, notre gouvernement est un gouvernement du peuple, comme vous l'avez indiqué; il est donc de mise de consulter la population. Non seulement de la consulter, mais d'obtenir sa participation aux discussions qui concernent l'avenir du Sénat.

Les gens n'ont pas eu l'occasion de s'exprimer, comme vous l'avez très justement fait remarquer. Je partage tout à fait votre opinion. Je crois toujours que la Constitution existe pour le bien de la population et qu'elle a sa raison d'être; il faut y adhérer jusqu'à ce qu'un engagement public se prenne ou que la grogne populaire incite le gouvernement à apporter un changement.

Voilà mon problème.

Comme nous en sommes rendus là, que pensez-vous de cette situation difficile qui nous oblige à trouver une solution tout en empêchant un politicien ou un gouvernement d'agir de façon unilatérale, d'aller de l'avant, de faire fi de la Constitution ou de faire entorse au principe de la primauté du droit?

Voilà le cœur du problème. J'estime qu'il faut répondre à cette question. Je n'ai pas entendu cette réponse. Si nous devons pour poursuivre nos discussions sans aller au fond des choses, nous perdons notre temps et nous gaspillons de l'argent.

M. Franks : Je pense qu'en ce moment, on contourne la loi plutôt qu'on ne l'enfreint. Comme il a été dit précédemment, les postes au Sénat demeurent vacants longtemps. Je n'ai jamais vu d'étude poussée sur la durée de ces vacances, mais nous savons tous que certains sièges sont inoccupés depuis de longs mois voire des années.

Le Sénat doit se demander à quel moment les sièges vacants s'accumuleront au point où cette institution ne sera plus en mesure de s'acquitter de ses fonctions. Je ne parle pas ici des fonctions que vous souhaiteriez la voir exercer, mais bien des fonctions qu'elle doit exercer.

Je ne connais pas la réponse à cette question. Toutefois, quelque chose va finir par céder. Je ne sais ni quand ni comment. Peut être que la Chambre des communes va adopter le projet de loi C-20, que ce projet de loi va se retrouver devant le Sénat et que vous allez dire : « D'accord, nous y consentons, pourvu qu'on nous donne l'assurance que l'autre volet de cette réforme — la durée du mandat — soit mené de façon satisfaisante pour nous. » Cependant, je pense qu'une telle situation donnerait lieu à un renvoi à la Cour suprême.

It is a messy, ugly situation. I do not particularly like it and if I was choosing an approach to Senate reform, I would not choose it. However, no other approach that is ever been taken has worked in the 100-plus years of Canadian history.

On the other hand, I often remember what Samuel Johnson said when Boswell said to him, "So, sir, you laugh at schemes for political improvement." Johnson said, "Well, sir, most schemes for political improvement are very laughable things."

I feel that way about many of proposals for Senate reform. I cannot answer your question. This is one of those open-ended, evolving stories that is in its opening chapters, and I do not know what the last chapter is.

Ms. Smith: It is a political situation. If everyone is to agree with the Prime Minister, then that would be one way of resolving it, but if people do not and his idea does not come to fruition, what happens then? What does his government do? Does it persist in not making these appointments except under certain circumstances? What does another government do? If the aim of the exercise is somehow to drive the country towards considering change to the Senate, then the current path may lead there.

Senator Moore: Professor Smith, I thought the House of Commons took care of the increased numbers in the Senate vis-à-vis the provincial populations. I think back to Confederation, the compromise that was reached, and the fact that Nova Scotia was given 10 seats.

In another appearance, you talked about pulling out the rug from under the people. Would it not be pulling the rug out from under the people of Nova Scotia if someone were trying to increase numbers outside of the regional basis on which the country was established?

Ms. Smith: Are you referring to vacancies?

Senator Moore: I am referring to the idea that because there are more people in another province now than were there at the time of Confederation, therefore they should have more senators.

Ms. Smith: You are talking about the distribution of Senate seats and whether it should be changed and, if so, how and so on.

To my way of thinking, the answer to that question depends on your opinions about a prior set of questions. People have to decide if they want a bicameral Parliament, whether it is a parliamentary upper house first, which means sober second thought, scrutiny, dealing with legislative difficulties of one kind or another, and perhaps studying particular issues and so on. Is that the fundamental practical function of a parliamentary upper house? Alternatively, do the people want to put more emphasis on the provincial-territorial representation component? On the one hand, it would not be a replica of the House of Commons, at the same time that would be an aspect of things. Then one

C'est une situation compliquée, qui prend une mauvaise tournure. Je n'aime pas particulièrement cette situation et si j'avais à choisir une approche pour ce qui est de la réforme du Sénat, ce n'est pas celle que j'adopterais. Toutefois, aucune autre des approches adoptées par le passé n'a fonctionné, et ce, depuis plus d'un siècle d'histoire dans notre pays.

D'autre part, je me rappelle souvent ce que Samuel Johnson a répondu lorsque Boswell lui a dit : « Ainsi, monsieur, vous vous moquez des plans du gouvernement tendant à améliorer la situation des citoyens? » Johnson a répondu : « Mais mon ami, la plupart des plans politiques n'excitent que la moquerie. »

C'est dans le même esprit que j'analyse de nombreuses propositions de réforme du Sénat. Je ne peux répondre à votre question. Il s'agit d'un de ces romans dans lequel tout peut arriver, qui ne cesse d'évoluer, qui n'en est qu'à ses premiers chapitres et dont nous ne connaissons pas la fin.

Mme Smith : Il s'agit d'une situation politique. Si tout le monde accepte de se ranger du côté du premier ministre, on aurait une façon de régler le problème, mais si les gens décident autrement et que son idée ne porte pas fruit, que se passe-t-il? Que fera son gouvernement? Persistera-t-il à ne pas nommer de sénateurs, sauf dans certaines circonstances? Que ferait un autre gouvernement? Si le but de l'exercice est en quelque sorte d'amener le pays à envisager une réforme du Sénat, la voie déjà empruntée pourrait s'avérer la bonne.

Le sénateur Moore : Madame Smith, je croyais que la Chambre des communes s'était occupée de revoir le nombre accru de sièges au Sénat par rapport à la population de chaque province. Je me reporte à la Confédération, au compromis auquel on en est arrivé et au fait que la Nouvelle-Écosse s'est vu attribuer dix sièges.

À l'occasion d'un témoignage antérieur, vous avez parlé de couper l'herbe sous les pieds des gens. Ne couperait-on pas l'herbe sous les pieds des Néo-Écossais si on tentait d'accroître le nombre de sièges autrement qu'en fonction de la représentation des régions qui constituent ce pays?

Mme Smith : Parlez-vous des sièges vacants?

Le sénateur Moore : Je parle de l'idée selon laquelle on devrait attribuer davantage de sièges à une province dont la population est aujourd'hui plus importante qu'elle ne l'était à l'époque de la Confédération.

Mme Smith : Vous parlez de la distribution des sièges du Sénat et vous vous interrogez à savoir s'il conviendrait de la changer et, le cas échéant, comment le faire et ainsi de suite.

Selon moi, la réponse à cette question dépend de votre opinion sur un ensemble de questions préalables. Les gens doivent décider s'ils veulent un Parlement bicaméral, s'il s'agit avant tout d'une Chambre haute parlementaire, ce qui veut dire une entité chargée d'assurer un second examen objectif, de passer les lois au crible, de s'occuper des questions posant des difficultés législatives de tous genres, et peut-être d'examiner des problèmes particuliers et ainsi de suite. Est-ce là le rôle fondamental d'une Chambre haute parlementaire? En revanche, les gens veulent-ils mettre davantage l'accent sur la composante de la représentation provinciale-territoriale? D'une part, on éviterait ainsi de créer une réplique

must decide whether one wants to look at a model like that in the United States or at different kinds of models that you see in European countries with bicameral legislatures and different ways and so on.

I think you have to answer those prior questions first. I tend to see it as a bit of a whole. There are many pieces of the puzzle, but you must start with first principles and how you conceive of this body in terms of function.

Senator Moore: Related to the filling of vacancies aspect of the bill and the current situation, as a Nova Scotian, we have three vacancies, so 30 per cent of our constitutional entitlement is not being filled, and this is by the direction of the Prime Minister.

What do you have to say about that in terms of pulling the rug out from underneath Nova Scotians? The Yukon is entitled to one and now has none, so a 100 per cent vacancy, and B.C., which is entitled to six, has only three, so it is down to half.

Ms. Smith: I do not think it is a good thing at all. The Constitution is fairly clear on the situation, and it is an extraordinary situation when you do not have a functioning body in the manner prescribed.

Senator Moore: Senator Stratton mentioned selection and elections and so on. Really, the method of selection he was talking about is irrelevant to this conversation. What we are talking about here is vacancies cannot be tolerated on an indefinite basis, and that is what I am trying to get at in this bill. I think we have your comments on that earlier, and those of Professor Franks.

Senator Murray: Mr. Chair, the comments that I am going to make, and they are comments will be as timely, I hope, when the second panel is at the table as they would have been with the first panel. However, I thank Professor Smith and Professor Franks for coming here today.

I want to say for the record, apropos Senator Moore's comments, that while we are emphatically on the same side with this bill, we are emphatically on opposite sides on the issue of western regional representation.

The Chair: And the motion you have made.

Senator Murray: The House of Commons is not rep by pop. Seven provinces in the House of Commons are considerably overrepresented in terms of rep by pop, and therefore I find it difficult to accept arguments that —

de la Chambre des communes, mais on ne pourrait pas tout à fait l'éliminer non plus. Ensuite, il faut déterminer si on souhaite envisager un modèle comme celui des États-Unis ou d'autres modèles comme en on voit dans les pays européens, dotés d'assemblées législatives bicamérales, de procédures différentes et ainsi de suite.

Je pense qu'il faut d'abord répondre à ces questions. J'ai plutôt tendance à examiner la chose comme faisant partie d'un tout. Il s'agit d'un problème à facettes multiples, mais il faut d'abord asseoir les principes et établir le fonctionnement d'un tel organisme.

Le sénateur Moore : Pour ce qui est des dispositions du projet de loi qui régissent la façon de pourvoir les sièges vacants au regard de la situation actuelle, en tant que Néo-Écossais, je constate que nous avons trois postes vacants, ce qui veut dire que 30 p. 100 des sièges auxquels nous avons droit en vertu de la Constitution ne sont pas occupés, et ce, selon les directives du premier ministre.

Qu'avez-vous à dire à ce sujet? Les Néo-Écossais se sont-ils fait couper l'herbe sous le pied? Le Yukon a droit à un siège au Sénat, siège qui est actuellement vacant, et la Colombie-Britannique, qui a droit à six représentants au Sénat, n'en a que trois, soit la moitié.

Mme Smith : Je ne crois pas du tout que cela est une bonne chose. La Constitution est relativement claire là-dessus, et on se trouve en présence d'une situation exceptionnelle quand un organisme ne fonctionne pas comme il devrait.

Le sénateur Moore : Le sénateur Stratton a parlé de sélection et d'élection, et ainsi de suite. À vrai dire, la méthode de sélection dont il parlait n'est pas pertinente dans le contexte actuel. Ce dont il est question ici, c'est qu'on ne peut tolérer indéfiniment que des sièges restent vacants, et c'est ce à quoi j'essaie de remédier avec le présent projet de loi. Je crois que vous nous avez déjà fait part de vos commentaires à ce sujet, de même que le professeur Franks.

Le sénateur Murray : Madame la présidente, j'espère que les commentaires que je m'apprête à formuler, et je dis bien commentaires, seront aussi à propos quand le second groupe d'experts se présentera à cette table, qu'ils l'auront été devant le premier groupe. Néanmoins, je remercie Mme Smith et M. Franks de leur présence ici aujourd'hui.

À propos des commentaires du sénateur Moore, je tiens à préciser que, même si nous sommes clairement du même côté en ce qui concerne le présent projet de loi, nous avons des points de vue diamétralement opposés sur la question de la représentation des provinces de l'Ouest.

La présidente : Et la motion que vous avez présentée.

Le sénateur Murray : La composition de la Chambre des communes ne repose pas sur le modèle de la représentation selon la population. Si l'on se fonde sur ce mode de représentation, on constate que sept provinces sont nettement surreprésentées à la Chambre des communes; par conséquent, je trouve difficile d'accepter les arguments selon lesquels...

The Chair: That are beyond the scope of this bill. We promised Professor Smith that she could leave 10 minutes ago. We thank you very much indeed and apologize for keeping you overtime.

Senator Moore: Mr. Franks, I am interested in your comments with regard to the British and Australian situations. Are there other democracies where the executive can selectively or capriciously fill or refuse to fill vacancies?

Mr. Franks: New Zealand is the other democracy, but in recent years, most of the vacancies that have occurred are on list members rather than constituency members, so they simply put in the next person on the list to replace the list member. You see, it is a mixed member PR.

Senator Murray: It is unicameral.

Mr. Franks: Yes, so the issue is not the same as by-elections here in Canada. That is why I used Australia and Britain as the two comparisons.

Senator Andreychuk: Professor Franks, you said that the worth of the Senate is in our committee work. I have always thought that as our value-added. We do an extremely good job in committees; however, our raison d'être is legislation and our sober second thought on legislation. That is the essence of our work and debate in the chamber.

Mr. Franks: I absolutely agree, but in my view the committee work on legislation is often better in the Senate than in the House, and there is value-added there too.

Senator Milne: Professor Franks, why do you believe that the 180-day maximum for Senate vacancies is too long and it should be at most, 90 days. In addition, you would suggest amending Senator Moore's bill so that by-elections are held within 90 days of a vacancy.

Mr. Franks: My reasoning on that is sort of the reverse of the presentation. In his bill, Senator Moore explained the 180 days because it exists in the Parliament of Canada Act; it exists as the time within which a writ must be issued. That is not when the election is held, but when a writ must be issued.

I find that too long and I cannot defend that length of time. I do not see the sense or rationale in waiting for that length of time. In fact, I would be happy to have it go down to 60 days for by-elections. I would be comfortable with that and, using Senator Moore's approach to Senate vacancies; I see no reason for waiting longer than 90 days, as well. I cannot imagine it takes a Prime Minister more than 90 days to decide on a Senate appointee. It was for the sake of consistency that I used the 90 days for both recommendations.

La présidente : Qui vont au-delà de la portée du présent projet de loi. Nous avons promis à Mme Smith qu'elle pourrait partir, il y a dix minutes. Nous vous remercions infiniment et nous nous excusons de vous avoir gardée plus longtemps que prévu.

Le sénateur Moore : Monsieur Franks, vos commentaires sur la situation en Grande-Bretagne et en Australie ont suscité mon intérêt. Y a-t-il d'autres démocraties où le pouvoir exécutif peut, de façon sélective ou comme bon lui semble, combler ou refuser de combler des sièges vacants?

M. Franks : L'autre pays est la Nouvelle-Zélande, mais depuis quelques années, la plupart des vacances touchent la liste des candidats plutôt que les sièges eux-mêmes, de sorte qu'on prend simplement la personne suivante sur la liste pour remplacer celle qui n'y figure plus. Il s'agit, voyez-vous, d'un système mixte proportionnel.

Le sénateur Murray : C'est monocaméral.

M. Franks : Oui, de sorte que l'enjeu n'est pas le même que lors des élections partielles ici, au Canada. Voilà pourquoi j'ai choisi l'Australie et la Grande-Bretagne pour fins de comparaison.

Le sénateur Andreychuk : Monsieur Franks, vous avez dit que la valeur du Sénat se trouvait dans les travaux de nos comités. J'ai toujours vu en cela notre valeur ajoutée. Nos comités font de l'excellent travail; cependant, notre raison d'être est d'étudier les lois et d'en faire un second examen objectif. C'est l'essence même de nos travaux et de nos discussions au Sénat.

M. Franks : Je suis parfaitement d'accord, mais à mon avis, le travail des comités qui étudient les lois est souvent meilleur au Sénat qu'à la Chambre, de sorte qu'il y a là aussi une valeur ajoutée.

Le sénateur Milne : Monsieur Franks, pourquoi estimez-vous que le délai maximal de 180 jours, en ce qui concerne les sièges vacants au Sénat, est trop long et qu'il devrait être d'au plus 90 jours? En outre, vous semblez proposer d'amender le projet de loi du sénateur Moore afin que les élections partielles se tiennent dans les 90 jours suivant la date où un siège devient vacant.

M. Franks : Mon raisonnement à ce sujet va en quelque sorte à l'encontre de l'exposé. Dans son projet de loi, le sénateur Moore explique le délai de 180 jours en invoquant le fait qu'il est mentionné dans la Loi sur le Parlement du Canada. En fait, il s'agit du délai à l'intérieur duquel doit être émis le bref d'élection. On ne parle pas du délai avant la tenue de l'élection, mais bien du délai avant l'émission d'un bref d'élection.

Je trouve ce délai trop long et je ne crois pas qu'on puisse le justifier. Je ne vois pas l'utilité ou la logique d'attendre aussi longtemps. En fait, je serais heureux qu'on le ramène à 60 jours dans le cas des élections partielles. Je serais à l'aise avec cela et, dans l'optique du sénateur Moore quant aux sièges vacants au Sénat, je ne vois également aucune raison d'attendre plus longtemps que 90 jours. Je ne peux imaginer qu'un premier ministre ait besoin de plus de 90 jours pour nommer un sénateur. C'est par souci d'uniformité que j'ai parlé d'un délai de 90 jours dans les deux recommandations.

Senator Joyal: Professor Franks is it not illogical that the government has proposed Bill C-16 to establish a fixed general election date to remove the so-called prerogative of the Prime Minister, while by-elections remain at the whim of the Prime Minister.

Mr. Franks: I think it was overlooked. It is one of the anomalies of our system. It is one that this current Prime Minister, like previous prime ministers, has used to what he felt would be to advantage in his political games and machinations of winning seats in the House of Commons. I do not like at this time regardless of what party does it. That is why I put it what I did there. I think it was just overlooked. On the other hand, you must appreciate that the bill is now law. The Elections Act has been amended for fixed elections and that means that no election can be held after that period; it must be by a given date. However, it has nothing that prevents an election before that time. In fact, the bill states in its initial paragraphs that nothing in this act prevents the Governor General from dissolving a Parliament for an election. That means that the very firm convention that unless there is an obvious alternative that has a majority in the House of Commons, the Governor General obeys the demand of the Prime Minister still holds. I will bet you that over the next 50 years, the result is that we will not have any parliaments longer than four years. However, we will have some shorter. Likely, the average length of time of a Parliament will be reduced. That is certainly the view of Eugene Forsey, an honourable member of this institution, and I share his view.

Senator Peterson: The Prime Minister has refused to take this to the Supreme Court and is encouraging provinces to have elections. In addition to Alberta, some others may do so. If a province disagreed with this procedure, could it ask that this matter be referred to the Supreme Court?

Mr. Franks: Absolutely. You can ask for anything to be referred to the Supreme Court. The Supreme Court may choose not to hear it. I believe there will be a time when the Senate not only feels it cannot do its job but cannot do it, assuming that nothing changes and no one is appointed. At that time, if Bill C-20 on the election of Senate gets through Parliament, it is perfectly possible that Nova Scotia or British Columbia — feeling hard done by — might ask for it to be considered by the courts.

Senator Moore: Mr. Franks, when I was putting the bill together, I used the 180 days because it was in the Parliament of Canada Act and I thought it would be easy for people to associate with and to perhaps support.

One last item is I would like you to comment on the sequential calling of by-elections.

Mr. Franks: I covered that in my 90 days. The by-elections should be held within 90 days.

Le sénateur Joyal : M, Franks, n'est-il pas illogique que le gouvernement ait présenté le projet de loi C-16 visant à établir une date fixe pour la tenue d'élections générales et à retirer cette soi-disant prérogative du premier ministre, alors que celui-ci peut décider de tenir des élections partielles quand bon lui semble?

M. Franks : Je crois qu'on a fermé les yeux là-dessus. C'est l'une des anomalies de notre système. Une anomalie que le premier ministre actuel, à l'instar de ses prédécesseurs, a utilisé à son avantage, lui semblait-il, dans ses jeux politiques et ses manœuvres pour gagner des sièges à la Chambre des communes. Je n'aime pas cela, peu importe le parti. C'est pourquoi j'ai parlé de cela. Je crois que cet aspect a été simplement négligé. Par contre, il faut bien se rendre compte du fait que le projet de loi est maintenant devenu une loi. La Loi électorale a été modifiée en vue de la tenue d'élections fixes, ce qui signifie qu'aucune élection ne peut avoir lieu au-delà de cette période; elle doit se tenir au plus tard à une date donnée. Toutefois, il n'y a rien qui empêche la tenue d'une élection avant cette date. En fait, le projet de loi prévoit, dans les premiers paragraphes, que rien dans la présente loi n'empêche le Gouverneur général de dissoudre le Parlement en vue d'une élection. Cela signifie que tient toujours le principe fermement établi selon lequel le Gouverneur général acquiesce à la demande du premier ministre à moins qu'une autre solution évidente ne rallie la majorité à la Chambre des communes. Je serais prêt à parier que, pour les 50 prochaines années, cela fera en sorte que nous n'aurons aucune législature qui durera plus de quatre ans. Cependant, certaines dureront moins longtemps. De même, la durée moyenne d'une législature sera réduite. C'est assurément l'opinion d'Eugene Forsey, membre éminent de cette institution, et je partage son point de vue.

Le sénateur Peterson : Le premier ministre a refusé de porter cette question devant la Cour suprême, et il encourage les provinces à tenir des élections. Outre l'Alberta, d'autres provinces pourraient le faire. Si une province n'approuve pas cette façon de procéder, peut-elle demander que cette question fasse l'objet d'un renvoi devant la Cour suprême?

M. Franks : Tout à fait. On peut toujours demander qu'une question soit soumise à la Cour suprême. Celle-ci peut décider de ne pas l'entendre. Je crois que viendra un temps non seulement où le Sénat aura l'impression de ne pas pouvoir faire son travail, mais où il sera aussi dans l'impossibilité de le faire, en supposant que rien ne change et qu'il n'y ait pas de nominations. À ce moment-là, si le projet de loi C-20 sur l'élection du Sénat est adopté, il est parfaitement possible que la Nouvelle-Écosse ou la Colombie-Britannique — se sentant lésées — demandent à ce que la question soit soumise aux tribunaux.

Le sénateur Moore : Monsieur Franks, quand j'ai élaboré le projet de loi, j'ai fixé le délai à 180 jours parce qu'il était déjà prévu dans la Loi sur le Parlement du Canada et que j'ai pensé qu'il serait facile pour les gens de faire le lien et, peut-être, d'apporter leur appui.

En dernier lieu, j'aimerais avoir vos commentaires sur le déclenchement des élections partielles qui suit.

M. Franks : C'est inclus dans mon délai de 90 jours. Les élections partielles devraient se tenir dans les 90 jours.

Senator Moore: Sequentially?

Mr. Franks: Sequential is less important than the time limit. I appreciate you were trying to eliminate the cherry-picking for by-elections. However, if they will be held within 90 days, there will be little likelihood of being able to defer and try to put something off too long.

The Chair: Thank you very much, Mr. Franks. I want to apologize to you and all senators for my insistence for moving this along. However, the fact is we do have more witnesses and senators have other committees. This goes straight to your point about whether we are overworked. Senators do find themselves obliged to be at two committees at once and that can make life difficult.

For the record, I will invite our next witnesses to come to the table and will remind everyone who they are. Two learned professors, Don Desserud, and David Smith will join us.

David Smith, Professor Emeritus, Department of Political Studies, University of Saskatchewan, as an individual: Honourable senators, thank you for inviting me to appear before you today. Although there are two parts to Bill S-224, An Act to amend the Parliament of Canada Act (vacancies), both deal with a single issue: To curb the discretion of the Prime Minister, first, in the sequence in which by-elections are called to fill vacancies in the House of Commons and, second, to require the Prime Minister to recommend to the Governor General the filling of vacancies in the Senate within 180 days of their creation.

Three arguments are advanced in support of these proposals. First, prime ministerial discretion is at odds with the notion of a properly-functioning Parliament, free from executive influence. Second, prime ministerial discretion used selectively in the case of House of Commons vacancies and indefinitely in the case of Senate vacancies, interferes with the right Canadians enjoy under the Constitution, to representation in Parliament. Finally, there is a syllogism. Part A of the syllogism is the protection of minority rights is a constitutional principle in Canada — see the *Secession Reference (1998)*. Part B is that a primary purpose of the Senate is to afford protection to the various sectional interests in Canada — see the *Senate Reference (1980)*. Part C, therefore, the Senate cannot fulfill its constitutional obligation in the matter of sectional and regional representation if its composition and function, as set down in the Constitution, are impaired.

Le sénateur Moore : Les unes à la suite des autres?

M. Franks : L'ordre est moins important que le délai. Je comprends que votre but était d'éliminer le déclenchement arbitraire et sélectif d'élections partielles. Cependant, si ces élections doivent se tenir dans les 90 jours, il est peu probable qu'on puisse les remettre à plus tard et essayer de laisser un siège vacant pendant trop longtemps.

La présidente : Merci beaucoup, monsieur Franks. Je voudrais m'excuser auprès de vous et de tous les sénateurs pour mon insistance à faire avancer le débat. Cependant, le fait est que nous avons d'autres témoins à entendre et que des sénateurs siègent à d'autres comités. Voilà qui illustre bien votre point de vue quand vous vous demandiez si nous étions surchargés de travail. Des sénateurs se voient effectivement obligés de participer à deux séances de comité en même temps, ce qui ne facilite guère les choses.

J'inviterais maintenant nos prochains témoins à prendre place à la table. Je rappelle à tous que nous avons devant nous deux éminents professeurs, soit MM. Don Desserud et David Smith.

David Smith, professeur émérite, Département d'études politiques, Université de la Saskatchewan, à titre personnel : Mesdames et messieurs, je vous remercie de m'avoir invité à témoigner aujourd'hui. Le projet de loi S-224, Loi modifiant la Loi sur le Parlement du Canada (sièges vacants), comprend deux parties, mais les deux se rapportent à une question : restreindre le pouvoir discrétionnaire du premier ministre, d'abord lorsqu'il s'agit d'établir l'ordre du déclenchement d'élections partielles pour combler les vacances à la Chambre des communes, et ensuite, pour obliger le premier ministre à faire une recommandation au Gouverneur général pour combler toute vacance au Sénat dans les 180 jours suivant la date où un siège devient vacant.

Trois arguments sont avancés à l'appui de ces propositions. Premièrement, le Parlement doit fonctionner efficacement, sans influence de l'exécutif, et l'octroi d'un pouvoir discrétionnaire au premier ministre va à l'encontre de ce principe. Deuxièmement, l'utilisation du pouvoir discrétionnaire du premier ministre, de façon sélective dans le cas de vacances à la Chambre des communes et de façon indéfinie dans le cas de vacances au Sénat, porte atteinte à un droit conféré aux Canadiens par la Constitution, soit le droit à la représentation au Parlement. Troisièmement, on se trouve devant un syllogisme, qui repose sur deux énoncés. Le premier énoncé, c'est qu'au Canada, la protection des droits des minorités est un principe constitutionnel, d'après le *Renvoi sur la sécession (1998)*. Le deuxième énoncé, c'est que l'un des buts primordiaux du Sénat est de protéger les divers intérêts régionaux au Canada, d'après le *Renvoi sur le Sénat (1980)*. Il en découle que le Sénat ne peut pas remplir son obligation constitutionnelle en matière de représentation régionale si on altère sa composition et ses fonctions telles qu'elles ont été établies dans la Constitution.

Vacancies in the Senate at the current time lend support to this line of reasoning. In British Columbia, with a population of 3.25 million, 3 of 6 senatorial positions are vacant while, in the 4 Atlantic provinces with a population 2.3 million, 6 of 30 positions are vacant.

The discrepancy accentuates the long-standing grievances about unequal provincial representation in the upper house while, in the case of British Columbia, it mutes the expression of that province's sectional concerns in the Senate. Absent any change in policy by the Prime Minister, vacancies are projected to rise from 14 at present to 30 by late 2009. This is the heart of matter: The vacancies are the consequence of a policy choice by the Prime Minister not to make Senate appointments.

An upper chamber of senators appointed for terms as opposed to retirement at age 75 or, better still, one where consultative elections precede recommendation for appointment by the Governor General is the Prime Minister's preferred option for Senate reform. Until the Prime Minister has achieved that objective, he has stated he will not exercise the prerogative of his office and make personal recommendations to the Governor General to fill vacancies in the Senate.

Here in the self-abnegation of the use of the prime ministerial prerogative to advise the Crown on appointments rather than in the exercise of the prerogative itself and its implication for the independence of Parliament is the fundamental issue to be considered.

The prerogative is central to the functioning of constitutional monarchy in a Westminster-style parliamentary system. Indeed, only with its use can that arrangement of powers, persons and structures operate in a coherent way and in a manner that permits the realization of the modern Constitution's fundamental principle of responsible government.

That being the case, is it permissible for the prime minister not to exercise the prerogatives which adhere to his or her office — and have adhered for more than a century and a half — and which make the principle of responsible government a political reality? As the first minister in a constitutional monarchy, is the prime minister not obliged to tender advice to the Crown?

What would one say if the issue at hand were section 96, the appointment of judges, rather than section 24, the summoning of senators? If, as a matter of deliberate policy, advice were not given to the Crown in respect to appointing judges to senior courts, would not the argument be made that this inaction eroded the rule of law, another constitutional principle noted in the *Secession Reference*, one associated with a sense of orderliness — and that phrase comes from the *Patriation Reference* — to the detriment of the courts and their operation?

Ce qui se produit actuellement au Sénat avec le nombre de sièges vacants donne du poids à ce raisonnement. En Colombie-Britannique, où la population est de 3,25 millions de personnes, trois des six sièges de sénateurs sont vacants, alors que dans les quatre provinces de l'Atlantique, qui comptent une population de 2,3 millions de personnes, six des 30 sièges sont vacants.

Ces écarts amplifient les récriminations de longue date à propos de l'iniquité de la représentation des provinces à la Chambre haute, et dans le cas de la Colombie-Britannique, la situation limite réellement les possibilités d'expression des préoccupations régionales au Sénat. Si le premier ministre ne change pas sa politique, le nombre de vacances devrait passer de 14 à 30 d'ici la fin de 2009. Voilà le nœud de l'affaire : les vacances résultent de la décision stratégique du premier ministre de ne pas nommer de sénateurs.

Le premier ministre voudrait réformer le Sénat de façon à ce que la Chambre haute soit constituée de sénateurs nommés pour des mandats d'une durée déterminée et non jusqu'à l'âge de 75 ans, et il préférerait que des élections consultatives précèdent les recommandations visant des nominations par le Gouverneur général. Le premier ministre a déclaré que, avant d'avoir atteint cet objectif, il n'exercerait pas sa prérogative pour faire des recommandations au Gouverneur général en vue de combler les sièges vacants au Sénat.

Ce n'est pas tant à l'exercice de la prérogative du premier ministre et à son incidence sur l'autonomie du Parlement qu'il faut s'arrêter, mais au fait que le premier ministre renonce à cette prérogative qui lui est accordée afin qu'il conseille la Couronne sur les nominations.

Cette prérogative revêt une importance clé pour le fonctionnement de la monarchie constitutionnelle dans un système parlementaire de type Westminster. En effet, elle doit être exercée pour que les différents pouvoirs et les différentes personnes et structures puissent fonctionner d'une manière cohérente qui permette d'assurer un gouvernement responsable, un principe fondamental de la Constitution moderne.

Dans ce contexte, est-il acceptable pour le premier ministre de ne pas exercer les prérogatives qui sont rattachées à ses fonctions — des prérogatives que les premiers ministres ont exercées pendant plus d'un siècle et demi — et qui font du principe de gouvernement responsable une réalité politique? En tant que premier ministre dans une monarchie constitutionnelle, le premier ministre n'est-il pas tenu de conseiller la Couronne?

Que dirions-nous si la question à l'étude était plutôt l'article 96, qui concerne la nomination des juges, et non l'article 24, sur la nomination des sénateurs? Si les personnes qui doivent guider la Couronne relativement à la nomination des juges aux cours supérieures s'abstenaient délibérément de donner des conseils, ne dirions-nous pas que cette inaction porte atteinte à la primauté du droit — un autre principe constitutionnel figurant dans le *Renvoi relatif à la sécession*, et qu'on associe à un mode de fonctionnement ordonné — au détriment des tribunaux

How is the matter of the failure to recommend appointment of senators different from this hypothetical instance?

I understand that there are strong differences of opinion in and outside of this chamber on the form and function that Parliament's upper house should take. However strong and however reasonable these proposals may appear to be to supporters, they do not, in my opinion, allow the first minister in Canada's constitutional monarchy to abdicate his existing constitutional responsibility to advise the Governor General.

If earlier discussion in this committee is any gauge, the adverse consequences of the Prime Minister's failure to perform his constitutional duty in the matter of recommending appointments to fill Senate vacancies could be serious indeed.

For instance, I believe it is been suggested that the Governor General might make appointments in the absence of prime ministerial recommendations. Surely, this would be a remedy worse than the disease it is intended to cure. It would refute the principle of responsible government while at the same time undermine two parts of Parliament — the office of Governor General and the Senate.

The preamble of the Constitution Act, 1867, speaks of the original provinces of Canada desiring to be ". . .federally united in one dominion under the Crown of the United Kingdom with a Constitution similar in principle to that of the United Kingdom."

Since the provisions of the Constitution Act, 1867, deal almost exclusively with the structure and powers of the units of the new federation, one must assume that the preambular phrase just quoted refers to the unwritten constitution whose purpose, since the mid-19th century, has been to achieve the realization of responsible government in a constitutional monarchy.

The unwritten constitution comprises parliamentary customs, usages, understandings and conventions. Among the features these elements of the Constitution share in common is the fact that they are not well known to the general public, if only because there are not set down in written law. It would require some study to speak with authority on such matters. Interpreters of the Constitution are a rare breed. In consequence, one might think that codifying conventions, and thus extinguishing say discretionary authority on the part of the prime minister, is an object to be sought.

I am not so sure about this, nor do I think it is easily attainable. To codify the unwritten constitution would be a complex, difficult and ambiguous undertaking. What I am sure of is that codifying parts of the Constitution *seriatim*, so to speak, is a bad idea for two reasons.

et de leur bon fonctionnement, comme il est dit dans le *Renvoi relatif au rapatriement*? En quoi le défaut de recommander la nomination de sénateurs diffère-t-il de cette situation hypothétique?

Je comprends qu'il y a de profondes divergences d'opinions au Sénat et à l'extérieur de celui-ci en ce qui concerne la forme et la fonction que devrait prendre la Chambre haute du Parlement. En dépit de la force et du caractère raisonnable que semblent revêtir ces propositions aux yeux de leurs défenseurs, je ne crois pas qu'elles donnent le droit au premier ministre du Canada, dans une monarchie constitutionnelle, de se soustraire à la responsabilité constitutionnelle de conseiller le Gouverneur général.

Si on se fie aux discussions précédentes du comité, les conséquences néfastes qu'entraînerait le défaut du premier ministre de remplir son devoir constitutionnel, qui consiste ici à recommander la nomination des personnes qui combleront les vacances du Sénat, pourraient être très graves.

Par exemple, je crois qu'on a proposé que le Gouverneur général puisse procéder à des nominations sans avoir reçu de recommandations du premier ministre. Cette solution serait bien pire que le problème qu'on tente de régler. Cette solution irait à l'encontre du principe de gouvernement responsable tout en diminuant la crédibilité de deux éléments constituants du Parlement — la charge de Gouverneur général et le Sénat.

Dans le préambule de la Loi constitutionnelle de 1867, on stipule que les premières provinces du Canada ont exprimé le désir de « contracter une Union Fédérale pour ne former qu'une seule et même Puissance (*Dominion*) sous la couronne du Royaume-Uni de la Grande-Bretagne et d'Irlande, avec une constitution reposant sur les mêmes principes que celle du Royaume-Uni ».

Comme les dispositions de la Loi constitutionnelle de 1867 traitent presque exclusivement de la structure et des pouvoirs des unités de la nouvelle fédération, il faut présumer que l'extrait du préambule que je viens de citer renvoie à la constitution non écrite dont l'objectif, depuis le milieu du XIX^{e} siècle, est de réussir à avoir un gouvernement responsable dans une monarchie constitutionnelle.

La constitution non écrite comprend les coutumes, les usages, les arrangements et les conventions parlementaires. Ces éléments partagent entre autres la caractéristique d'être méconnus de la population, ne serait-ce que parce qu'ils ne sont pas consignés par écrit dans la loi. Il faudrait bien étudier la question avant d'en savoir assez pour se prononcer. Rares sont les gens qui peuvent interpréter la Constitution. Par conséquent, on pourrait penser que la codification des conventions, donc la suppression du pouvoir discrétionnaire du premier ministre, par exemple, est un but à atteindre.

J'ai des réserves sur ce point et je ne pense pas qu'il soit facile d'atteindre cet objectif. Codifier la constitution non écrite serait une entreprise complexe, difficile et pleine d'ambiguïté. Par contre, je suis certain que la codification de sections de la Constitution l'une après l'autre est une mauvaise idée, et ce pour deux raisons.

First, to codify means to set limits or to rigidify. To do this with only part of the Constitution would set up tension and create incoherence with other parts of the Constitution. Legislation providing for fixed dates for federal elections is a case in point. Fixed election dates will work differently depending upon whether there are two or more parties in a legislature. In the former, majority government will prevail. In the latter, it may not. It is also of some consequence whether the legislature is unicameral or bi-cameral. The confusion we have witnessed in parliamentary debates in recent months over what constitutes a matter of confidence suggests to me that the ramifications for government and Parliament of establishing fixed election dates were not given thorough study.

The second reason why I think codifying the unwritten constitution as proposed in Bill S-224 is undesirable is that it undervalues what is of central political importance, that is, the Constitution. The Constitution is not a tax code, to be serially or regularly changed. A constitution requires clarity, certainty and coherence. Inaction instead of action, as the unwritten constitution demands for the prime minister for the operation of section 24 of the act, supports none of these values. Senate vacancies and the speed with which they are filled are far more fundamental to good constitutional government in Canada than an ordinary amendment to the Parliament of Canada Act would suggest.

The other object of Bill S-224 is to statutorily require the prime minister to call by-elections to fill vacancies in the House of Commons in the order in which the seats become vacant. While both parts of the bill deal with vacancies in the two Houses of Parliament, the intent of each is different. The Senate provision seeks to protect the integrity of that body as a functioning part of Parliament in its investigative, representational and scrutinizing roles. The House of Commons provision, in the democratic-deficit language popular today, seeks a level playing field so that the prime minister's discretion may not be used for partisan favouritism. It also employs a right-to-representation argument for those constituents who experience inequitable periods without representation in the Commons.

How could one oppose the House of Commons provision of Bill S-224 except on the grounds of consistency? Representation of Canadians in the House of Commons is now so distorted because of the formula used and will remain at some distance from rep by pop principle even if the proposed democratic

Premièrement, « codifier » signifie établir des limites ou rendre rigide. Si on n'applique cette mesure qu'à une partie de la Constitution, on risque de créer des tensions et de l'incohérence avec d'autres parties de la Constitution. Les dispositions législatives prévoyant des dates fixes pour les élections fédérales en sont un exemple typique. Les élections à date fixe ne fonctionneront pas de la même façon selon qu'une législature compte deux ou plus de deux partis. Dans le premier cas, c'est le gouvernement majoritaire qui va l'emporter. Dans le deuxième cas, il ne l'emportera peut-être pas. Le fait que la législature soit monocamérale ou bicamérale a aussi un certain impact. Au cours des derniers mois, la confusion qui a coloré les débats parlementaires à propos de la question de confiance semble indiquer que l'établissement d'une date fixe pour les élections présente, pour le gouvernement et le Parlement, des ramifications qui n'ont pas été étudiées en profondeur.

Deuxièmement, je crois que la codification de la constitution non écrite, telle que proposée dans le projet de loi S-224, est peu souhaitable parce que ça ferait perdre de la valeur à ce qui revêt une importance politique centrale, soit la Constitution. La Constitution n'est pas un code fiscal qu'on peut modifier petit à petit ou sur une base régulière. Une constitution doit être claire, sans équivoque et cohérente. De choisir l'inaction plutôt que l'action, alors que la constitution non écrite exige que le premier ministre agisse en ce qui concerne l'application de l'article 24 de la loi, n'appuie aucune de ces valeurs. Les sièges vacants au Sénat et la vitesse à laquelle ils sont comblés sont bien plus essentiels au maintien d'un bon gouvernement constitutionnel au Canada que le serait une modification ordinaire à la Loi sur le Parlement du Canada.

Le projet de loi S-224 vise également à exiger expressément que le premier ministre déclenche des élections partielles en vue de combler les vacances à la Chambre des communes en suivant l'ordre dans lequel les sièges sont devenus vacants. Bien que les deux parties du projet de loi portent sur les vacances dans les deux Chambres du Parlement, le but de chacune est différent. Avec la disposition concernant le Sénat, on cherche à protéger l'intégrité de cet organe en tant qu'élément fonctionnel du Parlement en ce qui concerne ses rôles d'enquête, de représentation et d'examen. Avec la disposition concernant la Chambre des communes, selon les expressions populaires de déficit démocratique qu'on utilise de nos jours, on cherche à avoir des règles de jeu équitables de façon à ce que les pouvoirs discrétionnaires du premier ministre ne puissent pas servir à favoriser un parti en particulier. On avance également l'argument du droit à la représentation pour les électeurs qui doivent parfois composer avec l'iniquité lorsqu'ils ne sont pas représentés à la Chambre des communes.

Quel argument pourrait-on invoquer pour s'opposer à la disposition du projet de loi S-224 concernant la Chambre des communes à part celui de la cohérence? À l'heure actuelle, la représentation des Canadiens à la Chambre des communes ne reflète vraiment pas la réalité à cause de la procédure utilisée, et

representation bill is passed that the premise of Bill S-224 is vulnerable, perhaps not fatally so but vulnerable nonetheless.

To conclude my remarks, let me return to the Senate provision of Bill S-224. There is a real irony in this bill and what it seeks to accomplish. The Fathers of Confederation were determined that the upper house of the new federal Parliament should be no plaything of the political executive but rather that it should be independent. One item of agreement at Charlottetown and Quebec City was that there should be a fixed upper limit on the Senate's numbers. In other words, there should be no possibility of the Senate being swamped as the Legislative Council of the Parliament of United Canada had been swamped at the time of the passage of the Rebellion Losses Bill. They all knew this. It was only 20 years previous. Equally, with an upper limit, there could be no threat of swamping as was to happen in Great Britain at the time of the passage of the Parliament Act in 1911 when the lords were restricted to a suspense of veto.

Nowhere and at no time was it contemplated that the political executive would seek to achieve its policy ends not by swamping the upper chamber but by doing the reverse, whatever word might capture that intent — "sapping" perhaps. Inaction was not contemplated because inaction was not conceived to fall within the range of discretionary choice.

Section 11 of the Constitution Act provides for a Privy Council to aid and advise the Governor General. It says nothing about contemplating withholding aid or advice. The legal or, in the instance of senatorial recommendations, the conventional limits on discretionary action were set by the need to protect the Crown from the consequences of its actions by taking responsibility for those actions. In short, there was a constitutional duty to advise.

Don Desserud, Professor, Department of Political Science, University of New Brunswick: Senators, I thank you for inviting me here today. The bill before us is Bill S-224, to amend the Parliament of Canada Act. It seeks, among other things, to impose the same conditions on Senate vacancies as currently exist for vacancies in the House of Commons, or at least similar ones. It is an attempt to see that Senate vacancies are filled in a timely manner.

This is a very intriguing bill, and it raises a number of interesting constitutional questions. The approach that I will take is the constitutional questions that this bill raises and how I think they can be resolved or not, as the case may be.

nous n'atteindrons pas la représentation selon la population même si le projet de loi sur la représentation démocratique est adopté, tant et si bien que la prémisse du projet de loi S-224 est vulnérable — peut-être pas au point d'être rédhibitoire, mais elle reste tout de même fragile.

Pour conclure, laissez-moi revenir sur la disposition du projet de loi S-224 concernant le Sénat. Il y a une véritable ironie contenue dans ce qu'on cherche à accomplir avec ce projet de loi. Les Pères de la Confédération étaient déterminés à ce que la Chambre haute du nouveau Parlement fédéral ne devienne pas le jouet du pouvoir exécutif; ils tenaient à ce qu'elle reste indépendante. À Charlottetown et à Québec, on s'entendait pour dire qu'il devrait y avoir un nombre maximal fixe de sénateurs. En d'autres mots, ce ne devrait pas être possible que le Sénat soit surchargé comme l'a été le conseil législatif du Parlement du Canada-Uni au moment où on a adopté le Bill des pertes de la rébellion. Ils le savaient tous. Ça ne faisait que 20 ans que ça s'était produit. De même, s'il y a un nombre maximal, on ne risquerait pas de surcharger le Sénat comme ça a été le cas en Grande-Bretagne au moment de l'adoption de la Loi sur le Parlement en 1911, lorsque les lords ont vu leur veto suspendu.

Peu importe le lieu ou l'époque, on n'a jamais songé que le pouvoir exécutif chercherait à atteindre ses objectifs stratégiques non pas en surchargeant la Chambre haute, mais en faisant exactement le contraire, qui serait de la vider, si on peut dire. L'inaction n'a pas été envisagée parce que ce n'est pas considéré comme un choix possible dans l'exercice du pouvoir discrétionnaire.

L'article 11 de la Loi constitutionnelle prévoit la constitution d'un conseil privé pour aider et aviser le Gouverneur général. On ne parle pas d'envisager de ne pas fournir d'aide ni de conseil. La limite juridique ou, dans le cas de recommandations du Sénat, la limite conventionnelle qui concerne les mesures discrétionnaires a été fixée parce qu'il fallait protéger la Couronne des conséquences de ses actes en assumant la responsabilité de ces actes. En bref, donner des conseils était un devoir constitutionnel.

Don Desserud, professeur, Département de science politique, Université du Nouveau-Brunswick : Mesdames et messieurs les sénateurs, je vous remercie de m'avoir invité ici aujourd'hui. Le projet de loi à l'étude est le S-224, qui vise à modifier la Loi sur le Parlement du Canada. Par ce projet de loi, on cherche entre autres à imposer les mêmes conditions pour les vacances du Sénat que celles qui existent déjà pour les vacances à la Chambre des communes, ou du moins des conditions très semblables. On essaie de s'assurer que les sièges vacants au Sénat sont comblés sans trop tarder.

C'est un projet de loi très intéressant qui soulève plusieurs questions pertinentes d'ordre constitutionnel. J'aborderai le sujet en parlant des questions d'ordre constitutionnel et des manières dont elles peuvent ou non être résolues, selon le cas.

The first question is whether this bill is at all within Parliament's competence to pass. The answer is that it probably is, at least mostly, but the reasons for that, I would argue, are less obvious than some might assume.

Clearly, under section 44 of the Parliament of Canada Act, Parliament has the unilateral authority to amend its own constitution, and the Parliament of Canada Act is a part of that constitution by virtue of the Constitution Act, 1867, section 18. However, there are some restrictions, as senators know. One of those restrictions is on the method of selecting senators, which under section 42 of the Constitution Act, 1982, suggests that any changes to the method of selecting senators must go through the general formula. At my last appearance here, that was the discussion at hand, so you are familiar with this subject.

The question becomes, would imposing the 180-day limit on the selection process of a senator constitute an amendment to the method of selecting senators? It might, if we assume that the Governor General has a right to receive advice on a Senate appointment that is well pondered and unfettered by time constraints. However, I would suggest that that argument would be a little difficult to maintain, because surely the Governor General also has the right to be advised in a timely manner.

The Constitution Act of 1867, under section 32, merely states that in cases of a vacancy in the Senate, the Governor General shall fill that vacancy by summoning a suitably qualified person. That we do this on the advice of the Prime Minister, of course, is a constitutional convention. It is an important convention because it is intrinsic to our system of responsible government; however, the timeline or how long this should take is not mentioned. It might be that the Governor General has the right to delay such an appointment as long as she wishes. I would suggest that this is probably unlikely, because undue delay would undermine the integrity of Parliament itself. It also might mean that the Prime Minister has the right to ponder such advice as long as is needed, but surely, again, the right of the Governor General to be advised in a timely manner would trump such an indulgence.

The problem is whether the relationship I am referring to here between the Governor General and the Prime Minister and the advice so sought is within Parliament's competence to legislate, and that I do not know. It could be that the bill before us is actually clarifying the terms of that relationship rather than changing it. If it is simply clarifying what this advice is meant to be and what was assumed a part of that advice, then it is, to me, within the competence of Parliament to pass. However, if it is not, then I would suggest you need more advice to find out whether this fits in with a unilateral amendment.

La première question consiste à savoir si le Parlement possède la compétence nécessaire pour adopter ce projet de loi. La réponse est sans doute oui, en grande partie, mais les raisons justifiant cette réponse sont, selon moi, moins évidentes que ce qu'on pourrait imaginer.

Aux termes de l'article 44 de la Loi sur le Parlement du Canada, il est clair que le Parlement possède l'autorité unilatérale de modifier sa propre constitution, et la Loi sur le Parlement du Canada fait partie de cette constitution conformément à l'article 18 de la Loi constitutionnelle de 1867. Toutefois, comme les sénateurs le savent, il existe quelques restrictions. Une de ces restrictions porte sur le mode de sélection des sénateurs. D'après l'article 42 de la Loi constitutionnelle de 1982, toute modification portant sur le mode de sélection des sénateurs doit se faire conformément à la procédure normale. Nous en avons discuté lors de ma dernière comparution devant le comité, alors vous êtes familiers avec ce sujet.

La question est donc la suivante : est-ce que le fait d'imposer une limite de 180 jours au processus de sélection d'un sénateur serait vu comme une modification au mode de sélection des sénateurs? Peut-être, si on suppose que le Gouverneur général a le droit de recevoir des conseils sur les nominations au Sénat qui sont réfléchis et qui ne sont soumis à aucune restriction de temps. Je dirais toutefois que cet argument serait un peu difficile à défendre, car le Gouverneur général a sûrement le droit lui aussi de recevoir des conseils rapidement.

L'article 32 de la Loi constitutionnelle de 1867 dit simplement qu'en cas de vacance au Sénat, le Gouverneur général doit pourvoir le poste en nommant une personne qui possède les qualifications nécessaires. Le fait que cette démarche soit entreprise sur la recommandation du premier ministre est, bien sûr, une convention constitutionnelle. Il s'agit d'une convention importante, car elle fait partie intégrante de notre système de gouvernement responsable. Cependant, l'article ne fait mention d'aucun échéancier, d'aucun délai. Le Gouverneur général a le droit de retarder cette nomination aussi longtemps qu'il le souhaite, ce qui me semble improbable, car un retard excessif porterait atteinte à l'intégrité du Parlement. -Le premier ministre a aussi le droit de réfléchir à la recommandation qu'il formulera aussi longtemps qu'il le faut, mais, encore une fois, le droit du Gouverneur général de bénéficier de la recommandation en temps opportun prévaudrait certainement.

Le problème consiste à déterminer si la relation à laquelle je fais référence, entre le Gouverneur général et le premier ministre, en ce qui concerne la recommandation demandée, relève du pouvoir de légiférer du Parlement. Cela, je l'ignore. Le projet de loi qui nous est présenté apporte peut-être tout simplement des éclaircissements sur les modalités de cette relation au lieu de les modifier. S'il apporte seulement des éclaircissements sur l'objet de cette recommandation et sur ce qu'elle sous-entend, le Parlement a, à mon avis, le pouvoir de l'adopter. Néanmoins, si ce n'est pas le cas, je crois que vous aurez besoin de plus d'information pour savoir s'il est possible de procéder à un amendement unilatéral.

Another question I would like to raise is the question of wording, because the bill specifically calls on the Prime Minister to make this recommendation. It does not do what we normally see in legislation, referring instead to the Governor-in-Council. In the Parliament of Canada Act, there is no mention specifically of the Prime Minister, with two exceptions. The Prime Minister is mentioned in terms of salaries and in a new section whereby the Conflict of Interest and Ethics Commissioner reports to the Prime Minister. I am wondering why the term Governor-in-Council was not used rather than Prime Minister. I suspect I know, and perhaps you will tell me if I am right. I suspect it is because if you did say Governor-in-Council, you would be clearly legislating on the powers and responsibilities of the Governor General, and therefore this is a way of avoiding that. However, my question then becomes, has this really avoided that problem?

I refer you back to a ruling by Speaker Michener in 1960. He argued that Parliament cannot call upon the government to take one course of action or another, and this has been a point of constitutional debate for some time.

I am saying this in an ambiguous way because I know about that quotation because of an article by Eugene Forsey who argues that Michener is wrong in saying they cannot, and Forsey says of course they can call upon the government to take action because they can advise. However, both concluded that in the offering of that advice, it was not necessarily an obligation for the Prime Minister or the Governor-in-Council to follow that advice.

I do not know how to work this out, because I conclude that the legislation is probably within the competence of Parliament to enact, and it probably does not affect other sections of the Constitution in terms of the amending formula, but I do not know what would happen if the Prime Minister were simply to refuse to follow the legislation. I do not know how you would enforce such a provision and whether this act provides any way in which those provisions could be enforced.

I find myself in a conundrum. I see the point. I see where it is going. I see the purpose of it. I am not 100 per cent convinced it can work in its current form. I will leave it at that and invite your questions.

The Chair: Thank you very much. We do, of course, have questions.

Senator Andreychuk: Thank you, both, for your presentations. They were intriguing. You have brought interesting perspectives to this bill, which at first blush, seems short and crisp, but you brought out more nuances and legal issues.

Professor Smith, are you saying that some of the problems associated which not making appointments is because no bill has come because of inaction by other prime ministers. Is it the number of vacancies or some other trigger mechanism that gives legitimacy to this bill? You have said it is the Prime Minister's statement that he would not exercise his prerogative. Are you

J'aimerais soulever une autre question, celle de la formulation, car le projet de loi fait expressément appel au premier ministre pour formuler cette recommandation. Cette formulation va à l'encontre de ce qu'on voit habituellement dans les lois, qui font plutôt référence au gouverneur en conseil. La Loi sur le Parlement du Canada ne comporte aucune mention du premier ministre en tant que tel, sauf à deux endroits. On le nomme dans un article sur les traitements et dans un nouvel article en vertu duquel le commissaire aux conflits d'intérêt et à l'éthique relève du premier ministre. Je me demande pourquoi on n'a pas employé le terme « gouverneur en conseil » au lieu de « premier ministre ». Je me doute de la réponse, et vous pourrez peut-être me dire si j'ai raison. Je crois que si le terme « gouverneur en conseil » avait été utilisé, le projet de loi aurait directement touché les pouvoirs et les responsabilités du Gouverneur général, ce qu'on a voulu éviter. Je me demande toutefois si on a bel et bien su éviter ce problème.

Je vous renvoie à une décision rendue par le Président Michener en 1960. Il soutenait que le Parlement ne pouvait pas demander au gouvernement de suivre une voie ou une autre, ce qui fait l'objet d'un débat constitutionnel depuis un certain temps.

J'utilise une formulation ambiguë, car j'ai pris connaissance de ces faits dans un article d'Eugene Forsey, qui soutient que M. Michener avait tort. En effet, il estime qu'il est évident que le Parlement peut demander au gouvernement de suivre une voie en particulier, car il peut formuler des recommandations. Toutefois, l'auteur et le Président concluent tous deux que le premier ministre ou le gouverneur en conseil ne sont pas nécessairement tenus de suivre les recommandations du Parlement.

Je ne comprends pas très bien, car je déduis que le Parlement a probablement le pouvoir d'adopter cette mesure législative et que celle-ci n'aura probablement aucune conséquence sur les autres articles de la Constitution en ce qui concerne la procédure de modification, mais je ne sais pas ce qui se produirait si le premier ministre refusait tout simplement de suivre la loi. Je ne sais pas comment il serait possible de faire respecter une pareille disposition ni si cette loi offre un mécanisme pour veiller à son application.

J'ai devant moi une énigme. Je comprends l'idée et l'objectif de cette mesure, mais je ne suis pas entièrement convaincu qu'elle puisse être mise en œuvre dans sa forme actuelle. Sur ce, je vous invite à poser vos questions.

La présidente : Merci beaucoup. Effectivement, nous avons des questions.

Le sénateur Andreychuk : Merci à vous deux pour vos exposés qui incitent à la réflexion. Vous avez jeté un éclairage intéressant sur ce projet de loi qui, à première vue, semblait sans ambiguïté. Vous en avez fait ressortir les nuances et soulevé les aspects juridiques.

Monsieur Smith, dites-vous que certains des problèmes relatifs à l'absence de nominations existent parce qu'aucun projet de loi n'a été déposé en raison de l'inaction d'autres premiers ministres? Est-ce le nombre de postes vacants qui justifie ce projet de loi, ou existe-il un autre élément déclencheur? Vous avez dit que c'était la déclaration du premier ministre selon laquelle il n'exercerait pas

resting your case of the Prime Minister's statement that he will not exercise his prerogative, or on the cumulative number of vacancies?

Mr. Smith: I think it is the former and not the latter. It seems to have been stated as a public policy. My analogy then is to the courts. If the same thing were done with the courts and the prime minister said he would not appoint judges and starve the courts of personnel that would bring the rule of law and the administration of the courts into disrepute. How, then, is it different with regard to the Senate? Obviously it is different in many ways, but how is it in principle different from the Senate? I would put to one side my view or anyone else's view about reform of the Senate. That is a separate matter. The consequences of action or, in this instance, inaction are actually almost palpable given what was said a few minutes ago when the other witnesses were here.

I cannot see a difference in principle. Is it possible for the chief adviser of the Crown not to give advice when in fact it is only on advice that you have democratized our system of government? How then can you not give advice? I do not think discretion extends to not doing something. It has a breadth of range of things you may do, but I not think it includes doing nothing.

Senator Murray: What is the remedy?

Mr. Smith: Maybe I need to take longer to work it out. I respect Senator Moore and the proposed amendment. I think it is always easy with the unwritten constitutional question of conventions to say these are small things that no one understands and they really do not matter. It does matter. It matters fundamentally. However, this is the weak position because you are forced to argue about something that is difficult to see why it matters. Ultimately, it comes down to this being a constitutional monarchy. It is the representative of the sovereign that performs the actions on advice. We used to teach about responsible government and its achievement.

It was through this kind of advice that the Governor General acted. If you do not give the advice, where are you? It seems to me that the system grinds to a halt. There is a paralysis. It is not only that there are not more senators. There is a paralysis elsewhere.

There is another aspect of this. Parliament has three components and at least two are affected by not doing this. It detrimentally affects the Crown; it detrimentally affects the Senate; and it affects the House to some degree through the Prime Minister.

It is sufficiently significant that it needs to be made a matter of a resolution. I do not think constitutional amendments should be made this way unless it is fully clear that is what we are doing. This almost disguises that fact, either deliberately or inadvertently by following this route. It is much more important than that.

sa prérogative. Vous fondez-vous — sur la déclaration du premier ministre selon laquelle il n'exercerait pas sa prérogative ou sur le nombre croissant de postes vacants au Sénat?

M. Smith : Je pense que c'est le premier argument et non le deuxième. Il semble que cette déclaration ait été prononcée en tant que politique officielle. J'ai ensuite fait une analogie avec les tribunaux. Si le même cas se présentait pour ceux-ci, à savoir que le premier ministre déclarait qu'il ne nommerait pas de juges et laisserait les cours aux prises avec un manque de personnel, cela jetterait le discrédit sur la primauté du droit et sur l'administration de la justice. Pourquoi, alors, en serait-il autrement du Sénat? Manifestement, il y a de nombreuses différences entre les deux instances, toutefois, comment, en principe, la situation serait-elle différente de celle du Sénat? Je mettrai de côté mon point de vue ou le point de vue de quiconque sur la réforme du Sénat. C'est une tout autre question. Les conséquences des actions ou, en l'occurrence, de l'inaction sont en fait presque tangibles d'après ce qui a été dit il y a quelques minutes par les autres témoins.

Je ne vois pas de différence de principe. Le conseiller en chef de la Couronne peut-il ne pas conseiller quand, en réalité, c'est sur conseil uniquement que notre système de gouvernement a été démocratisé? Comment alors peut-on ne pas conseiller? Je ne pense pas que le pouvoir discrétionnaire aille jusqu'au droit de ne rien faire. Il permet de faire toutes sortes de choses, mais je ne crois pas qu'il confère le droit de ne rien faire.

Le sénateur Murray : Quel est le remède?

M. Smith : Je dois sans doute prendre plus de temps pour l'exposer. Je respecte le sénateur Moore et l'amendement proposé. Je crois qu'il est toujours facile, à propos des éléments non écrits de la Constitution comme les conventions, de dire qu'il s'agit de petites choses que personne ne comprend et qui n'ont pas vraiment d'importance. Mais ces éléments sont importants. Ils sont d'une importance fondamentale. C'est toutefois une position d'infériorité puisqu'il s'agit de défendre une cause dont il est difficile de saisir l'importance. En fin de compte, tout vient du fait que nous sommes dans une monarchie constitutionnelle. C'est le représentant du souverain qui agit selon les conseils. Notre programme d'enseignement portait sur le gouvernement responsable et sur ses résultats.

C'est sur ce type de conseil que le Gouverneur général agit. Si vous ne conseillez pas, qu'arrive-t-il? Il me semble que la machine s'arrête. C'est la paralysie. Ce n'est pas seulement qu'il n'y a pas plus de sénateurs. La paralysie touche d'autres secteurs.

Voici un autre aspect de la question. Le Parlement est composé de trois éléments et au moins deux sont touchés par cette inaction. Cela nuit à la Couronne; cela nuit au Sénat et cela touche, dans une certaine mesure, la Chambre des communes par l'intermédiaire du premier ministre.

La question est suffisamment importante pour faire l'objet d'une résolution. Je ne pense pas qu'on devrait apporter des modifications à la Constitution de cette manière, à moins qu'on le fasse savoir clairement. Cette façon de faire masque la réalité, délibérément ou par inadvertance. La question est beaucoup

Prime ministerial discretion is an important aspect of our Constitution and has always been. To ignore that by an ordinary amendment undervalues what is occurring here.

Senator Andreychuk: The Prime Minister has said he will not exercise his prerogative and you used the judges as an example. Consider that the prime minister says I am not going to appoint any other judges because I want to put in place a different, more meritorious system of appointing judges. The prime minister may set a quasi-judicial group of police or former police, lawyers and some members of the public at large. That process may take some time to work its way through. It is not a prime minister saying I will not appoint judges because I am going to starve the system.

Is that not similar when you have a prime minister who says I am not going to make appointments because I want to have an election process in place?

Mr. Smith: These matters are far too important for prime ministers to determine in a democracy. Our historic way of dealing with these matters has been things such as white papers and royal commissions. These are fundamental to the way we govern ourselves and not to be determined by a single individual despite recognizing that prime ministers have great power and necessarily so in many instances. However, that does not mean there are no limits to prime ministerial powers.

I certainly could not see that an analogous situation regarding the courts in which there would be no comment. The courts must function; that is a fundamental test of whether government is working and they cannot function if the judiciary does not properly staff them. Presumably, the same applies to the Senate. This is separate from the question of wanting a reformed Senate which many people do. Some people may want to abolish the Senate, but that is different from this question.

Senator Andreychuk: It seems to me that one remedy would be the next election. I am more confident that people understand issues. I think that if we have ground to a halt, would not this be a matter of discussion? Different parties could take this up as an intensely important democratic issue to bring to the electorate in the next election?

Ms. Smith: Yes, I think the purpose of Parliament is to take notice, to inform and to scrutinize. I am not sure that excludes doing something else prior to an election.

Senator Andreychuk: I am building on this because you said resolution might be the way to do it. It seems this follows that line of reasoning.

Senator Joyal: Professor Smith, if you conclude that there is a constitutional duty to advise, then what is the sanction of the breach in our institution to say the constitutional principles that are ours?

plus importante que cela. Le pouvoir discrétionnaire du premier ministre est, et a toujours été, un aspect important de notre Constitution. L'ignorer en faisant adopter un simple amendement, c'est sous-estimer ce qui se passe ici.

Le sénateur Andreychuk : Le premier ministre a dit qu'il n'exercerait pas sa prérogative et vous avez pris pour exemple les juges. Supposez que le premier ministre dise : « Je ne vais pas nommer d'autres juges parce que je veux mettre en place un autre système de nomination des juges, plus fondé sur le mérite. » Le premier ministre peut mettre sur pied un groupe quasi-judiciaire composé de policiers, d'anciens policiers, d'avocats et de membres du grand public. Ce processus pourrait prendre du temps à se mettre en place. Le premier ministre ne dit pas qu'il ne nommera pas de juges parce qu'il veut priver le système de personnel.

N'est-ce pas la même chose lorsqu'un premier ministre dit qu'il ne nommera pas d'autres sénateurs parce qu'il souhaite la mise en place d'un processus électoral?

M. Smith : Ces questions sont bien trop importantes pour qu'un premier ministre les tranche dans une démocratie. Depuis toujours, nous traitons ce genre de question en ayant recours aux livres blancs ou aux commissions d'enquête parlementaires. Ces questions sont fondamentales pour la façon dont nous nous gouvernons et ne doivent pas être tranchées par un seul individu, même s'il faut reconnaître que les premiers ministres ont beaucoup de pouvoir et que ce pouvoir est nécessaire à bien des égards. Toutefois, cela ne signifie pas qu'il n'y a pas de limites aux pouvoirs du premier ministre.

Je ne pourrais certainement pas imaginer qu'une situation semblable concernant les tribunaux puisse être ignorée. Les tribunaux doivent fonctionner; ils sont le reflet du fonctionnement du gouvernement et ils ne peuvent pas fonctionner si l'appareil judiciaire n'y affecte pas le personnel nécessaire. On peut penser que le même principe s'applique au Sénat. Cela n'a rien à voir avec le fait qu'on veuille ou non réformer le Sénat, ce que beaucoup souhaitent. Certains voudraient même abolir le Sénat, mais là n'est pas notre propos.

Le sénateur Andreychuk : Il me semble que la prochaine élection pourrait permettre d'apporter une solution. Je suis certain que les gens comprennent les problèmes. Si la machine est paralysée, la question ne mériterait-elle pas d'être débattue? Les différents partis pourraient considérer qu'il s'agit d'une question d'une extrême importance sur le plan démocratique, qui doit être soumise aux électeurs lors de la prochaine élection.

M. Smith : Oui, je pense que le rôle du Parlement est de prendre connaissance des dossiers, de les réviser en profondeur et d'informer. Cela n'exclut pas nécessairement qu'il fasse autre chose avant une élection.

Le sénateur Andreychuk : J'insiste sur cet aspect parce que vous avez dit qu'une résolution serait peut-être le moyen de régler la question, ce qui semble suivre le même raisonnement.

Le sénateur Joyal : Monsieur Smith, si vous concluez qu'il y a un droit constitutionnel de conseiller, quelle infraction y a-t-il à ce que notre institution énonce les principes constitutionnels qui sont les nôtres?

Let me suggest an approach. The Supreme Court has ruled that conventions are a very important part of our Constitution. The *Patriation Reference* ruled that there was no specific responsibility under the Constitution for the government to seek provincial concurrence. Nevertheless there has been a convention established in the opinion of the court. The court ruled, not in unanimity, but with more than 50 per cent. The court came to the conclusion after reviewing historical precedents in the way former provincial and federal governments have behaved.

The court concluded that it could not prevent the federal government from proceeding with the resolution, but that the resolution would be illegitimate. The Prime Minister of the time called another meeting and there was an agreement.

Would it not be a possible for a province to seek a reference to its Court of Appeal stating that the Prime Minister has a constitutional duty to advise and asking its court to pronounce on that duty? The court pronouncing would probably not grant an injunction against the Prime Minister to advise, because it is not the proper procedure under our constitutional principle. However, the court can conclude, as you did, that there is a constitutional duty to advise. For that very principle of institutional integrity, as long as the Constitution remains the same, the Prime Minister has to abide by those principles. The Prime Minister has to abide by those principals or seek the respective level of concurrence from the other parts of the Constitution to come to terms with it. Professor Desserud mentioned section 42 or section 44, depending on the level of the changes that are sought. Is that not one way for that constitutional duty to be sanctioned by the court when there is a breach of it?

Mr. Smith: Although I am not a lawyer, it is my understanding that the provincial governments go to their Courts of Appeal, as the previous government of the Province of Saskatchewan submitted to the Court of Appeal the question of equalization. With regard to patriation, three provincial Courts of Appeal examined this right; that is the root.

It seems to me the plaintiff, although that is a wrong language in a reference, or the initiator would be a provincial government. While there are senatorial regions, the senators are assigned to provinces. Nova Scotia and British Columbia only have three senators. It would seem to me one argument would be that we only have 50 per cent of the number of senators.

There have been delays in the past, but going back to the point about it being a public policy, if indeed that can be verified, which I think it can, then that would be the argument for going to the Court of Appeal and then the Court of Appeal rendering its opinion on this matter as to whether indeed there is a constitutional duty to advise and that the chief adviser to the Crown is derelict in not giving this advice. I am not quite sure after that what happens.

Senator Joyal: It is in the court of public opinion.

Permettez-moi de suggérer une approche. La Cour suprême a statué que les conventions sont une partie très importante de notre Constitution. Le *Renvoi relatif au rapatriement* de la Constitution a statué que le gouvernement n'avait aucune obligation particulière, en vertu de la Constitution, d'obtenir l'approbation des provinces. La cour estimait néanmoins qu'il existait une convention en ce sens. Elle a statué, pas à l'unanimité, mais à plus de 50 p. 100. La cour en est arrivée à une conclusion après avoir examiné les précédents historiques, à savoir la façon dont ont agi les anciens gouvernements provinciaux et fédéral.

La cour a conclu qu'elle ne pouvait pas empêcher le gouvernement fédéral d'aller de l'avant avec la résolution, mais que cette résolution n'aurait aucune légitimité. Le premier ministre de l'époque a convoqué une autre réunion, et une entente a été conclue.

Une province ne pourrait-elle pas saisir d'un renvoi sa cour d'appel déclarant que le premier ministre a le devoir constitutionnel de conseiller et demander à sa cour d'appel de se prononcer sur ce devoir? Le verdict de la cour n'entraînerait probablement pas une injonction de consulter contre le premier ministre parce que ce n'est pas la procédure adéquate en vertu de notre principe constitutionnel. En revanche, la cour peut conclure, comme vous l'avez fait, à l'existence d'un devoir constitutionnel de conseiller. Au nom de l'intégrité institutionnelle, tant que la Constitution demeure la même, le premier ministre doit respecter les principes. Il doit respecter les principes ou obtenir les approbations nécessaires des autres parties prenantes à la Constitution. M. Desserud a mentionné l'article 42 ou l'article 44, selon l'ampleur des modifications recherchées. N'est-ce pas là un moyen de faire sanctionner par les tribunaux tout manquement à ce devoir constitutionnel?

M. Smith : Bien que je ne sois pas juriste, je crois comprendre que les gouvernements provinciaux ont recours à leurs cours d'appel, comme l'a fait le précédent gouvernement de la Saskatchewan sur la question de la péréquation. Quant au rapatriement de la Constitution, trois cours d'appel provinciales ont examiné le dossier; voilà la base.

Il me semble que le demandeur, bien qu'il s'agisse d'un terme inadéquat dans un renvoi, ou l'instigateur, serait un gouvernement provincial. Il y a des divisions sénatoriales, mais les sénateurs sont affectés à des provinces. La Nouvelle-Écosse et la Colombie-Britannique n'ont que trois sénateurs. Je dirais comme argument que nous n'avons que 50 p. 100 du nombre de sénateurs.

Il y a eu des retards dans le passé, mais revenir au point d'en faire une politique d'intérêt public, si cela peut effectivement être vérifié, ce qui me semble possible, il s'agirait alors de l'argument qui justifierait la présentation de cette question à la Cour d'appel, qui déterminerait alors s'il existe effectivement le devoir constitutionnel d'offrir des conseils et si le conseiller en chef de la Couronne fait preuve de négligence en ne fournissant pas ces conseils. Je ne suis pas certain de ce qui se passe par la suite.

Le sénateur Joyal : La question se retrouve à la cour de l'opinion publique.

Mr. Smith: There is a court of public opinion. In parliamentary systems, it is the political dynamic that takes over, the public opinion, the media and so forth — not so much the law but public opinion.

Senator Joyal: As I said, according to our principles, a court cannot grant an injunction against an adviser to the Crown.

The Chair: There is, to the best of my knowledge, no rule against BlackBerrys in committee, although there is a rule against BlackBerrys in the Senate chamber. We have had a Speaker's ruling about that. The general rule is, unless otherwise specified, proceedings and demeanour in committee follow the rules in the chamber.

I have until very recently not had occasion to think that BlackBerrys were actually impeding the functioning of the committee, and I would ask all senators to govern themselves accordingly.

As we were. Had you concluded, sir?

Mr. Smith: Yes, I have concluded on that point.

Mr. Desserud: It is actually a very simple solution but you will think it outrageous when I tell you. If the Prime Minister were not performing the functions that he is supposed to perform, then the prerogative of the Governor General would kick in. The Governor General does not have to wait for advice.

If that ever happened, and she ever exercised that prerogative, it would precipitate a massive constitutional crisis because we would not know what to do. That is still the law of the land. The Governor General does not have to wait, and a court ruling as you described could clarify that situation. That is not so much ordering somehow how to advise but it is clarifying the legal position of the Governor General with respect to the Constitution in making those appointments. That is still open.

I am not suggesting that this is a smart thing to do. One of the advantages of the Westminster model we follow is that we tend to favour political solutions over legal solutions to these problems, so probably this situation will work itself out through the political machinery including, as Senator Andreychuk said, in the next election.

There are other solutions beyond that, and I am sure you have thought of them, not the least of which is something similar, a joint address to the Crown requesting that something be done. That is a legal possibility for Parliament. Whether that is politically possible is another question.

There is the availability of the partisan senators to rally the opposition parties in the House of Commons to force a non-confidence vote. Your suggestion, Senator Joyal, of asking a province or consulting with a province to see whether they can make their own reference case is perfectly legitimate. Again,

M. Smith : Il y a une cour de l'opinion publique. Dans les régimes parlementaires, la dynamique politique l'emporte, à savoir l'opinion publique, les médias et ainsi de suite — pas le droit, mais plutôt l'opinion publique.

Le sénateur Joyal : Comme je l'ai dit plus tôt, selon nos principes, une cour ne peut pas adresser une injonction contre un conseiller de la Couronne.

La présidente : Il n'y a, pour autant que je sache, aucun règlement qui interdit les BlackBerry dans les salles de comité, même s'il en existe un qui les interdit dans la salle du Sénat. Une décision de la présidence a été prise à ce sujet. En règle générale, sauf avis contraire, les procédures et les comportements dans les comités sont ceux de la Chambre.

Je n'ai jamais pensé jusqu'à très récemment que les BlackBerry nuisaient au déroulement des activités du comité, et j'aimerais que tous les sénateurs agissent en conséquence.

Poursuivons. Aviez-vous terminé?

M. Smith : Oui, j'ai terminé mon intervention pour ce point.

M. Desserud : Il y a en fait une solution très simple, mais vous allez la trouver scandaleuse lorsque je vous aurai dit de quoi il s'agit. Si le premier ministre n'assumait pas ses fonctions, la prérogative de la Gouverneure générale entrerait alors en vigueur. Elle n'a pas besoin d'attendre des conseils.

Si cela se produisait, et si elle exerçait ce droit, cela entraînerait rapidement une crise constitutionnelle parce que nous ne saurions pas quoi faire. Cela demeure la loi du pays. La Gouverneure générale n'a pas à attendre, et une décision judiciaire, comme vous l'avez décrit, éclaircirait la situation. Il ne s'agit pas réellement de dire à quelqu'un comment fournir des conseils, mais plutôt d'éclaircir la position juridique de la Gouverneure générale en ce qui a trait à la Constitution lorsqu'il faut faire les nominations. Le dossier demeure ouvert.

Je ne veux pas dire qu'il s'agit là d'un geste sensé. Un des avantages du modèle traditionnel britannique que nous avons adopté, c'est que nous favorisons les solutions politiques au lieu des solutions juridiques pour ce genre de problèmes. Cette situation va donc probablement se régler d'elle-même par l'entremise du régime politique, ce qui comprend, comme l'a dit le sénateur Andreychuk, la tenue de la prochaine élection.

Il y a d'autres solutions, et je suis certain que vous y avez pensé, y compris quelque chose de semblable, c'est-à-dire une adresse du Sénat et de la Chambre des communes à la Couronne pour demander une intervention. Il s'agit d'une possibilité juridique pour le Parlement. Il reste à savoir si cela est possible sur le plan politique.

De plus, les sénateurs partisans peuvent rallier les partis de l'opposition à la Chambre des communes pour qu'ils exigent un vote de censure. Votre suggestion, sénateur Joyal, de demander à une province d'intervenir ou de la consulter pour déterminer si elle peut établir son propre renvoi est parfaitement légitime. Ne

please do not think I am recommending such a course of action, but when a crisis is imposed on you, you can react in kind so you force your crisis back.

Having said all that, I am a little alarmed by how seriously we are taking the words of the Prime Minister when he says he intends not to do X, Y and Z. Are these policy or political statements? If they were said during an election campaign, we would take them one way. If they were said in this environment, how serious are they?

Before we jump into crisis management, which I seem to be good at, as I said, I would like to see the situation calm down a bit and perhaps see what will happen. This legislation is interesting. It will provoke more questions. If it gets to the House of Commons and goes through committee there, many interesting questions will be raised. To me, that would be the safest course of action, to let the legislation proceed and see what occurs. I am not as alarmed as I think others might be.

Senator Milne: Professor Smith, you are against this bill, but you have not offered us any solutions. As we are living in the effects of the Prime Minister's present inaction, what do we do when the Prime Minister refuses to do his duty? This is not just a prerogative of the Prime Minister. This is, as you said in your presentation, the constitutional duty of the Prime Minister. You are saying that our hands are tied and just let the things fall out as they may.

Mr. Desserud has suggested a few other approaches to deal with it, and one of them is letting this bill proceed to see what comes of it.

We are not to too likely to get a presentation to the Governor General from both Houses of Parliament. That is highly unlikely. Would this bill, in effect, have the effect of shaming the Prime Minister into actually doing something?

Mr. Smith: I could not speak to that. I have never met the Prime Minister.

The gist of my comments was that this issue is very important and central. As my colleague says, one must be clear that this is not a false issue.

If it is not, I think it is an extremely important one, more important than I think an amendment to an existing statute would suggest as a remedy. Although I do not see what the Senate itself could do, I would prefer that a province would seek a reference opinion from its Court of Appeal. It is the province whose interests are affected directly. What a court would say, I have no idea; but I think that would be the remedy; and it would be the remedy on several grounds. One is that it would be a very public one. That is important in the sense of informing and making the issue clear to the public. Senator Andreychuk has suggested, perhaps, in an election. That could be a second extreme.

pensez pas que je recommande la prise de telles mesures, mais si on vous impose une crise, vous pouvez réagir de la même manière pour la repousser.

Cela dit, je suis un peu alarmé par le degré de gravité accordé aux propos du premier ministre lorsqu'il dit qu'il a l'intention de ne pas faire telle ou telle chose. S'agit-il de déclarations stratégiques ou politiques? Si elles étaient faites durant une campagne électorale, nous les interpréterions d'une certaine façon. Si elles étaient faites dans ce contexte, quel serait leur degré de gravité?

Avant de passer à la gestion des crises, domaine que je semble bien maîtriser, comme je l'ai dit, j'aimerais que la situation se calme un peu et ensuite voir ce qui va se produire. Cette loi est intéressante et elle va entraîner d'autres questions. Si la Chambre des communes en est saisie et si un comité l'examine, de nombreuses questions intéressantes seront soulevées. À mon avis, ce serait la façon de faire la plus sûre, c'est-à-dire laisser le projet de loi poursuivre son cours et voir ce qui va se passer. Je ne suis pas aussi inquiet que d'autres personnes semblent l'être à ce sujet.

Le sénateur Milne : Monsieur Smith, vous êtes contre ce projet de loi, mais vous ne nous avez pas offert de solution. Puisque nous subissons les effets de l'inaction actuelle du premier ministre, que devons-nous faire quand il refuse de faire son devoir? Il ne s'agit pas simplement d'une prérogative du premier ministre. C'est, comme vous l'avez mentionné dans votre exposé, un devoir constitutionnel du premier ministre. Vous dites que nous ne pouvons rien faire et qu'il faut laisser faire les choses.

M. Desserud a proposé d'autres approches pour faire face à cette situation, notamment de laisser passer ce projet de loi pour voir ce qu'il va en découler.

Il est peu probable que les deux Chambres du Parlement présentent un exposé à la Gouverneure générale. C'est en fait très peu probable. Ce projet de loi, dans les faits, couvrirait-il de honte le premier ministre, le forçant ainsi à agir?

M. Smith : Je ne sais pas. Je n'ai jamais rencontré le premier ministre.

Grosso modo, je voulais dire que cet enjeu est très important et fondamental. Comme l'a dit mon collègue, il faut s'assurer qu'il ne s'agit pas d'une fausse alerte.

S'il s'agit d'une situation réelle, je pense qu'elle est extrêmement importante, et à mon avis, si importante qu'il ne suffirait pas de modifier une loi existante pour pouvoir la régler. Bien que je ne voie pas ce que le Sénat puisse faire, je préférerais qu'une province demande une opinion à sa Cour d'appel. Ce sont les intérêts de la province qui sont directement touchés. Je ne sais pas ce que dirait une cour, mais je pense qu'il s'agirait de la solution attendue, et ce, à plusieurs niveaux. D'abord, ce serait un enjeu très public, ce qui est important pour informer le public et lui présenter clairement cet enjeu. Le sénateur Andreychuk a déclaré que cette situation se règlerait, peut-être, dans le cadre d'une élection. Cela pourrait être une autre solution extrême.

As I said earlier, matters of convention are subtle and often difficult to articulate. A Court of Appeal would be a better forum to canvass the range of the issues.

Senator Moore: Mr. Smith, I listened to your answers to Senator Milne. I still do not know what your answer is regarding an alternative. Are you suggesting that we simply submit to this policy by this Prime Minister vis-à-vis the Senate aspect of the bill?

Mr. Smith: I support the intent, the principle or the motive behind the impending legislation. I think the issue is more central than the remedy that is being suggested. Perhaps one has to take a less overt action, but I do not think it is a desirable one. I would much prefer to see the issue of the convention of advice examined and pronounced upon rather than working this route.

Senator Moore: The Parliament of Canada Act already constrains the Prime Minister. He has to call a by-election within 180 days. If that is the situation with the House of Commons, why is it wrong for the same situation to prevail vis-à-vis the Senate?

Mr. Smith: It is not wrong, but it is substantively different. What is happening with regard to the Senate and the inaction of the Prime Minister is to alter the Senate in its fundamental character by not appointing senators. That seems to me be quite different as to when a by-election is held for a vacancy for a seat in the House of Commons.

Senator Moore: It is still a constraint on the discretion of the Prime Minister on both issues; a constraint is a constraint regardless of which House.

Mr. Smith: Again, I am not necessarily in favour of constraint of discretion. If the idea is that the Prime Minister should have no discretion, I would not support that. I think the prime ministerial government requires discretion. I think you need to have that. The question is how much discretion and what context. Are there to be some limits? However, I am not opposed to discretion. I do not think the parliamentary system can work without prime ministerial discretion.

Senator Moore: Do you mean unfettered or unlimited discretion? I am not just speaking of this Prime Minister, but past prime ministers as well. I am speaking about prime ministers of any stripe. I do not think it is right. That is why I took this initiative.

Mr. Smith: You do not think discretion is right?

Senator Moore: I do not think the time that they were taking was right. I felt the prime ministers were taking too long to fill the positions and in taking that time were not fulfilling the constitutional rights of Canadians to have representation in the Houses.

Comme je l'ai dit plus tôt, les questions de convention sont subtiles et souvent difficiles à exprimer clairement. Une Cour d'appel serait un forum qui conviendrait davantage à l'examen de l'ampleur des enjeux.

Le sénateur Moore : Monsieur Smith, j'ai écouté les réponses que vous avez données au sénateur Milne. Je ne sais toujours pas quelle est votre réponse concernant les solutions de rechange. Proposez-vous de simplement suivre la politique du premier ministre en ce qui a trait à l'aspect de ce projet de loi qui touche le Sénat?

M. Smith : J'appuie l'intention, le principe ou le motif sous-jacent à la loi imminente. Je pense que l'enjeu est plus fondamental que le recours proposé. Peut-être faut-il prendre des mesures moins évidentes, mais je ne pense pas que cela soit souhaitable. Je préfèrerais nettement qu'on examine l'enjeu de la convention relative aux conseils et qu'on se prononce à ce sujet au lieu de vouloir suivre davantage cette voie.

Le sénateur Moore : La Loi sur le Parlement du Canada exerce déjà des contraintes sur le premier ministre. Il a 180 jours pour déclencher une élection partielle. Si c'est le cas pour la Chambre des communes, pourquoi cette situation ne devrait-elle pas s'appliquer dans le cas du Sénat?

M. Smith : Elle peut s'appliquer, mais la situation est nettement différente. Ce qui se passe concernant le Sénat et l'inaction du premier ministre, c'est que l'on modifie les fondements du Sénat en ne nommant pas les sénateurs. Cela me semble très différent du choix de la date d'une élection partielle pour combler un siège vide à la Chambre des communes.

Le sénateur Moore : C'est tout de même une contrainte quant au pouvoir discrétionnaire du premier ministre sur les deux questions. Une contrainte est une contrainte, peu importe la Chambre qu'elle vise.

M. Smith : Je le répète, je ne suis pas nécessairement en faveur des contraintes relatives au pouvoir discrétionnaire. Je ne suis pas d'accord pour que le premier ministre n'ait pas de pouvoir discrétionnaire. Je crois que c'est une nécessité. Il faut déterminer le degré de pouvoir discrétionnaire et préciser le contexte. Doit-il y avoir des limites? Par contre, je n'ai rien contre le pouvoir discrétionnaire. Je ne crois pas qu'un système parlementaire puisse fonctionner sans le pouvoir discrétionnaire du premier ministre.

Le sénateur Moore : Voulez-vous dire un pouvoir discrétionnaire sans entrave ou sans limite? Je ne parle pas seulement du premier ministre actuel, mais aussi des premiers ministres précédents, peu importe leur parti politique. Je crois que ce n'est pas correct. C'est pourquoi j'ai pris cette initiative.

M. Smith : Vous vous opposez au pouvoir discrétionnaire?

Le sénateur Moore : Je m'oppose au temps qu'ils prenaient. Je crois que les premiers ministres prenaient trop de temps pour combler les vacances et que, ce faisant, ils ne respectaient pas les droits constitutionnels des Canadiens d'avoir des représentants dans les deux Chambres.

Mr. Smith: The current limit on the Prime Minister concerning the House of Commons came about because of public opposition; there was a lot of criticism in the House 20 years ago or so that the government was derelict in that regard.

Senator Moore: It did not account for the sequential calling of by-elections, which has been an abuse by all prime ministers since the clean up that you are talking about 20 or so years ago.

Mr. Smith: If you will have a requirement that there be by-elections, the filling by sequence of vacancies seems to be a reasonable procedure to follow; if you are going to have a statutory requirement that they be filled. I cannot see a principled reason to oppose that. My principal argument is with regard to discretion; I do not object to prime ministerial discretion.

Senator Moore: I wondered what your thoughts would be if did the reverse — if we were lengthening out the time period. Would we be doing that? I do not think so.

Mr. Smith: No, we would not.

Mr. Desserud: There is always a problem when we are dealing with these constitutional issues, particularly issues dealing with conventions. One, we look at the issue of whether a certain action should or should not occur, is it the right thing to do, should people do it and are they being a good person if they do it or not. The second issue is do we have the constitutional mechanism or power to force the person to do what we think is the right thing?

The two issues are separate and they are not easy to keep separate. Morally, the senator is correct: If the Prime Minister is not making Senate appointments to undermine deliberately the integrity of the Senate, then that is immoral. Do we have a remedy within our Constitution to prevent that action? No, we do not have a very good one. The fact that we do not speaks to the problem we have with our Constitution, including, may I say it, the very way in which we select our Governors General. We have not dealt with these things. I had a list of possible solutions when you were speaking earlier.

This solution is from the political scientist. We love constitutional conferences. I know no one else does but I miss those days. Maybe that is what we need. It is not just this issue; there are so many of these issues that include fixed date elections, which I have spoken about before, the electing of senators, the possible electing of senators, et cetera. There are lots that are in the hopper. I think maybe it is time for another round.

Senator Murray: Mr. Smith says he is not against discretion. I take it that he is not against placing limits on prime ministerial discretion, but that the issue is what limits and in what context and therefore, the issue before us will be whether the limits proposed by Senator Moore are reasonable, in a free and democratic society.

M. Smith : La limite actuelle imposée au premier ministre concernant la Chambre des communes est issue de l'opposition publique. Il y a de cela environ 20 ans, le gouvernement a fait l'objet de vives critiques voulant qu'il soit négligeant à cet égard.

Le sénateur Moore : Cette limite ne tenait cependant pas compte du déclenchement séquentiel d'élections partielles, dont tous les premiers ministres ont abusé depuis le redressement dont vous parlez, qui date de 20 ans environ.

M. Smith : Si l'on exige la tenue d'élections partielles, combler les vacances de façon séquentielle semble être une façon raisonnable de fonctionner, à condition d'imposer une obligation légale de combler les vacances. Je ne vois aucune raison justifiée pour m'y opposer. Mon argument principal porte sur le pouvoir discrétionnaire; je ne m'oppose pas au pouvoir discrétionnaire du premier ministre.

Le sénateur Moore : Je me demande ce que vous penseriez si nous faisions l'inverse; c'est-à-dire chercher à prolonger le délai accordé. Nous ne ferions pas cela, n'est-ce pas? Je ne le crois pas.

M. Smith : Non, nous ne le ferions pas.

M. Desserud : Il y a toujours un problème lorsqu'on traite de ces questions constitutionnelles, en particulier les questions qui traitent de conventions. Premièrement, nous déterminons si une chose devrait ou non se produire, si c'est la chose honorable à faire, si les gens devraient la faire et s'ils agissent correctement s'ils la font ou non. Deuxièmement, nous établissons si nous avons le mécanisme ou le pouvoir constitutionnel de forcer une personne à faire ce qui selon nous est la chose honorable à faire.

Les deux questions sont distinctes et il est difficile de maintenir cette distinction. Sur le plan moral, le sénateur a raison : si le premier ministre, en ne nommant pas de sénateur, agit délibérément afin de miner l'intégrité du Sénat, c'est immoral. Avons-nous un recours dans la Constitution pour prévenir cela? Non, nous n'en avons pas de très bons. C'est justement le fait que nous n'en avons pas qui révèle le problème de notre Constitution, y compris, si j'ose dire, le problème lié à notre façon de choisir nos gouverneurs généraux. Nous n'avons pas abordé ces questions. J'avais une liste de solutions possibles lorsque vous parliez plus tôt.

Ma solution est celle du politicologue. Nous, les politicologues, adorons les conférences constitutionnelles. Je sais que je suis bien le seul, mais cette époque me manque. C'est peut-être ce qu'il nous faut. Il ne s'agit pas seulement de la question abordée aujourd'hui, il y en a tant d'autres, notamment la tenue d'élections à une date fixe, dont j'ai déjà parlé, l'élection des sénateurs, la possibilité d'élire des sénateurs, et d'autres encore. Il y a beaucoup d'enjeux de la sorte en cause. C'est peut-être le temps d'une autre série de conférences constitutionnelles.

Le sénateur Murray : M. Smith affirme ne rien avoir contre le pouvoir discrétionnaire. J'en conclus qu'il ne s'oppose pas à l'imposition de limites au pouvoir discrétionnaire du premier ministre, mais qu'il faut déterminer les limites et le contexte; par conséquent, il faut savoir si les limites proposées par le sénateur Moore sont raisonnables dans une société libre et démocratique.

Not enough focus has been paid to the fact that Senator Moore, a Liberal, and his Liberal colleagues are proposing and supporting a bill which, if it is passed in a timely fashion, would result in the appointment of 20 or 30 Conservatives to the Senate. For sheer high-mindedness, it would be hard to find anything exceeding that in our history.

As far as the government's long-term intentions on Senate reform are concerned, I think it has to be observed that a lot of this is more apparent than real.

The government brought in a bill to the House of Commons on Senate tenure on November 13, I believe. They brought it forward in February for a day's debate and nothing has been heard of it since. They brought a bill in November on so-called Senate consultative elections. By February, they remembered it was there and they brought it forward for a bit of debate, whereupon it was sent to a legislative committee, which has been examining it in fits and starts ever since. I think it is fair to make the point that the Senate reform initiatives of the government are not a very high priority.

Senator Moore: It is not as good as this.

Senator Murray: It is not as good as my constitutional resolution to improve the Western Senate.

Senator Andreychuk, an election, whatever it produces, will not force provinces to hold Senate elections. A federal election will not force them to do so and I do not know how many are thinking of it.

I do know, because I informed the Senate 18 or 20 years ago when I was in a position to do so, that it was the view of the government, on advice, that the Alberta legislation for Senate elections was ultra vires from stem to stern, not just in one or two respects. My reading as a layman of the legal documents relating to that was and is that it will be very difficult for a provincial government to come up with Senate election legislation that was intra vires that province. We are going nowhere there.

As for this abomination called Senate consultative federal elections that has been brought in by the government, three provinces, I think I am correct, have already indicated that not only will they not hold those elections but that if the bill goes through and gets Royal Assent, they will go to court to challenge it. I think it is Quebec, New Brunswick and Ontario. The quick route, of course, if the government were serious about Senate reform, would be to send that bill to the Supreme Court of Canada immediately for a judgment as to whether it is intra vires the federal Parliament acting unilaterally.

One of the reasons I support this bill of Senator Moore is that the Prime Minister has declared it as his intention, and I take it seriously, that he will not fill Senate vacancies unless candidates

Nous ne nous sommes pas suffisamment penchés sur le fait que le sénateur Moore, un libéral, et ses collègues libéraux, proposent d'appuyer un projet de loi qui, s'il est adopté en temps utile, mènera à la nomination de 20 à 30 conservateurs au Sénat. En fait de noblesse d'âme, il serait difficile de trouver mieux dans toute notre histoire.

En ce qui concerne les intentions du gouvernement à long terme à l'égard de la réforme du Sénat, je crois qu'il faut noter que c'est plutôt une question d'apparence que de réalité.

Le gouvernement a présenté un projet de loi à la Chambre des communes sur la durée des mandats des sénateurs le 13 novembre, je crois. Ce projet a été abordé en Chambre en février pour un débat d'une journée et plus rien n'a été mentionné par la suite. De plus, toujours en novembre, un projet de loi sur de soi-disant élections sénatoriales consultatives a été présenté. En février, on s'est souvenu de son existence et on l'a abordé pour en débattre un peu, puis le projet de loi a été confié à un comité législatif, qui l'étudie sporadiquement depuis. Je crois que l'on peut en déduire que les projets de réforme du Sénat ne font pas partie des priorités du gouvernement.

Le sénateur Moore : Ce n'est pas aussi bon que le projet de loi à l'étude ici.

Le sénateur Murray : Ce n'est pas aussi bon que ma résolution constitutionnelle pour une meilleure représentation de l'Ouest au sein du Sénat.

Madame le sénateur Andreychuk, une élection, peu importe son résultat, ne forcera pas les provinces à tenir des élections sénatoriales. Une élection fédérale ne peut pas les forcer à le faire, et j'ignore combien de gens pensent ainsi.

Ce que je sais par contre, pour l'avoir annoncé au Sénat il y a 18 ou 20 ans, alors que j'étais en mesure de le faire, c'est que, selon le gouvernement, qui avait été conseillé à ce sujet, la loi de l'Alberta concernant les élections des membres du Sénat était *ultra vires* intégralement, et non seulement par rapport à un ou deux aspects. Mon interprétation, en tant que non-initié, des documents juridiques à ce sujet était, et est toujours, qu'il sera très difficile pour un gouvernement provincial de mettre au point une loi sur l'élection de sénateurs qui restera dans les limites du pouvoir de cette province. Nous n'aboutissons nulle part.

Pour ce qui est de cette abomination que l'on appelle élections sénatoriales consultatives, que le gouvernement a proposée, trois provinces — je crois que c'est bien ça — ont déjà indiqué que non seulement elles ne tiendront pas ces élections, mais que, si le projet de loi est adopté et qu'il obtient la sanction royale, elles le contesteront devant les tribunaux. Je crois qu'il s'agit du Québec, du Nouveau-Brunswick et de l'Ontario. La solution la plus rapide, évidemment, si le gouvernement était vraiment sérieux au sujet de la réforme du Sénat, ce serait de saisir immédiatement la Cour suprême du Canada du projet de loi afin que cette dernière détermine s'il est constitutionnel que le Parlement agisse unilatéralement.

Une des raisons pour laquelle j'appuie le projet de loi du sénateur Moore, c'est que le premier ministre a fait valoir, et je le prends au sérieux, qu'il ne comblerait aucun poste de sénateur à

for the Senate are somehow elected. He is the first Prime Minister to have indicated that he will not exercise his discretion. My second reason for doing so, or one of the factors, at any rate, is that the so-called Senate reform initiatives proposed by the government are going nowhere slowly, and I think the government knows that perfectly well. What the fate of this bill will be, I do not know, but I intend to support it.

Mr. Desserud, you said something that alarmed me slightly when you suggested that if this bill were challenged on the grounds that it was interfering with the method of appointment and the prerogative of the Prime Minister to recommend, at his leisure, names of Senate candidates, that it could be interpreted as simply clarifying the advice. What alarmed me about it was the possibility that the same argument might be used to justify what I call this abomination of federal consultative Senate elections.

Mr. Desserud: You are talking about Bill C-20. I just finished a paper on Bill C-19, and Bill C-20 became a footnote. Although I argue in that paper that the intent of Bill C-20 is clearly a violation of the method of selecting senators as indicated in the Constitution in section 42 because it restricts itself to advice, and there are authorities that have predicted such a thing will happen, the advice does not have be followed. Since the advice does not have to be followed, it is possible it avoids that problem. It is a back door way of doing something that is not front and centre.

My main position, which I made when I was here last year about another bill, is that we have a wonderfully flexible set of amending formula in our constitution that tries to consider all contingencies, and one of those contingencies is we really do not know what the effect of the proposed amendment will be. We have a general formula that we can use, and that is what we should be using that. It is a basic constitutional principle. If in doubt, go to section 38.

Senator Murray: Are you arguing that Bill C-20 is intra vires the federal Parliament?

Mr. Desserud: No, I think it avoids cleverly that charge. I think it could be. I think the intention certainly is, but because it is worded carefully, it may well avoid that charge.

The Chair: I think Senator Murray is asking if you are arguing that Bill C-20 is intra vires the federal Parliament.

Mr. Desserud: I think it might be because of the clever wording. In intention, no, but in legal script, yes. I am not saying I like the bill, but I think they can get away with it.

Senator Milne: I understand that both of those bills are on the Order Paper for debate this week in the House of Commons, so they are finally disinterring them again. In that bill, the Prime Minister is narrowing his own prerogative. He is voluntarily narrowing his prerogative. He goes to consultative elections and

moins que les candidats ne soient élus. C'est le premier premier ministre à avoir indiqué qu'il n'exercerait pas son pouvoir discrétionnaire. Ma deuxième raison pour appuyer le projet de loi, ou l'un des facteurs à tout le moins, c'est que les prétendus projets de réforme du Sénat proposés par le gouvernement se dirigent lentement vers une impasse, et je crois que le gouvernement le sait pertinemment. J'ignore ce qu'il adviendra de ce projet de loi, mais j'ai l'intention de l'appuyer.

Monsieur Desserud, vous m'avez un peu inquiété tantôt quand vous avez dit que, si le projet de loi était remis en question sous prétexte qu'il nuit à la méthode de nomination et à la prérogative du premier ministre de recommander des candidatures au Sénat comme bon lui semble, il serait possible de voir ce projet de loi simplement comme une façon de préciser les conseils fournis à la Gouverneure générale. Ce qui m'a inquiété, c'est la possibilité que le même argument soit utilisé pour justifier ces horribles élections sénatoriales consultatives fédérales.

M. Desserud : Vous parlez du projet de loi C-20. Je viens de terminer un document sur le projet de loi C-19, et le projet de loi C-20 est devenu sans importance. Dans le document, j'affirme que l'intention du projet de loi C-20 contrevient clairement à la méthode prévue pour la sélection des sénateurs à l'article 42 de la Constitution. Puisque le rôle se limite à formuler des recommandations, comme certains l'ont prédit, il n'est pas nécessaire de suivre ces recommandations. Par conséquent, il est possible d'éviter le problème. Il s'agit d'un moyen détourné de faire les choses.

Comme je l'ai indiqué devant vous l'an dernier au sujet d'un autre projet de loi, nous avons une excellente série de formules de modification dans notre Constitution qui cherchent à parer à toutes les éventualités. En l'espèce, nous ne savons pas vraiment quelles seront les répercussions de la modification proposée. Nous avons à notre disposition une formule générale, et nous devrions nous en tenir à celle-ci. Il s'agit d'un principe constitutionnel de base. En cas de doute, il faut se référer à l'article 38.

Le sénateur Murray : Prétendez-vous que le projet de loi respecte la compétence du Parlement?

M. Desserud : Non, je crois qu'il contourne habilement le problème. Il pourrait toutefois y contrevenir. Tel est le but selon moi, mais puisqu'il a été libellé avec soin, il risque de ne pas donner prise à ce genre de reproches.

La présidente : Le sénateur Murray vous a demandé, me semble-t-il, si le projet de loi C-20 respectait selon vous la compétence du Parlement.

M. Desserud : Peut-être que oui, parce qu'il a été formulé avec soin. Le texte, oui, mais l'intention, non. Je ne dis pas que je souscris à ce projet de loi, mais je pense qu'on pourrait réussir.

Le sénateur Milne : Il semble que les deux projets de loi en question sont inscrits au *Feuilleton* et feront l'objet d'un débat cette semaine. On les a enfin déterrés. Par l'intermédiaire de ce projet de loi, le premier ministre limite plus étroitement sa prérogative. Il le fait volontairement. Il prévoit la tenue

narrows himself into choosing senators who have so-called been elected. This whole argument of discretion, it seems to me, falls apart.

Mr. Smith: The whole argument to maintain the integrity of the discretion falls apart because the Prime Minister is supporting a bill that would allow its limitation?

I think the question is how far may a prime minister alienate his or her discretion, and is it binding on the next? I do not think it is self-evident to me that a single prime minister can do that. Discretion is a bit like sovereignty. What can be done with regard to discretion? Can it be alienated away? I am not sure that is possible. Permanently, I am not sure that it is. If we go back to the business about law, and law being coherent and predictable, I am not sure that this lends support to that view of law.

The Chair: This committee is just endlessly interesting.

Senator Joyal: Let us go back to the *Repatriation Reference*. The reference began in 1980 when Manitoba, Quebec and Newfoundland wanted to fight the federal government. Under the convention, there was no amending formula. These provinces were opposed to the federal government initiative and wanted to stop it from moving along with its resolution. At the point in time when the federal government realized that it would be stuck with three different references from three different Courts of Appeal, it decided to make its own reference to the Supreme Court of Canada. The federal government decided to fight the provinces on the legal grounds of the interpretation of the nature of the convention.

The Supreme Court handed down its ruling and even though it was not legally binding because it interpreted the convention, it was seen as a legitimate ruling to inspire the action of the federal government. The federal government acted to seek the concurrence of at least seven provinces. Following that, there was an agreement to define the convention in a statutory, constitutional form, namely, the 7/50 amending formula that we now have in section 38 of the Constitution.

Let us take a parallel route to the situation we are in now. The federal government wants to force the provinces to adopt consultative, municipal, whatever elections. Many provinces do not want to go that route. I will speak for my own province, which is on the record many times on this issue.

I think Quebec is right not to go that route because I happen to share the views of Senator Murray that it is ultra vires; the responsibility of the provincial government under section 92. Section 92 has no residual clause except the last one, which says "all matters of a private or local nature." That has nothing to do with a local nature; it is a House of Parliament. I strongly share that view.

d'élections à des fins de consultation et limite son rôle à la nomination des sénateurs soi-disant élus. L'argument fondé sur la discrétion me paraît renversé.

M. Smith : Ainsi, l'argument voulant que l'on protège l'intégrité du pouvoir discrétionnaire peut être rejeté parce que le premier ministre appuie un projet de loi qui limiterait ce pouvoir?

Il faut, selon moi, savoir à quel point un premier ministre peut aliéner son pouvoir discrétionnaire et si une telle mesure est contraignante pour ses successeurs. Il ne va pas de soi, selon moi, qu'un premier ministre puisse prendre à lui seul une telle décision. Le pouvoir discrétionnaire est assimilable à la souveraineté. Que peut-on faire avec ce genre de pouvoir? Peut-on l'aliéner? Je ne sais pas si c'est possible, surtout de façon permanente. Si nous nous concentrons sur la loi, je ne suis pas convaincu, compte tenu du fait que la loi se veut cohérente et prévisible, que cette interprétation soit défendable.

La présidente : Les débats de notre comité sont toujours très intéressants.

Le sénateur Joyal : J'aimerais reparler du *Renvoi relatif au rapatriement de la Constitution*. En 1980, le Manitoba, le Québec et Terre-Neuve ont voulu s'opposer au gouvernement fédéral. La convention constitutionnelle ne prévoyait aucune formule de modification. Or, ces provinces n'appuyaient pas l'initiative du gouvernement et voulaient empêcher ce dernier d'aller de l'avant. Lorsqu'il s'est rendu compte que trois renvois distincts seraient présentés à des cours d'appel différentes, le gouvernement a décidé de renvoyer lui-même la question à la Cour suprême du Canada. Le gouvernement fédéral a défié les provinces en invoquant, pour motifs d'ordre juridique, l'interprétation de la nature de la convention.

La Cour suprême du Canada a rendu sa décision. Même s'il s'agissait uniquement d'une interprétation de la convention, cette décision a légitimé l'action du gouvernement fédéral. Le gouvernement s'est efforcé d'obtenir l'accord d'au moins sept provinces. Ensuite, les parties ont convenu d'établir juridiquement et constitutionnellement la formule de modification 7/50, que l'on trouve maintenant à l'article 38 de la Constitution.

Faisons maintenant le parallèle avec la situation actuelle. Le gouvernement fédéral veut forcer les provinces à mettre en œuvre des élections consultatives, municipales ou quelque chose du genre. Un grand nombre de provinces s'y opposent. Je parlerai pour ma province, qui a indiqué publiquement sa position à maintes reprises.

Selon moi, le Québec fait bien de ne pas jouer le jeu. Je suis du même avis que le sénateur Murray, c'est-à-dire que c'est invalide. En ce qui concerne les responsabilités des provinces, l'article 92 ne contient pas de disposition résiduelle, sauf la dernière, qui précise « toutes les matières d'une nature purement locale ou privée ». Or, la question qui se pose n'a rien de local, elle touche une Chambre du Parlement. Je suis fortement de cet avis.

The federal government wants to push provinces to take a certain route, but provinces are resisting. The retaliation on the federal side is to say, "If you do not go that route, you will not have senators to speak on behalf of your sectional and minority interests," as you appropriately stated. That is very serious. Minority interests are a defining principle of this country. It would not have been a federation if there would not have been protection of minority interests. I do not need to retell our history.

A province would see two political routes to adopt in such a case either a preventive initiative by making a reference to its Court of Appeal, thus forcing the Government of Canada probably to go to the Supreme Court, which we saw that in the patriation reference. The other option is to wait until federal legislation is adopted and is already on the record to challenge the constitutionality of that legislation.

Professor Desserud, even though Bill C-20 might be dressed up within the competence of Parliament, the test the Supreme Court would apply is in pith and substance. The pith and substance of this bill is essentially to establish elections. As the common dictum says, "If it walks like a duck, is dressed like a duck and quacks like a duck, it is a duck." Similarly, it is an election.

A prime minister would feel much more compelled to appoint a senator who has been "elected" than to appoint someone of his own or her own choice. There would be no more discretion. The only discretion left is within those who are supposed to be elected. It reduces the scale of those being elected.

It seems to me that our Constitution, in its broadest terms, provides some ways and means. There is the political route, as Senator Andreychuk alluded to — an electoral campaign; a platform. Plebiscite or referendums are not part of our Constitution. It is an opinion, but some provinces who might want to concur into that reform would have to hold referendums besides the federal election. Manitoba and B.C., and there are three other provinces that have provincial referendum acts to directly seek the concurrence of their own citizens. In other words, we have in the whole of the panoply of the tools at stake an element of pressure to bring a result that would yield a legitimate result if we want to have proper and sound reform.

The bill we have before us, through the initiative of Senator Moore, is a bill that seems to be innocuous, as you have said, because it seems to be simple. It raises many questions, but it has exactly the same weight as a constitutional resolution or the initiative of the government. The government says "If we are to change things, here is a proposal. Let us see if we can change things."

This is exactly the same route. If that bill were to be adopted, someone would question the constitutionality of it, or a province can have a reference on it. It is part of the parliamentary initiative to try to come to terms with a fundamental problem. Can we have an institution, one of the two Houses of Parliament, depleted to a point where it cannot give its advice and consent to the Governor

Le gouvernement fédéral veut forcer les provinces à faire les choses d'une certaine façon, mais les provinces opposent une résistance. Comme vous l'avez si bien indiqué, le gouvernement fédéral rétorque en disant que si elles ne suivent pas la voie proposée, les provinces n'auront aucun sénateur pour défendre leurs intérêts locaux et minoritaires, ce qui est très grave. La défense des intérêts minoritaires est l'un des principes fondamentaux de notre pays. Il n'y aurait pas eu de fédération s'il n'y avait pas eu de protection des intérêts minoritaires. Je n'ai pas besoin de vous rappeler l'histoire.

Deux options politiques se présentent aux provinces, soit agir de manière préventive en renvoyant la question à la cour d'appel, ce qui forcerait le gouvernement du Canada à recourir à la Cour suprême, comme ce fut le cas pour le rapatriement. Elles peuvent aussi attendre que le projet de loi soit adopté, puisqu'on a déjà dit publiquement qu'on en contesterait la constitutionnalité.

Monsieur Desserud, bien que le projet de loi C-20 semble respecter, par son libellé, la compétence du Parlement, la Cour suprême en étudierait le but et la portée. Or, ce projet de loi vise essentiellement à établir un processus électoral. Comme le veut le dicton, il faut « appeler un chat un chat ». De même, une élection est une élection.

Tout premier ministre se sentirait sensiblement contraint de nommer un sénateur « élu » plutôt qu'une personne de son choix. Il n'y aurait plus de pouvoir discrétionnaire, sauf en ce qui concerne le choix des personnes à élire, ce qui a pour effet de réduire le bassin des personnes pouvant être élues.

Il me semble que la Constitution, dans son ensemble, nous offre des moyens de trouver une solution. Il y a la voie politique, à laquelle a fait illusion le sénateur Andreychuk, soit une campagne électorale. La Constitution n'ouvre pas la porte au plébiscite et aux référendums. Ce n'est qu'une opinion, mais je pense que certaines provinces, désireuses d'appuyer cette réforme, devront peut-être tenir des référendums, qui s'ajouteraient alors aux élections fédérales. Le Manitoba, la Colombie-Britannique et trois autres provinces ont en place des lois référendaires provinciales pour obtenir l'assentiment de leur population. Autrement dit, les instruments proposés visent à exercer des pressions dans le but d'obtenir un résultat légitime, et ce pour en arriver à une réforme judicieuse et concrète.

Le projet de loi à l'étude, proposé par le sénateur Moore, semble inoffensif, comme vous l'avez dit, en raison de sa simplicité apparente. Il soulève toutefois un grand nombre de questions, puisqu'il a exactement le même poids qu'une résolution constitutionnelle ou l'initiative du gouvernement. Pour sa part, le gouvernement nous propose un moyen de changer les choses et nous invite à voir si c'est possible.

Or, le projet de loi à l'étude propose exactement la même chose. Si ce projet de loi est adopté, quelqu'un en contestera la constitutionnalité ou encore une province renverra la question devant un tribunal. C'est le rôle du Parlement de tenter de trouver une solution à un problème fondamental. Pouvons-nous accepter qu'une institution, une des deux Chambres du Parlement, soit

General in the proper and legitimate form that it has been created to give? That, too, is a very important compelling element of the Constitution.

The Chair: Is this a question?

Senator Joyal: Is it not a possibility to address the issue in a responsible way?

Mr. Smith: You make quite a strong case for using that route from that perspective; that is, that it becomes the grounds for challenging the inaction of the Prime Minister in making appointments. Is that right?

Senator Joyal: Yes.

Mr. Smith: I suppose that is one possibility. I had not thought of that particularly. I was looking at it from the way I think most people would look at it, which is not actually seeing it as the end game in terms of what the ultimate objective is, which, as you lay out, would be to challenge the use or non-use of discretionary power.

Senator Joyal: Yes, the non-use of it.

Mr. Desserud: I would agree with almost everything you said. I still say this with reluctance because this is not about Bill C-20, so we should not get caught up in it. Maybe you are right, and I hope you are right, about how a court would respond. I am not 100 per cent convinced. Otherwise, yes, I agree if terms of strategy that this is probably the moat sensible one that you have before you. There are others. Some are dangerous and some are not as sensible. However, letting the legislation go through to see what happens is as good as any.

Senator Andreychuk: You are saying to get this through and see what happens. Would that not be more dangerous? That would then be the position we could take on virtually every law.

Mr. Desserud: No, I argue that this is okay; that it is within your competence to do so. I say it is tricky and I think you might need more advice on some areas I do not know the answers to. In balance, I think it is okay. I would not suggest you do something unconstitutional.

Senator Moore: Mr. Smith, you seem to be focused on the matter of prime ministerial discretion. This bill would require things to happen in set periods of time; it would be consistent with what is there now in terms the House of Commons and filling of vacancies — 180 days and a by-election called sequentially.

We had Mr. Franks before us earlier this afternoon. His position is that there should be a lessening of discretion to 90 days so that the citizens can have their constitutionally-guarded rights of representation in both Houses.

What do you have to say about that?

réduite au point de ne plus pouvoir donner des conseils ou son consentement au Gouverneur général dans la forme prescrite et légitime qui constitue sa raison d'être? Il s'agit là d'un élément probant très important de la Constitution.

La présidente : S'agit-il d'une question?

Le sénateur Joyal : N'est-ce pas une façon responsable d'aborder le tout?

M. Smith : Vous présentez d'excellents arguments en faveur cette option, selon laquelle l'échéance devient un motif de contestation de l'inaction du premier ministre en matière de nomination. Est-ce exact?

Le sénateur Joyal : Oui.

M. Smith : C'est une possibilité à laquelle je n'avais pas pensée. Comme la plupart, je crois, j'examinais le problème sous un tout autre angle. Je ne m'étais pas penché sur la question de l'objectif final qui est, comme vous le mentionnez, la contestation de l'utilisation ou l'inutilisation du pouvoir discrétionnaire.

Le sénateur Joyal : Oui, son inutilisation.

M. Desserud : Je suis du même avis que vous, à quelques exceptions près. C'est avec réticence que je le dis, car les discussions ne visent pas le projet de loi C-20, alors nous ne devrions pas nous attarder sur le sujet. Peut-être avez-vous raison, je l'espère, en ce qui a trait à la façon dont la cour réagirait. Je ne suis pas entièrement convaincu. Cela dit, je dois avouer qu'il s'agit probablement de la stratégie la plus raisonnable. Des stratégies présentées, certaines sont dangereuses et d'autres moins raisonnables. En revanche, adopter le projet de loi pour voir ce qui arrivera est une solution comme une autre.

Le sénateur Andreychuk : Vous suggérez d'adopter le projet de loi pour voir ce qui arrivera. N'est-ce pas un peu risqué? Rien ne nous empêcherait d'adopter cette position à l'égard de n'importe quel projet de loi.

M. Desserud : Non, j'affirme que c'est correct, que cela est de votre ressort. Selon moi, c'est une solution compliquée. Vous aurez probablement besoin de conseils éclairés sur certains points qui ne relèvent pas de mes compétences. Dans l'ensemble, c'est une solution acceptable. Jamais je ne vous proposerais une solution anticonstitutionnelle.

Le sénateur Moore : Monsieur Smith, le pouvoir discrétionnaire du premier ministre semble constituer votre principale préoccupation. Ce projet de loi établit des échéances particulières pour certaines choses; il est conforme aux exigences actuelles de la Chambre des communes concernant la dotation des sièges vacants — 180 jours et déclenchement d'une élection partielle.

Nous avons entendu le témoignage de M. Franks un peu plus tôt cet après-midi. Selon lui, les nominations devraient avoir lieu dans les 90 jours suivant les vacances de façon à respecter le droit de représentation des citoyens dans les deux Chambres, lequel est prévu par la Constitution.

Qu'en pensez-vous?

Mr. Smith: I heard him say that. Not to be disputatious, but why not 45 days? The trouble with time limits is that there seems to be no particular rationale for one or another. If short is what you seek, make it shorter. I do not see that 90 days is particularly better than 180 days. Why not make it shorter still?

It is one of the troubles with limits. I do not think they are particularly self-evident often; the reasoning is not necessarily self-evident. A limit is a limit; that limit can simply be chosen. I do not particularly support making it 90 days. There could be some argument to say that 90 days is better, but what would be the argument?

Senator Moore: In terms of the fact that 180 is the number of days now provided for —

Mr. Smith: There is a precedent for 180, so that kind of coherence seems to make at least some arithmetical continuity.

Senator Moore: That is consistent and has been in the past.

Mr. Smith: Yes; however, once you go beyond that, it is not at all clear to me.

Senator Moore: You would not go the other way and lengthen it out to 360 days?

Mr. Smith: No. In one of your earlier meetings I believe Senator Murray raised a comment. I know we have fixed election dates in a very Canadian way — fixed election dates, maybe. What is our national sport, lacrosse or hockey? It is this institutional ambivalence. We try to meet all standards.

As I recall, Senator Murray raised the point of what do you do if you have 180 days and there will be an election, we think, in 140 days or even in 220 days, will we go ahead with an election?

Senator Moore: That is provided for already.

Mr. Smith: How is it provided for?

Senator Moore: In the House of Commons.

Senator Milne: In the Elections Act.

Senator Moore: There is a section that deals with that.

Mr. Smith: How do you anticipate that?

Senator Moore: There is a provision in the statute now.

The Chair: We have kept the witnesses nearly 45 minutes longer than we promised to keep them. We are very grateful to them. This has been an extremely interesting session. I meant it when I said this committee is endlessly fascinating, and this has been one of the more interesting sessions. We are very grateful to you both.

M. Smith : C'est ce que j'ai entendu. Je ne souhaite pas lancer un nouveau débat, mais pourquoi ne pas avoir choisi un délai de 45 jours? Il semble que le choix des échéances ne repose sur rien. Si vous souhaitez obtenir des résultats rapides, fixez une échéance plus rapprochée. Je ne vois pas en quoi l'échéance de 90 jours est préférable à celle de 180 jours. Pourquoi ne pas la devancer encore plus?

C'est l'un des problèmes engendrés par les échéances. Dans la plupart des cas, elles ne vont pas de soi; leur fondement ne va pas de soi. Une échéance est une échéance, elle peut être établie de façon arbitraire. Je n'approuve pas l'échéance de 90 jours. Elle est préférable selon certains, mais pour quelle raison?

Le sénateur Moore : En ce qui à trait aux 180 jours prévus actuellement...

M. Smith : Il y un précédent à cet égard; il y a une cohérence qui semble offrir une certaine continuité arithmétique.

Le sénateur Moore : Cela correspond à ce qui a été fait dans le passé.

M. Smith : Oui; cependant, si on en fait abstraction, ce n'est pas clair.

Le sénateur Moore : Vous ne prolongeriez pas l'échéance jusqu'à 360 jours?

M. Smith : Non. Lors de l'une des réunions précédentes, le sénateur Murray, si je ne m'abuse, avait soulevé cette question. Je suis conscient que les dates des élections sont établies de façon très canadienne — dates d'élection fixes peut-être. Quel est notre sport national, la crosse ou le hockey? C'est un cas d'ambivalence institutionnelle. Nous essayons de répondre à toutes les normes.

Si je me souviens bien, le sénateur Murray se posait la question suivante : Comment procède-t-on dans les cas où le premier ministre dispose de 180 jours pour procéder à une nomination et que des élections pourraient avoir lieu dans 140 jours ou même 220 jours. L'élection serait-elle déclenchée quand même?

Le sénateur Moore : C'est déjà prévu.

M. Smith : Comment?

Le sénateur Moore : Par la Chambre des communes.

Le sénateur Milne : Par la Loi électorale.

Le sénateur Moore : Une section de la loi traite de ce sujet.

M. Smith : Comment est-ce prévu?

Le sénateur Moore : À l'heure actuelle, la loi contient des dispositions à ce sujet.

La présidente : Les témoins sont restés 45 minutes de plus que prévu. Nous les en remercions. Ce fut une séance des plus intéressantes. J'avais vu juste en annonçant à quel point les discussions de notre comité sont fascinantes. Ce fut l'une des séances les plus intéressantes. Nous vous en sommes très reconnaissants.

Senator Stratton: This is not a point of order but something I wish to raise. The rule in the Senate chamber with respect to any kind of electronic device is that if it emits a noise or causes interference by noise it is disallowed.

You can use your BlackBerry in the chamber; you can use your laptop in the chamber. They went to the extent of changing the microphones in the chamber to prevent that noise interference.

The Chair: Unsuccessfully, but they tried.

Senator Stratton: Ninety-nine per cent of the noise is now eliminated. I can set my BlackBerry on my table top and it does not cause interference in the chamber. With respect, that is the rule.

The Chair: You are right Senator Stratton. This came up very quickly and I did not want to have a long excursion into this issue because we had substantive things to discuss.

My understanding of the Speaker's reasoning in those rulings is that the object was to avoid interference with the proceedings of the chamber, to avoid having proceedings of the chamber disrupted, either in general or locally.

Senator Stratton: By the noise.

The Chair: Whatever.

Senator Stratton: As a comparison, in the House of Commons, BlackBerrys are allowed, Madam Chair.

The Chair: At the point at which the issue was raised, I made the point of saying there was no rule against the use of them here, but I also tried to allude to the need to avoid disrupting procedures. You may recall that there appeared to be a fascinated conversation going on in connection with, it appeared, something that was legible on a BlackBerry at that time. That discussion was on the verge of becoming, perhaps, a disruption of the proceedings for other senators who wanted to listen to the witness.

Senator Stratton: That part I can accept.

The Chair: That was the point I was trying to raise, and I really think that, while it was not a ruling, it was a strong suggestion, and I would propose that we now conclude these proceedings.

Senator Andreychuk: I propose we take that up in the steering committee.

The Chair: You can certainly do that.

The committee adjourned.

OTTAWA, Thursday, May 1, 2008

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill S-224, an Act to amend the Parliament of Canada Act (vacancies), met this day at 10:50 a.m. to give consideration to the bill.

Le sénateur Stratton : Ce n'est pas un rappel au Règlement, mais je souhaiterais soulever un point. Selon la règle concernant les dispositifs électroniques dans la salle du Sénat, si un dispositif émet des bruits ou cause des interférences sonores, il est interdit.

Vous pouvez utilisez votre BlackBerry dans la salle ou encore votre ordinateur portable. Les microphones de la salle ont été changés afin d'éviter les interférences sonores.

La présidente : On a essayé d'éliminer les interférences, sans beaucoup de succès.

Le sénateur Stratton : On a réussi à éliminer 99 p. 100 du bruit. Je peux désormais déposer mon BlackBerry sur la table sans causer d'interférence dans la salle. Sauf le respect que je vous dois, c'est la règle.

La présidente : Vous avez tout à fait raison, sénateur Stratton. Ce point a été présenté à la dernière minute, et je voulais éviter de longues discussions étant donné que nous devions traiter d'importantes questions.

Si j'ai bien compris, le Président de la Chambre souhaitait éviter toute interférence dans la salle du Sénat et éviter de perturber les délibérations, de façon générale ou locale.

Le sénateur Stratton : Par le bruit.

La présidente : Par quoi que ce soit.

Le sénateur Stratton : À titre de comparaison, il est possible d'apporter un BlackBerry à la Chambre des communes, madame la présidente.

La présidente : Au moment où cette question a été soulevée, j'ai précisé qu'il n'y avait pas de règle contre leur utilisation ici. J'ai toutefois fait allusion à la nécessité de ne pas interrompre les travaux. Vous vous souviendrez peut-être qu'il semblait y avoir une conversation fascinante liée à quelque chose affiché à l'écran d'un BlackBerry. Cette discussion était, probablement, sur le point de déranger les autres sénateurs qui souhaitaient écouter les propos du témoin.

Le sénateur Stratton : Je suis d'accord avec vous sur ce point.

La présidente : C'est là où je voulais en venir. Bien qu'il ne s'agisse pas d'une décision, j'estime que c'est une recommandation sérieuse. Je propose de mettre un terme aux délibérations.

Le sénateur Andreychuk : Je propose que l'on soumette la question au comité de direction.

La présidente : Vous pouvez certainement le faire.

La séance est levée.

OTTAWA, le jeudi 1er mai 2008

Le Comité permanent des affaires juridiques et constitutionnelles, auquel a été renvoyé le projet de loi S-224, Loi modifiant la loi sur le Parlement du Canada (sièges vacants), se réunit aujourd'hui, à 10 h 50, pour examiner le projet de loi.

Senator Joan Fraser (*Chair*) in the chair.

[*Translation*]

The Chair: Colleagues, welcome to this meeting of the Standing Senate Committee on Legal and Constitutional Affairs. We are continuing our study of Bill S-224, an Act to amend the Parliament of Canada Act (vacancies). We have the great pleasure of welcoming as our first witness today, Mr. Gérald R. Tremblay, who is a partner at the McCarthy Tétrault law firm in Montreal. Thank you very much for having accepted our invitation, Mr. Tremblay. You are aware of our procedures; we ask you to make a presentation and afterwards, we will move on to a question period.

Gérald R. Tremblay, Partner, McCarthy Tétrault LLP, as an individual: I thank you for your invitation, Madam Chair. It is always a pleasure and a privilege to appear before you. It would be the second time that I appear on the issue of Senate reform. The first was last September 21. At the time, we were discussing the 10-year mandate; seven, eight, or nine years as compared to 75 and of Senate elections.

I had the opportunity to appear with Senator Beaudoin, who was sitting beside me. He is a friend of yours as well as mine because he was my teacher at law school at the University of Ottawa. I am alone today and therefore I have neither the moral nor the physical support of Senator Beaudoin, but I do hope that he will not be disappointed in his student's statements. His name is Gérald-A. Beaudoin and I am Gérald R. Beaudoin. It has often been said that Gérald A. brought Gérald R. into this world.

The question posed by the bill is an interesting one. Even though this is a private senator bill, it provides us with the opportunity to stir up some extremely important concepts in the evolution of the Canadian Constitution.

[*English*]

Basically, there are four issues. First, we assume that the Governor General has full discretion to appoint whomever she wants. That is what the British North America Act said in 1867 and continues to say, but the Governor General must respect the numbers of representation per province, and so on.

Second, by giving Royal Assent to a bill that would have that effect, can the Governor General acquiesce to a limitation to her own discretion? Is it illegal for someone who has full discretion to agree to have some legislative guidelines to exercise his discretion? If the Governor General does so by giving Royal Assent to a bill, is she, directly or indirectly in a matter like this one, affecting the constitutional balance? Is she amending the Constitution? If she does, in view of the wording of section 41, does it affect only the federal side of the Constitution, which the federal Parliament has the right to amend?

Le sénateur Joan Fraser (*présidente*) occupe le fauteuil.

[*Français*]

La présidente : Je vous souhaite la bienvenue au Comité sénatorial permanent des affaires juridiques et constitutionnelles. Nous poursuivons notre étude du projet de loi S-224, loi modifiant la Loi sur le Parlement du Canada (sièges vacants). Nous avons le très grand plaisir d'accueillir comme premier témoin aujourd'hui, M. Gérald R. Tremblay, partenaire chez McCarthy Tétrault à Montréal. Merci beaucoup d'avoir accepté notre invitation, Me Tremblay. Vous connaissez notre procédure; on vous demande de faire votre présentation et ensuite, nous passerons à la période des questions.

Gérald R. Tremblay, partenaire, McCarthy Tétrault LLP, à titre personnel : Madame la présidente, je vous remercie de votre invitation. C'est toujours un plaisir et un privilège de comparaître devant vous. En ce qui me concerne, sur la question de la réforme du Sénat, c'est la deuxième fois. J'ai comparu le 21 septembre dernier. On discutait à l'époque du terme de dix ans; sept, huit, neuf ans, par rapport à 75 ans et de l'élection au Sénat.

J'avais eu la chance de comparaître avec le sénateur Beaudoin, qui était assis à côté de moi. C'est un ami de vous tous et un ami à moi parce que j'ai appris mon droit de lui lorsque j'étais étudiant à l'Université d'Ottawa. Je suis seul aujourd'hui et donc je n'ai pas le soutien moral ou physique du sénateur Beaudoin, mais j'ose espérer qu'il ne sera pas déçu des déclarations de son élève. Lui, c'est Gérald-A. Beaudoin et moi Gérald R. Beaudoin. Souvent, on disait que Gérald A. avait mis au monde Gérald R.

La question posée par le projet de loi est intéressante. Même s'il s'agit d'un projet de loi d'initiative privée, il donne l'occasion de brasser des notions extrêmement importantes dans l'évolution constitutionnelle canadienne.

[*Traduction*]

Essentiellement, il y a quatre questions. Tout d'abord, nous présumons que la Gouverneure générale a toute discrétion en matière de nomination. C'est ce que prévoit l'Acte de l'Amérique du Nord britannique de 1867, encore à ce jour, bien que des critères de représentation par province doivent être respectés, entre autres.

Deuxièmement, en donnant sa sanction royale à ce projet de loi qui aurait l'effet dont nous venons de parler, la Gouverneure générale se trouve-t-elle à accepter de limiter son propre pouvoir discrétionnaire? Est-ce illégal, pour quelqu'un qui a tout pouvoir discrétionnaire, d'accepter des limites législatives à ce pouvoir? Si elle l'accepte en accordant la sanction royale à ce projet de loi, est-ce que directement ou indirectement la Gouverneure générale modifie l'équilibre constitutionnel? Est-ce qu'elle modifie la Constitution? Le cas échéant, étant donné le libellé de l'article 41, cela ne touche-t-il que l'aspect fédéral de la Constitution, que le Parlement fédéral a le droit de modifier?

Third, does framing the power or the discretion to appoint affect the federal-provincial balance of power as established in the British North America Act, 1867, and now incorporated in the Constitution Act, 1982?

Finally, there is the problem of sanction. I read the debate in which Senator Joyal participated. The question was asked: What do we do if someone who has either a constitutional duty or a legal duty to do something at that level does not do anything? Do you impeach the Governor General? What do you do? Is the sanction political only? Is it merely public brouhaha? Would a court, for instance, displace the Governor General and say that the Supreme Court must appoint another one because this one does not respect the six-month time limit contained in the act in which the Governor General agreed to be limited by way of discretion?

Those would be the four questions. In my humble opinion, it is not abnormal or uncommon for a government authority that would have total discretion according to the Constitution to accept this power to have boundaries or to have limitations.

[*Translation*]

The example that most frequently comes to mind and that I believe has been mentioned to you is that of judicial appointments. The Constitution is just as specific and just as vague on judicial appointments as it is on Senate appointments. The Governor General, under sections 96 to 100, appoints judges to the superior courts across Canada. There is absolute discretion. And yet, federal legislation and almost all provinces have Judges Act or Canadian Judicial Counsels and in fact there is a debate as to whether or not it is right for this committee to have a policeman as a member with the opportunity to say whether or not this or that person should be appointed as a judge. Today, no one challenges whether or not this kind of legislation is legally correct.

The problem that arises is that of a assent. What happens if the Governor General, notwithstanding all of the required mechanisms for consultation before appointing someone, were to decide to set aside the recommendations and to say: the judicial appointment committee is putting forward candidates one, two, three, four and five. I am going to disregard that and appoint six.

That is not right. You have a statutory scheme. The fundamental issue is the following: the Constitution sets out that the Governor General appoints judges. Would this appointment be illegal? It is the parallel situation that most often comes to mind. If we can set out guidelines for judicial appointments, we can no doubt do the same for senatorial appointments.

The proposal is that there would be a requirement to appoint or replace a senator within six months. The question is, and it is very interesting and very theoretical — but it is always when reasoning is pushed to its most absurd that we see where the real principle lies — if the Prime Minister were never to advise the

Troisièmement, est-ce que les limites ainsi imposées au pouvoir discrétionnaire de nomination nuisent à l'équilibre des pouvoirs entre le gouvernement fédéral et les provinces établie par l'AANB de 1867 et maintenant intégré à la Loi constitutionnelle de 1982?

Enfin, il y a le problème des sanctions. J'ai lu la transcription du débat auquel a participé le sénateur Joyal. On posait la question suivante : que faire si quelqu'un qui a un pouvoir constitutionnel ou législatif de faire quelque chose, à un certain niveau, ne le fait pas? Peut-on destituer le Gouverneur général? Que peut-on faire? Est-ce que la sanction n'est que politique? S'agit-il simplement d'un scandale public? Est-ce qu'un tribunal, par exemple, pourrait demander le renvoi du Gouverneur général et dire que la Cour suprême doit en nommer un autre, parce que le titulaire du poste n'a pas respecté l'échéance de six mois prévue par la loi, soit la limite à sa discrétion qu'a acceptée le Gouverneur général?

Ce serait mes quatre questions. Bien humblement, je vous dirais qu'il n'est ni anormal ni inusité qu'un représentant du gouvernement qui a toute discrétion en vertu de la Constitution accepte que ces pouvoirs soient limités.

[*Français*]

L'exemple qui me vient le plus souvent à l'esprit et qui je pense a été mentionné devant vous est celui de la nomination des juges. La Constitution est aussi précise et aussi vague pour la nomination des juges qu'elle ne l'est pour la nomination des sénateurs. Le Gouverneur général, ce sont les articles 96 à 100, nomme les juges des cours supérieures à travers tout le Canada. C'est une discrétion absolue. Pourtant, la législation fédérale et presque toutes les législations provinciales ont des Judges Act, ont des Canadian Judicial Counsels d'ailleurs il y a un débat à savoir si c'est correct pour ce comité d'avoir un policier comme membre pour opiner sur l'opportunité de nommer un juge, celui-là plutôt que celui-là. Personne aujourd'hui ne conteste que ce type de législation est juridiquement correct.

Le problème qui se soulève est celui de la sanction. Qu'arriverait-il si le Gouverneur général, nonobstant tous ces mécanismes de consultation nécessaires avant de nommer quelqu'un, décidait d'oublier ces recommandations et de dire : le comité de nomination des juges me propose les candidats un, deux, trois, quatre et cinq. J'ignore cela et je nomme six.

Ce n'est pas correct. Vous avez un système législatif. La question fondamentale est la suivante : la Constitution dit que le Gouverneur général nomme les juges. Est-ce que cette nomination serait illégale? C'est le parallèle qui me revient le plus souvent à l'esprit. Si on peut baliser le système de nomination des juges, on peut sans doute baliser le système de nomination des sénateurs.

La proposition est qu'il y aurait une obligation de nommer ou de remplacer un sénateur dans un délai de six mois. La question posée, très intéressante et très théorique est la suivante — mais c'est toujours lorsqu'on pousse des raisonnements à l'absurde qu'on voit où réside le véritable principe — si le premier ministre

Governor General and we found ourselves with no senators after 10 years, we would de facto have abolished the Senate. What would be the penalty?

Could the Supreme Court say: given that no one has acted, we are issuing an injunction under which the Governor General must appoint senators? And if the Governor General did not appoint any senators, I find him or her in contempt to court. Ultimately, that would mean that the House of Lords in England could find Her Majesty guilty of contempt to Parliament if she did not appoint representatives to the House of Lords.

It is rather as one says in diplomacy, the ultimate sanction is war. In this case, in my humble opinion, the ultimate sanction is political. And there are no mechanisms that can ensure the application of such a measure. But what people now call a constitutional convention is created over a period of years. Once the process has been in place for a number of years, no one notices anymore.

The Constitution does not even make any mention of cabinet, of the council of ministers. There has not been a single government since Confederation that has functioned without a cabinet, and the same thing is true for England. There are constitutional conventions that are as robust as legislation, so long as the social contract is respected by those who are living it.

I think that legislation that would define the exercise of discretionary powers, were it be those of the Governor General, could not be legally challenged. It would be allowable legislation.

The other problem is that of assent. In our case, would the fact of defining the power or discretion of the Governor General have the effect of amending or modifying the Constitution? In the case before us, it is even more specific because the bill sets out that there be a six-month maximum period within which vacancies must be filled. Would the Constitution in fact be amended by a simple piece of legislation in having a provision like this, whereas the Constitution says from time to time? Is that the same thing as six months? It is debatable.

I believe we can say that it would amend the Constitution to a certain point. However, does the Canadian Parliament have the right to do so and is this not in fact its internal Constitution? In my humble opinion, I believe the answer is yes.

[*English*]

The famous decision that everyone quotes, the *Senate Reference*, says that any amendment has to be analyzed with one phrase in mind: Does it in any substantial way affect federal-provincial relationships?

It is difficult to pretend that telling the Governor General that she must fill a vacancy within six months affects in a substantial way the federal-provincial relationship. Therefore, in my humble opinion, this amendment, were it an amendment, would not be illegal.

n'avisait jamais le Gouverneur général et que l'on se retrouvait sans sénateur au bout de dix ans, on abolirait le Sénat de facto. Quelle serait la sanction?

La Cour suprême pourrait-elle dire : étant donné que personne ne bouge, j'émets une injonction pour que le Gouverneur général nomme des sénateurs? Et si le Gouverneur général ne nomme pas de sénateur, je le trouve coupable d'outrage au tribunal. À la limite, cela voudrait dire que la Chambre des lords en Angleterre pourrait trouver Sa Majesté la reine coupable d'outrage au Parlement si elle ne nommait pas de représentants à la Chambre des lords.

C'est un peu comme on dit en diplomatie, la sanction ultime, c'est la guerre. Dans ce cas, la sanction ultime est, à mon humble avis, politique. Et il n'y a pas de mécanismes qui peuvent assurer l'application d'une mesure comme celle-là. Mais il se crée avec les années ce que tout le monde appelle maintenant une convention constitutionnelle. Une fois le processus vécu pendant des années, personne ne s'en démarque.

La Constitution ne parle même pas du Cabinet, du conseil des ministres. Il n'y a pas un gouvernement depuis la Confédération qui fonctionne sans conseil des ministres et la même chose en Angleterre. Il y a des conventions constitutionnelles aussi solides que la loi en autant que le contrat social soit respecté par ceux qui le vivent.

Je pense qu'une législation qui balise l'exercice des pouvoirs discrétionnaires, fussent-ils ceux du Gouverneur général, ne serait pas attaquable sur le plan juridique. Ce serait une législation permise.

L'autre problème est celui de la sanction. Dans notre cas, est-ce que le fait de baliser le pouvoir ou la discrétion du Gouverneur général a pour effet d'amender ou de modifier la Constitution? Et dans notre cas, c'est encore plus précis parce que le projet de loi voudrait qu'il y ait une période de six mois maximum pour procéder au remplacement. Est-ce amender la Constitution par une simple loi d'avoir une disposition comme celle-là, alors que la Constitution dit de temps en temps? Est-ce la même chose que dans les six mois? On peut en discuter.

Je pense qu'on peut dire que cela amende jusqu'à un certain point la Constitution sur ce point. Cependant, est-ce que le Parlement du Canada a le droit de le faire et est-ce qu'il ne s'agit que de la Constitution interne? À mon humble avis, je pense que oui.

[*Traduction*]

La célèbre décision si souvent citée, le *Renvoi concernant le Sénat*, affirme que toute modification doit être analysée à la lumière d'une question : Cela affecterait-il de manière substantielle les relations fédérales-provinciales?

Il serait difficile de prétendre que d'obliger la Gouverneure générale à combler les vacances dans les six mois aurait un effet substantiel sur les relations fédérales-provinciales. Par conséquent, à mon humble avis, cette modification, si elle était faite, ne serait pas illégale.

The Chair: Could you please restate the legal-illegal argument? We have some confusion here about exactly the point you have made, sir.

Mr. Tremblay: Either I am not clear, or the translation is not clear. Those guys are trying to do their job.

The Chair: The translators are wonderful members of the Senate administration.

Mr. Tremblay: I am saying that if such a provision were adopted, and if it were considered as an amendment to the Constitution, I do not think that that amendment would be considered illegal, because it does not affect in any substantial way the federal-provincial relationship. That is my point.

Senator Oliver: Now I understand it.

Mr. Tremblay: I apologize for my poor command of the English language.

The Chair: Are you fishing for compliments?

Mr. Tremblay: I play humble at times. Someone once said that if you keep saying that you are humble, you are just proving that you have every reason to be.

What we all have in the back of our minds, though, is how this single private bill, only a clause or two, fits within the context of the other bill. We cannot erase from our minds the debate that we had in September 2006 on the reform of the Senate. Taken in isolation, the bill has one impact, but taken with everything else, it may raise another dimension. Although I have been called here on this particular piece, I will speak about the other stuff, too.

The reduction from 75 years of age to an eight-year or nine-year mandate becomes a question of degree. The Supreme Court also said that it was legitimate or legal for the federal Parliament acting alone to amend the Constitution to take the lifetime tenure and reduce it to 75 years of age, but at the same time they said that you cannot emasculate, and I have to watch my language here, the system by appointing for two or three years because then it becomes at the will of the government of the day. Then it becomes a question of degree.

Personally, I was not totally convinced, because in the United States, there is a completely different approach. They say lifetime tenure, and that is what it is. It would take three quarters of the states to agree to something else. Judges are appointed. You roll them into the courts in their wheelchairs, and if they do not want to resign, there is nothing that can be done. You just speak louder.

However, here it was decided that it was legal. If it is legal to continue until age 75, why not until age 60 or age 55? Where is the line? Then it becomes a question of degree.

That is why this amendment that is on the table today has to be read in the context of what you do with the rest. That was my point. On the rest, too, it would not be illegal for the Governor General to say, "Before appointing a senator, I would like to have

Le président : Pourriez-vous de nouveau nous présenter vos arguments sur la légalité de la chose? Nous ne les comprenons pas très bien, monsieur.

M. Tremblay : Peut-être me suis-je mal exprimé, ou alors c'est un problème d'interprétation. Les interprètes font de leur mieux.

Le président : Les interprètes sont d'excellents membres de l'administration du Sénat.

M. Tremblay : Je dis que si cette disposition était adoptée, et qu'elle était considérée comme une modification à la Constitution, je ne crois pas que ce serait illégal, puisque cela n'a pas d'incidence substantielle sur les relations fédérales-provinciales. C'était mon argument.

Le sénateur Oliver : Je comprends, maintenant.

M. Tremblay : Veuillez m'excuser pour la piètre qualité de mon anglais.

Le président : Vous péchez par fausse modestie!

M. Tremblay : Je suis parfois modeste. Quelqu'un a déjà dit qu'à force de faire preuve d'humilité, on prouve qu'on a toutes les raisons d'être modeste.

Ce qui nous reste en tête, toutefois, c'est que ce court projet de loi d'initiative parlementaire qui ne compte qu'un ou deux articles s'intègre au contexte de l'autre projet de loi. Nous ne pouvons faire abstraction des débats de septembre 2006 sur la réforme du Sénat. Pris isolément, le projet de loi a un effet, mais dans son contexte, bien d'autres questions sont soulevées. Bien qu'on m'ait demandé de parler strictement de ce projet de loi, je vais parler du reste aussi.

Quand on passe d'une limite d'âge de 75 ans à un mandat de huit ou neuf ans, c'est une question de degrés. La Cour suprême a dit qu'il était légitime, ou légal, pour le Parlement fédéral de modifier unilatéralement la Constitution pour faire passer le mandat à vie à un mandat limité jusqu'à l'âge de 75 ans. Mais elle a aussi dit qu'on ne pouvait émasculer, si vous me passez l'expression, le système de nomination en prévoyant des mandats de deux ou trois ans, ce qui soumettrait le Sénat aux caprices du gouvernement du jour. C'est donc une question de degrés.

Personnellement, je ne suis pas tout à fait convaincu du bien-fondé de la chose, car aux États-Unis, la démarche est tout à fait différente. Il s'agit d'un mandat à vie. Il faudrait que les trois quarts des États s'entendent pour qu'il y ait un changement. Les juges sont nommés. Il faut pousser leurs fauteuils roulants pour les amener dans leurs salles d'audience et s'ils ne veulent pas démissionner, on n'y peut rien. Il faut simplement parler plus fort.

Ici, pourtant, on a décidé que c'était légal. Si le mandat peut être accordé jusqu'à l'âge de 75 ans, pourquoi pas jusqu'à 60 ans ou 55 ans? Comment fixer la limite? C'est une question de degré.

Voilà pourquoi la modification proposée dont vous êtes saisis aujourd'hui doit être considérée dans le contexte qui l'entoure. C'était ce que je tenais à dire. Pour le reste, il ne serait pas illégal pour la Gouverneure générale de dire : « Avant de nommer un

the views of the population of the province from where the senator is supposed to come." It would not be more binding than the judges example I gave a few minutes ago.

Even if you look at the *Reference re Secession of Quebec*, a referendum, where everyone is consulted, cannot have a legislative impact; it is a signal to negotiate, a signal to do something. However, it is not illegal. If it is not illegal to consult the premiers or the people — in fact, it is desirable for the appointment to the Supreme Court of Canada, for instance — it would not be illegal either to say, "Before appointing a senator, I would like to have the views of the people of the province whose interests he is supposed to represent."

That is why there are two aspects. You take it in isolation, or you take it as part of the package that is currently being considered.

As an aside, on May 31, I will be the head of the Québec Bar. I think it has to be clear that no one knew that I would be the leader of the Québec Bar when I was asked to come here in 2006. It is in the same capacity that I am here today. One day, a bar committee could come with another view, but what I am saying today is my personal view.

The Chair: Congratulations. We are doubly honoured, therefore, to have you with us.

Mr. Tremblay: It does not make me more intelligent.

Senator Andreychuk: Thank you for your comments today. Yesterday, we heard a slightly different version, at least in my assessment of it. If the appointment is made, as you said, and if we reduce the tenure from lifetime to age 75, you have given some reasons why that was adequate. However, you also said they did not rule if we had changed it to age 50 or 45. Therefore, age 75 seemed eminently reasonable to support the working of the Senate in that concept.

Now, the argument I think Senator Moore is making is that at some point vacancies cause a problem for the working of the Senate. At first blush, it looks like a similar situation. Therefore, it is within the workings of the Senate to pass this bill.

However, we heard a comment that the fundamental reason senators are here is to represent provinces and minorities, and if you were to in any way tamper or change the appointment process, which is the fundamental essence of representation from provinces, it would be a federal-provincial issue; it would markedly affect the federal-provincial relationship. Their negotiation and their involvement would be needed, and therefore probably a constitutional amendment would be necessary.

Mr. Tremblay: Before coming here, I read what Mr. Pelletier said in 2006. By the way, he wrote that book. I would not say it is the Bible, but it is one of the basic books. His theory is precisely what you are saying.

sénateur, je voudrais avoir l'opinion des citoyens de la province dont ce sénateur est censé provenir. » Ce ne sera pas une contrainte plus grande que celle dont j'ai parlé pour les juges, il y a quelques instants.

Même d'après le *Renvoi relatif à la sécession du Québec*, un référendum qui consiste à consulter toute la population n'a pas d'effet législatif; c'est un signe qu'il faut négocier, qu'il faut faire quelque chose. Il n'est toutefois pas illégal. Il n'est pas illégal de consulter les premiers ministres des provinces, non plus que la population, ce serait même souhaitable pour des nominations à la Cour suprême du Canada, par exemple. Il ne serait pas non plus illégal de dire : « Avant de nommer un sénateur, j'aimerais savoir ce qu'en pensent les citoyens de la province dont il censé représenter les intérêts. »

Voilà pourquoi il y a deux éléments importants. On peut les considérer isolément, ou tenir compte du contexte actuellement envisagé.

En passant, le 31 mai, je deviendrai bâtonnier du Barreau du Québec. Il est clair que personne ne savait que je deviendrais bâtonnier quand on m'a invité ici en 2006. C'est toujours à ce titre que je me présente devant vous aujourd'hui. Un jour, un comité du Barreau présentera un autre point de vue, mais c'est en mon nom personnel que je vous parle aujourd'hui.

Le président : Félicitations. C'est donc un double honneur de vous recevoir aujourd'hui.

M. Tremblay : Je ne suis pas plus intelligent pour autant.

Le sénateur Andreychuk : Merci pour vos propos. Hier, nous avons entendu une opinion un peu différente, du moins d'après mon interprétation. Si la nomination est faite, comme vous le dites, et que le mandat qui était à vie est réduit jusqu'à la limite de 75 ans, c'est justifié d'après les raisons que vous avez données. Vous avez aussi dit que la cour ne s'était pas prononcée sur un changement qui aurait fait passer l'âge limite à 50 ans ou à 45 ans. Par conséquent, l'âge de 75 ans semble tout à fait raisonnable pour le fonctionnement du Sénat, dans ce cadre-là.

L'argument du sénateur Moore, je crois, c'est que le nombre de vacances peut représenter un problème pour le fonctionnement du Sénat. D'emblée, le problème paraît semblable. Ce projet de loi peut donc être adopté compte tenu du fonctionnement du Sénat.

On nous a aussi dit que la raison fondamentale de la présence des sénateurs au Parlement, c'est la représentation des provinces et des minorités et que si on modifie le processus de nomination, qui touche fondamentalement à la représentation provinciale, cela deviendrait une question fédérale-provinciale et aurait un effet marqué sur la relation fédérale-provinciale. La négociation avec les provinces, et leur participation, seraient nécessaires et par conséquent, il faudrait probablement une modification constitutionnelle.

M. Tremblay : Avant de venir ici, j'ai lu ce qu'avait dit M. Pelletier en 2006. En passant, il a écrit cet ouvrage. Je ne dirais pas que c'est la Bible, mais c'est un ouvrage de référence essentiel. Sa théorie concorde précisément avec ce que vous avez dit.

My own view — and I am just trying to be logical — is this: In what way are the provinces better protected by a non-consultation process rather than by pure discretion of the Prime Minister? They are saying that if you start playing with those concepts, it should involve everyone because it is the Canadian fabric. I think that the views of minorities — French Canadians in Quebec, for example — would be better known if there were an electoral process rather than the discretion of the Prime Minister alone in his office talking to a couple of his advisers. There is no crystal clear answer.

Senator Andreychuk: I was referring to the testimony that we received yesterday. We are talking about responsible government. The provinces, or at least the original provinces, coming into the Constitution in 1867 knew exactly what they were doing when they gave the discretion to the Prime Minister.

I would take it one step further: If the provinces did that, they did it for some reason, I have to assume. That discretion was necessary in the eyes of the provinces as well as in the eyes of the federal government. To step in now and say, "Well, we will give you six months in which to appoint," might limit what a prime minister wants to do in an appointment process. He might want to consult the community or segments of the community or he might want to reflect. There might be a reason for deferral, perhaps a host of reasons. Therefore, the discretion that the provinces gave the Prime Minister should not be taken away unilaterally by the Senate.

Mr. Tremblay: My mindset was larger. I was thinking about the election of the Senate. However, you are talking about the bill here.

First, even in that judgment, they say that water has gone under the bridge. Can you imagine the Province of Ontario saying, "The only reason we are joining is because we have an equal number of senators"? Only federal legislation or order-in-councils took in other provinces and added to the mix, thereby reducing Ontario's percentage of the total.

Senator Oliver: There were the Maritimes, Quebec and Ontario.

Mr. Tremblay: Ontario was a third at the time. Now they are 24 out of 105. Did they have a say in that? No. Therefore, if we talk about the original deal, to follow the same logic we should have said, "Ontario, you joined on the basis that you were one third. Do you agree that you will be reduced to one sixth? If you do not agree, it is breaking the deal. Therefore, we will not do it." That happened. We are living with that now.

I agree with you. There are two ways to go about it. You are taking the Latin way, which is like a French garden: it has to be squared. The other way is the English way, with flexibility.

Senator Murray: They muddle through.

Personnellement, et j'essaie d'être simplement logique, je demanderais de quelle façon un processus de non-consultation protège mieux les provinces que la simple discrétion du premier ministre? On nous dit que si on commence à jouer avec ce concept, tous doivent y participer parce que cela fait partie du tissu canadien. Je pense que le point de vue des minorités comme celles des Canadiens français au Québec serait mieux connu s'il y avait des élections qu'avec le pouvoir discrétionnaire du premier ministre seul, ou sur les conseils de quelques collaborateurs. Il n'y a pas de réponse manifeste.

Le sénateur Andreychuk : Je parlais du témoignage entendu hier. Nous parlions de gouvernement responsable. Les provinces, du moins celles qui ont soumis la Constitution de 1867, savaient exactement ce qu'elles faisaient en accordant ce pouvoir discrétionnaire au premier ministre.

J'irais encore plus loin : si les provinces ont accepté cela, ce doit être pour de bonnes raisons. Ce pouvoir discrétionnaire était nécessaire, aux yeux des provinces autant qu'aux yeux du gouvernement fédéral. Si on intervient en disant au premier ministre que désormais, il n'a que six mois pour procéder à une nomination, on risque de limiter ce qu'il peut faire dans le cadre du processus de nomination. En effet, il aurait pu vouloir consulter la communauté ou des groupes de la population, ou il aurait pu vouloir réfléchir davantage. Ces délais sont peut-être justifiés, peut-être même par de nombreuses raisons. Par conséquent, le Sénat ne devrait pas retirer unilatéralement le pouvoir discrétionnaire que les provinces ont accordé au premier ministre.

M. Tremblay : Mon point de vue était plus large. Je pensais à l'élection des sénateurs. Mais vous parliez plutôt de ce projet de loi.

Tout d'abord, même dans cette décision, les juges ont dit que le temps aurait passé. Pourriez-vous imaginer que l'Ontario dise : « La seule raison d'entrer dans la Confédération, c'est pour avoir un nombre égal de sénateurs »? C'est par loi fédérale ou décrets en conseil qu'ont été ajoutées d'autres provinces, réduisant ainsi le pourcentage de sénateurs de l'Ontario.

Le sénateur Oliver : Il s'agissait des Maritimes, du Québec et de l'Ontario.

M. Tremblay : L'Ontario avait le tiers des sénateurs, à l'époque. Elle en a maintenant 24 sur 105. L'Ontario a-t-elle eu son mot à dire? Non. Dans le cas de cette entente initiale, suivant la même logique, il aurait fallu dire : « Vous, de l'Ontario, vous avez accepté l'union à la condition d'avoir le tiers des sénateurs. Acceptez-vous de n'en avoir que le sixième? Dans la négative, l'entente sera rompue. Par conséquent, nous ne le ferons pas. » Vous savez comment les choses se sont passées, et nous vivons avec les conséquences.

Je suis d'accord avec vous. Il y a deux démarches possibles. Vous optez pour la manière latine, qui ressemble à un jardin français : tout doit être clair et net. Mais il y a aussi la manière anglaise, plus souple.

Le sénateur Murray : On s'en tire malgré la conclusion.

Mr. Tremblay: Yes, muddle through; that is well stated. Both are beautiful.

Senator Andreychuk: I rather like the French garden. I still come back to this point that you are taking the logic from one point of view, but you also asked what is the sanction, and you said that ultimately the sanction will be political. To go back to the arguments that I was pondering last night, the discretion was given totally to the Prime Minister. Ultimately, the choice is one that the Prime Minister makes. The sanction will be either an election or some other way in the House of Commons or elsewhere.

Mr. Tremblay: Or the Governor General will dissolve the House.

Senator Andreychuk: Exactly; so they would be political ramifications. Therefore, I think the discretion given to the Prime Minister took that into account.

Mr. Tremblay: The problem of sanction bothers me a lot. The difference between a real constitutional amendment and a simple act of the federal government acting alone creates the anguish about what the sanction would be because it is not contained in the Constitution, it is contained in federal legislation. There is no clear answer to any of that.

[*Translation*]

Senator Joyal: My first question is related to the Supreme Court decision on the Senate reference. Could you quote the part of the decision where the Supreme Court says that, as far as the term is concerned, since the court has no specific figure before it, it invites the parties to come back before the court with a specific figure.

Mr. Tremblay: It is not an invitation from the court, but it does not want to make a decision in the absence of this information.

[*English*]

The underpinning of what it is that you want. Are you going to say eight?

[*Translation*]

Senator Joyal: Can you provide that quote?

Mr. Tremblay: I will try to find it.

Senator Joyal: That is one of my questions.

[*English*]

Mr. Tremblay: The imposition of compulsory retirement at age 75 did not change the essential character of the Senate. However, to answer this question, we need to know what change of tenure is proposed.

[*Translation*]

Senator Joyal: Yes, that is exactly what I was looking for. The court having no specific numbers, that is to say on reducing the tenure, states that it cannot make a decision. Before concluding

M. Tremblay : Oui, bien dit. Les deux manières sont admirables.

Le sénateur Andreychuk : Je préfère les jardins français. Revenons à l'un des arguments que vous avez présentés : Vous avez parlé de la logique fondée sur un point de vue, mais vous avez aussi demandé quelle serait la sanction, affirmant qu'il s'agirait ultimement d'une sanction politique. Pour revenir aux arguments auxquels je réfléchissais hier soir, le premier ministre a une discrétion totale. Au bout du compte, c'est lui qui fait les choix. Il subira la sanction par voix électorale ou autrement, à la Chambre des communes ou ailleurs.

M. Tremblay : Ou le Gouverneur général fait aussi dissoudre la Chambre.

Le sénateur Andreychuk : En effet, il y aurait donc des conséquences politiques. Je crois par conséquent qu'on en a tenu compte quand on a donné ce pouvoir discrétionnaire au premier ministre.

M. Tremblay : Le problème de la sanction me préoccupe beaucoup. La différence entre une véritable modification constitutionnelle et une simple loi du gouvernement fédéral adoptée unilatéralement crée une certaine anxiété quant à la sanction, puisqu'elle ne serait pas prévue par la Constitution, mais par une loi fédérale. Il n'y a pas de réponse claire à cette question.

[*Français*]

Le sénateur Joyal : Ma première question est reliée à la décision de la Cour suprême dans la référence du Sénat. Pourriez-vous citer le passage de la décision où la Cour suprême dit que, en ce qui concerne la durée du mandat, la cour n'ayant pas devant elle un chiffre précis, elle invite les parties à revenir devant la cour avec un chiffre précis.

M. Tremblay : Elle n'invite pas, mais dit que si ce n'est pas, elle ne veut pas le faire si elle n'a pas.

[*Traduction*]

Ce qui sous-tend ce que vous voulez. Choisirez-vous huit ans?

[*Français*]

Le sénateur Joyal : Pouvez-vous le citer?

M. Tremblay : Je vais essayer de vous le trouver.

Le sénateur Joyal : C'est une des questions.

[*Traduction*]

M. Tremblay : L'imposition de la retraite obligatoire à 75 ans n'a pas changé le caractère essentiel du Sénat. Mais pour répondre à cette question, il faut savoir quel changement est proposé à la durée du mandat.

[*Français*]

Le sénateur Joyal : D'accord, c'est exactement cela que je voulais. La cour n'ayant pas de chiffres précis, c'est-à-dire de réduction du mandat, dit qu'elle ne peut pas se prononcer. Avant

absolutely that reform or a reduction in tenure would be legal, the fundamental question must be asked as to whether or not this has the effect of altering one of the critical features of the institution.

Mr. Tremblay: You are absolutely right; there is a magic number, I do not know what it is, perhaps there is more than one, but there is a point at which the court would say: oh! That changes the essential character of the institution.

Senator Joyal: Yes, very well. My second point is on the subject of assent. As you have well said, in my opinion, let us push the reasoning to the absurd that is to say to its extreme: the Prime Minister does not appoint anyone to the Senate for 10 years. The institution would no longer be able to function normally, as it was designed, according to the features given to it under the Constitution. Would it not come to a point where the legislative process itself would become illegal, unconstitutional, based on section 91. I quote:

> It shall be lawful for the Queen, by and with the advice and consent of the Senate and the House of Commons. . .

From the moment that the Senate can no longer give its consent or an opinion, the legislation that is passed would be tainted with illegality because it would no longer be the concurrent expression of two forms of consent. Therefore, legislation that would be adopted with an empty Senate would, in my opinion, be illegal and the Supreme Court could declare it so.

Mr. Tremblay: I agree. The Supreme Court said that it was essential to have the opinion and consent of both Houses. It is critical. Therefore, unless the answer is clear: can the Parliament of Canada alone abolish the Senate? The answer is no. Even if we achieve the same result that is to say that there would be no more second or first chamber, let us say that there is one House that is missing, the legislation would not be legal.

Senator Joyal: Precisely. So if we push this reasoning to its extreme, the assent is more than political, it is also constitutional, that is to say that the very exercise of legislative power would be tainted.

Mr. Tremblay: Tainted.

Senator Joyal: Tainted by fundamental irregularities.

Mr. Tremblay: You would have a Parliament, a House of Commons that would be sitting, a government in power whose every piece of legislation introduced would always be illegal, and in fact the Governor General would refuse to give them assent. That is one scenario.

Senator Joyal: We understand each other.

Mr. Tremblay: They have to go to the Senate.

Senator Joyal: Not always, they can be sanctioned in his or her office.

Mr. Tremblay: I am letting my age slip.

Senator Joyal: There is legislation that framed royal assent, that was passed validly by the Parliament of Canada and is now in effect.

de pouvoir conclure de façon absolue que la réforme ou la réduction du terme serait légale, il faut se poser la question fondamentale si cela a pour effet d'affecter une des caractéristiques essentielles de l'institution?

M. Tremblay : Vous avez absolument raison; il y a un chiffre magique, je ne sais pas lequel, peut-être plus qu'un, mais il y a une limite sous laquelle la Cour dirait : oh! cela change le caractère essentiel de l'institution.

Le sénateur Joyal : D'accord, très bien. Mon deuxième point est au sujet de la sanction. Comme vous dites bien, à mon avis, poussons le cas à l'absurde, c'est-à-dire à l'extrême : le premier ministre ne nomme personne au Sénat pendant dix ans. L'institution n'est plus en mesure de fonctionner comme normalement elle était conçue, selon les caractéristiques qu'on lui attribue dans la Constitution. Est-ce qu'il n'arriverait pas à un point où le processus législatif lui-même serait illégal, inconstitutionnel, sur la base de l'article 91. Je lis cet article :

> Il sera loisible à la Reine, de l'avis et du consentement du Sénat et de la Chambre des communes.

À partir du moment où le Sénat ne peut plus donner son consentement ou un avis, la loi adoptée serait entachée d'illégalité parce qu'elle ne serait pas l'expression concurrente de deux consentements. Donc, une loi qui serait adoptée avec un Sénat vide serait, à mon avis, une loi illégale et la Cour suprême pourrait la déclarer illégale.

M. Tremblay : Je suis d'accord. La Cour suprême a dit que c'était essentiel d'avoir l'avis et le consentement des deux Chambres. C'est essentiel. Donc, là où la réponse est claire : est-ce que le Parlement du Canada peut seul abolir le Sénat? La réponse est non. Mais si on en arrive au même résultat à savoir qu'il n'y a plus de deuxième Chambre ou de première, il manque une Chambre, disons, la législation ne serait pas légale.

Le sénateur Joyal : Exactement. Donc si on pousse le raisonnement à l'extrême, la sanction est plus que politique, mais aussi constitutionnelle, c'est-à-dire que c'est l'exercice même du pouvoir législatif qui serait entaché.

M. Tremblay : Entaché.

Le sénateur Joyal : Entaché d'irrégularités fondamentales.

M. Tremblay : Vous auriez un Parlement, une Chambre des communes qui siégerait, un gouvernement en place dont toutes les lois proposées seraient toujours illégales, d'ailleurs le Gouverneur général refuserait de les sanctionner. Ce serait un cas.

Le sénateur Joyal : On se retrouve.

M. Tremblay : Il faut qu'il vienne au Sénat.

Le sénateur Joyal : Pas toujours, il peut les sanctionner dans son bureau.

M. Tremblay : Je trahis mon âge.

Le sénateur Joyal : Une loi a encadré la sanction royale, qui a été adoptée par le Parlement du Canada validement et qui est maintenant en vigueur.

Mr. Tremblay: It is interesting that you say that; that means framing royal assent, which means that if we can frame royal assent, we can frame many other things as well.

Senator Joyal: That is what I believe. There are many less important things than royal assent that we could frame.

The third question I wanted to ask you concerns section 42(1)(*b*) of the Constitution Act of 1982. If you had the opportunity to read the testimony of the professor who appeared yesterday, it is on page 71. I will read this section with you:

> Any amendment to the Constitution of Canada dealing with the following issues is made pursuant to section 38(1).

That is the 7/50 rule.

> (*b*) the powers of the Senate and the method of selecting Senators;

The issue, as the professor pointed out in his presentation, is to know what the method of selecting senators is. How is this selection method defined? What would change the method of selecting senators? If we were to change any element of the method of selecting senators, we would find ourselves bound by the general formula in section 38(1), that is to say the 7/50 formula. You said earlier on during your presentation that the Prime Minister may consult whomever he wishes.

But the Supreme Court was very clear in the reference that you mentioned to wit that the election of senators would form a chamber other than the one designed at the outset by the Fathers of Confederation. It would therefore be a basic change in the character of the institution and on that basis, it would necessarily come under section 38(1). In what way can we define the method of selection of senators in your opinion?

Mr. Tremblay: I will start with the drafting of section 42. Look at the capitals. Any amendment of the Constitution of Canada. That means we cannot touch this text without using section 38(1).

It means that I cannot and that there would be no constitutional duty to act one way rather than another. I have not dealt with that, but we are at a prior stage; there is no constitutional obligation for the Governor General to consult with anyone, even by referendum or election, regardless of the means. Is there any constitutional impediment to him obliging himself to consult in such a way? What requires the process you are referring to would be someone wanting to alter this text in the same way that we did when we moved from lifetime appointments to a reduction to 75 years. But if the Governor General were to say before taking decision A or decision B, that I accept popular consultation that will not be constitutionally binding, but that would be a consultation through the constitutional lens, I think that would be as legal as the judicial appointment committees.

Senator Joyal: And judicial appointment committees, as you know, do not limit the prerogative of choosing candidates that are on the list or not. There was a Minister of Justice, Mr. Rock,

M. Tremblay : C'est intéressant ce que vous dites; cela veut dire encadrer la sanction royale, cela veut dire que si on peut encadrer la sanction royale, on peut encadrer bien des choses.

Le sénateur Joyal : C'est ce que je crois. Il y a bien des choses moins importantes que la sanction royale qu'on peut encadrer.

La troisième question que je voudrais vous poser est relative à l'article 42(1)*b*) de Loi constitutionnelle de 1982. Si vous avez eu l'occasion de lire le témoignage du professeur qui a comparu hier, c'est à la page 71. Je lis cet article avec vous :

> Toute modification de la Constitution du Canada portant sur les questions suivantes se fait conformément au paragraphe 38(1).

C'est la règle de 7/50.

> *b)* les pouvoirs du Sénat et le mode de sélection des sénateurs;

La question est de savoir comme le professeur l'a souligné dans sa présentation : de quoi est constitué le mode de sélection des sénateurs? Comment définir le mode de sélection des sénateurs? Qu'est-ce qui changerait le mode de sélection des sénateurs? Si on change un élément du mode de sélection des sénateurs, on se trouve sous l'emprise de la formule générale de l'article 38(1), c'est-à-dire le 7/50. Vous y avez fait allusion tantôt dans votre présentation que le premier ministre peut consulter qui il veut.

Mais la Cour suprême a été très claire dans la référence que vous avez mentionnée à savoir que l'élection des sénateurs constituerait une autre Chambre que celle que les pères originaux de la Confédération avaient conçue. Ce serait donc un changement substantiel de la nature de l'institution et sur cette base, on serait nécessairement sous l'emprise de l'article 38(1). En quoi ou comment peut-on définir le mode de sélection des sénateurs d'après vous?

M. Tremblay : Je commence par la rédaction de l'article 42. Regardez les majuscules. Toute modification de la Constitution du Canada. Cela veut dire qu'on ne peut pas toucher à ce texte sans passer par l'article 38(1).

Cela veut dire que je ne peux pas et qu'il n'y aurait pas de devoir constitutionnel d'agir d'une façon plutôt que de l'autre. Je n'ai pas touché à cela. Mais on est un étage plus bas; il n'y aurait pas d'obligation constitutionnelle pour le Gouverneur général de consulter qui que ce soit, même par référendum ou par élection, quelle que soit la façon. Est-ce qu'il y a un empêchement constitutionnel à ce qu'il s'astreigne lui-même à consulter de cette façon? Ce qui requiert le processus dont vous parlez, c'est quelqu'un qui veut toucher à ce texte de la même façon qu'on l'a touché lorsqu'on est parti des nominations à vie pour les réduire à 75 ans. Mais si le Gouverneur général dit avant de prendre la décision A ou la décision B, j'accepte une consultation populaire qui ne le lierait pas sur le plan constitutionnel, mais qui serait consultative seulement sur le plan constitutionnel, je pense que ce serait aussi légal que les comités de nomination des juges.

Le sénateur Joyal : Et les comités de nomination des juges, comme vous le savez, ne limitent pas la prérogative de choisir un candidat à l'intérieur de la liste ou à l'extérieur de la liste. Il y a eu

who committed to not recommending names that were not on the list, but that was valid only for that particular Minister of Justice as another minister recommended candidates who were not on the list.

Mr. Tremblay: I agree with you.

Senator Joyal: Therefore, the limit is not an imperative limit.

Mr. Tremblay: That is the word you are using. That is why I was talking about assent earlier on.

Senator Joyal: I do not want to get into a debate on Bill C-20 or on Bill C-43, but as soon as you start circumscribing discretion, at this stage, you are putting the method of selection into another context, there is a nuance.

Mr. Tremblay: I agree.

Senator Joyal: There is a difference between the two. And that is where, in my opinion, we are bound by the method of selection. Insofar as the Prime Minister can commit to consulting the provinces or a council of respected citizens, et cetera, through letters or otherwise, in my opinion, there would be no constitutional limitation. But when we start to say: here are the candidates and it will only be one of them, and they will be chosen by popular vote, we are changing the nature of the identification of candidates.

Mr. Tremblay: Let us imagine that the Prime Minister came before a next parliament and said: listen, for that to happen, first a statute needs to be interpreted in such a way as to give it constitutional meaning, rather than the other way around, and for it to be constitutional, it cannot be consultative, even slightly consultative. Just like your justice minister earlier, I am here to tell you right away that I am going to appoint who I want, I am going to look at what people have to say, but I am going to appoint who I want. And how would this be sanctioned?

Senator Joyal: Let me turn the question on its head; let us say that there are three nominees chosen through a consultative vote and the Prime Minister does not appoint any of the nominees and decides, instead, to appoint somebody else. Could one of the individuals who has a legal basis as a nominee, given that this would be a parliamentary statute, could such an individual not go before the courts and say I am one of the three nominees and under the act, the Prime Minister had to make his choice from the list of three nominees; and by extension, the Prime Minister has broken the law.

Mr. Tremblay: Well, that brings me back to what I said before. You are taking the argument to the next step.

[*English*]

At the end of the day, how bound would the Governor General be by such legislation?

un ministre de la Justice, M. Rock, qui s'est engagé à ne pas recommander des noms à l'extérieur de la liste, mais cela ne valait pas que pour ce ministre de la Justice puisqu'un autre ministre de la Justice a recommandé des candidats qui ne faisaient pas partie de la liste.

M. Tremblay : Je suis d'accord avec vous.

Le sénateur Joyal : Donc, la limite n'était pas une limite impérative.

M. Tremblay : C'est le mot que vous utilisez. C'est pour cela que je parlais de sanction tantôt.

Le sénateur Joyal : Je ne veux pas entrer dans le débat du projet de loi C-20 ou du projet de loi C-43, mais à partir du moment où vous encadrez de façon limitative la discrétion, à cette étape, vous êtes dans un autre contexte sur le mode de sélection. Il y a une nuance.

M. Tremblay : Je suis d'accord.

Le sénateur Joyal : Entre l'un et l'autre. Et c'est là où, à mon avis, on tombe sous l'emprise du choix de la méthode de sélection. Dans la mesure où le premier ministre s'engagerait à consulter les provinces ou un conseil de citoyens imminents, et cetera, par lettre ou autrement, à mon avis, il n'y aurait pas de limitation constitutionnelle. Mais à partir du moment où on dit : voici les candidats et ce ne seront que ceux-là et ils seront déterminés par un vote populaire, on a changé la nature de l'identification des candidats.

M. Tremblay : Supposons que le premier ministre arrivait à un Parlement subséquent et disait : écoutez, pour que cela ait lieu, d'abord on doit interpréter une disposition législative pour lui donner un sens constitutionnel plutôt que l'inverse et pour que ce soit constitutionnel, cela ne peut être que consultatif à la limite que consultatif. Comme votre ministre de la Justice tantôt, je vous dis tout de suite que je vais nommer qui je veux, je vais regarder ce que les gens vont dire, mais je vais nommer qui je veux. Quelle serait la sanction?

Le sénateur Joyal : Je vous pose la question inverse; à supposer qu'il y ait trois candidats choisis par un vote consultatif et que le premier ministre ne nomme aucun de ces candidats et décide de nommer à l'extérieur de ces candidats. Est-ce qu'une personne qui serait l'un des candidats déterminés par la loi, parce que ce serait une loi du Parlement, ne pourrait pas à ce moment-là aller devant un tribunal et dire qu'il était l'une des trois candidats déterminés et cette loi détermine, prévoyait que le premier ministre devait choisir à l'intérieur de ces trois candidats; le premier ministre est en violation de la loi.

M. Tremblay : Cela revient exactement à ce que je disais tantôt. Vous apportez un raisonnement à un autre niveau.

[*Traduction*]

Au bout du compte, dans quelle mesure les pouvoirs du Gouverneur général sont-ils limités par cette loi?

[*Translation*]

Normally, it is an organization that would have discretion in the matter and establish rules. So an individual could say: you have created these rules and I am dealing with you because you created these rules, and since they are your creation, you are bound by your own rules, whether it be the energy commission or any other body.

I am quite sure someone might make a convincing argument and say to the Governor General: you have agreed to be constrained in giving royal assent to this bill, so you are going to have to follow the rules, otherwise it will not be fair. And the Supreme Court could then say: regardless of the wording, at the end of the day, the appointment of another individual would be lawful because the discretion provided for by the Constitution remains.

The Chair: I apologize, but we do not have much time.

Mr. Tremblay: We could spend two days debating this.

The Chair: You are right.

[*English*]

Senator Di Nino: I want to go back to Senator Joyal's previous comment. It is always interesting to sit as a non-learned counsel at these discussions, which are interesting and educational. Those of us who do not have that training or those skills like to look at it in a more a practical way. Senator Joyal was talking about a situation where, in effect, the Senate would have no members. That is a hypothetical. That is not the issue, not what we are facing today. I do not see what that has to do with this bill, frankly, because we have had situations over the years where there have been more than 14 Senate vacancies, and the Senate has continued to function. I just want to put that on the record.

The question really is at what point in time is those vacancies are an issue. Is it when quorum is no longer available, or is it when there are no senators at all in the Senate?

Mr. Tremblay: Or no one wants the job?

Senator Di Nino: Or no one wants the job. That could well be, Mr. Tremblay.

Mr. Tremblay: It is absolutely true that when you push it to the absurd, there is no answer. If no one respects or fulfils their constitutional obligation, if the director general for elections does not call an election even if the House is dissolved, if the Supreme Court decides never to render any judgments, it is total chaos. You have places where the legislation was perfect but no system is functioning. You need to take people in good faith and assume that the Prime Minister will do his constitutional job. At one point, the Governor General should dissolve the House if nothing happens there. However, if the Governor General does not do his or her job, who dis-appoints the Governor General? You could create a scenario where there is no country any more. I agree with that.

[*Français*]

Là, c'est normalement un organisme qui aurait discrétion et qui adopte des règles. Le citoyen dit : vous avez adopté des règles et je m'adresse à vous parce que vous avez adopté des règles et si vous avez accepté d'adopter ces règles, vous êtes lié par vos propres règles, que ce soit la commission de l'énergie ou autre.

Je suis convaincu que quelqu'un pourrait proposer un argument passablement convaincant où il dirait au Gouverneur général : vous avez accepté d'être limité en donnant la sanction royale à cette loi, vous allez donc suivre ces règles ou ce n'est pas juste. La Cour suprême pourrait alors dire : quel que soit le choix des mots, à la fin, la nomination d'un autre ne serait pas invalide parce que la discrétion donnée par la Constitution n'a pas été enlevée.

La présidente : Je suis désolée, mais nous sommes limités dans le temps.

M. Tremblay : On pourrait passer deux jours sur ce débat.

La présidente : Justement.

[*Traduction*]

Le sénateur Di Nino : Revenons à ce qu'a dit tantôt le sénateur Joyal. Il est toujours intéressant d'écouter ces discussions en profane. Elles sont intéressantes et édifiantes. Pour ceux d'entre nous qui ne sommes pas juristes et qui n'avons pas ces compétences-là, il faut voir la chose d'un œil pratique. Le sénateur Joyal parlait d'une situation hypothétique où le Sénat n'aurait plus de sénateur. C'est une hypothèse. Ce n'est pas le problème que nous avons actuellement. Je ne vois pas ce que cela a à voir avec ce projet de loi, bien franchement, parce qu'au fil du temps, il est arrivé qu'il y ait plus de 14 vacances au Sénat sans que cela empêche le Sénat de fonctionner. Je tenais à le dire pour les besoins du compte rendu.

Ce qu'il faut savoir, c'est à quel moment ces vacances posent problème. Est-ce lorsqu'on ne peut plus avoir de quorum? Est-ce lorsqu'il n'y a plus de sénateur au Sénat?

M. Tremblay : Peut-être que personne ne veut le poste.

Le sénateur Di Nino : Peut-être bien. C'est fort possible, monsieur Tremblay.

M. Tremblay : Il est vrai que si on pousse l'argument jusqu'à bout, il n'y a pas de réponse. Si personne ne remplit cette obligation constitutionnelle, si le directeur général des élections ne déclenche pas d'élections même si le Parlement est dissous, et si la Cour suprême décide de ne plus rendre de jugements, c'est le chaos total. Il y a en effet des lois parfaites qui existent mais aucun système ne permettant de les mettre en œuvre. Il faut présumer que tous sont de bonne foi et que le premier ministre assumera ses responsabilités constitutionnelles. À un moment donné, le Gouverneur général devra dissoudre le Parlement si rien ne se passe. Toutefois, si le Gouverneur général n'assume pas ses responsabilités, qui destitue le Gouverneur général? Il se pourrait en effet que plus rien ne fonctionne au pays. Je suis d'accord avec vous.

It was all intellectual as to why would it be illegal for the government or Parliament to adopt legislation that would limit the discretion of the Governor General. There were 14 Senate vacancies for years, and at one point, in order to have a piece of legislation passed — for free trade, I think — eight new senators were appointed.

Senator Di Nino: You will agree that that argument will not really impact on this bill. That may happen many years from now, but my suggestion is it will probably never happen.

We are looking at improving the institution. I cannot see how Bill S-224 would be seen as an improvement on the Senate itself. That there are vacancies is an everyday fact of life. Sometimes there are three vacancies. In the 1980s, there were 24 or 26 vacancies and the institution still functioned.

Mr. Tremblay: There is, somewhere, a duty to appoint people to a vacant job. The question is where and when.

Senator Di Nino: Exactly.

Mr. Tremblay: For instance, you have sometimes had vacancies that impacted the Senate to the point where the Chief Justice intervened. There are not supposed to be too many communications between the Prime Minister and the Chief Justice, but it is now dysfunctional because we need someone.

However, where is the sanction? If the sanction is political, and if a Prime Minister does not fulfil his constitutional obligations, what can we do? A case before a court in Quebec could sometimes take months and months. Now, people have learned that it is important for the public to have a full band so that people can have their cases heard, and there is less of that.

However, what do you do if the government does not appoint judges, and people wait for years before their cases are heard? You make a big scene and you defeat the government. This bill wants to give a delay of about six months, a year.

Senator Milne: Mr. Tremblay, to get back to the bill that is before us, in answer to the question of what recourses are possible if a Prime Minister is not fulfilling his constitutional duty to appoint senators, you have said that they are political. I believe the purpose behind this bill, and Senator Moore can certainly tell you exactly, is to address the fact that we now have 13 vacancies in the Senate. By the end of next year there will be 30, and that will definitely affect how the Senate is able to perform its constitutional duty.

How do we force a Prime Minister, who is bound by law to stay in office until at least the next election, for which he has already set the date in legislation?

Mr. Tremblay: Is that constitutional?

La discussion sur la question de savoir s'il serait illégal pour le gouvernement ou le Parlement d'adopter une loi qui limiterait le pouvoir discrétionnaire du Gouverneur général était théorique. Pendant des années, 14 postes de sénateur sont restés vacants jusqu'à ce que, pour faire adopter un projet de loi particulier — sur le libre-échange, je crois — on a nommé huit nouveaux sénateurs.

Le sénateur Di Nino : Vous conviendrez que cet argument n'a pas véritablement d'incidence sur ce projet de loi. Cela pourrait se produire un jour, dans un avenir éloigné, mais selon moi, ça ne se produira jamais.

Nous voulons améliorer l'institution du Sénat. Or, je vois mal comment le projet de loi S-224 améliore le Sénat comme tel. Il arrive que des postes soient vacants, c'est une réalité. Parfois, trois postes sont vacants. Dans les années 1980, il y a eu 24 ou 26 vacances et ça n'a pas empêché le Sénat de fonctionner.

M. Tremblay : Le devoir de combler ces postes vacants existe. La question est de savoir à qui cette tâche incombe et à quel moment.

Le sénateur Di Nino : En effet.

M. Tremblay : Ainsi, il est arrivé qu'il y ait des vacances au Sénat qui avaient des conséquences telles que le juge en chef a cru bon d'intervenir. Le premier ministre et le juge en chef ne sont pas censés avoir des communications régulières, mais leur relation est maintenant dysfonctionnelle parce qu'il faut quelqu'un.

Toutefois, quelle est la sanction? Si la sanction est politique et si le premier ministre n'assume pas ses obligations constitutionnelles, que pouvons-nous faire? Une cause pouvait rester aux mains des tribunaux au Québec pendant des mois et des mois jusqu'à ce qu'on comprenne qu'il fallait doter tous les postes de juges pour que les justiciables puissent se faire entendre par les tribunaux, et les délais sont maintenant plus courts.

Toutefois, que pouvez-vous faire si le gouvernement ne comble pas les postes de juge et que, en conséquence, les gens attendent des années pour faire entendre leurs causes? Vous protestez et vous faites tomber le gouvernement. Ce projet de loi prévoit une période de six mois à un an.

Le sénateur Milne : Monsieur Tremblay, revenons au projet de loi dont nous sommes saisis. En réponse à la question sur les recours qui existent si le premier ministre se soustrait à sa responsabilité constitutionnelle de combler les postes de sénateur, vous avez dit que les recours sont politiques. Selon moi, et le sénateur Moore pourra vous le confirmera, ce projet de loi vise à faire en sorte que les 13 postes actuellement vacants soient comblés. D'ici la fin de l'an prochain, il y aura 30 vacances au Sénat, et cela aura certainement une incidence sur la capacité du Sénat d'assumer ses devoirs constitutionnels.

Comment pouvons-nous forcer le premier ministre à agir? La loi l'oblige à rester en poste au moins jusqu'aux prochaines élections, lesquelles se tiendront à une date qu'il a déjà fixée dans une loi.

M. Tremblay : Cette loi est inconstitutionnelle?

Senator Milne: Good question. You are the expert. Let us talk about that very issue, then.

If this bill becomes law and is violated in the future, would the penalties have to be similar in nature to what would be faced if this recent law about fixed election dates is violated in the future?

Mr. Tremblay: I think a court would say that it is mandatory or directory, but it would not oust the Prime Minister from office if he did not do that. We come back to the issue of sanction. What is the sanction?

Senator Milne: Your third point was whether this affects the federal-provincial balance of power? Right now we have provinces and one territory with no representation in the Senate whatsoever. We have a province with only 50 per cent representation in the Senate. How do we get a sitting Prime Minister to proceed and appoint some senators before some of us die?

Mr. Tremblay: I am looking around. I think you will be around at the next election.

There is no legal way to do so. The problem is that, when you start touching this thing, other issues are raised. What you are saying could be solved only if we had, for instance, the American system where everybody is elected for a fixed term. Then it is all right. There are no vacancies ever because they are elected for a fixed term.

The other side of the coin is that I do not like piecemeal legislation, where you fix it here, fix it there; but in our country, if you do not do something a bit piecemeal, you do nothing, because it takes a century to move anything, especially in constitutional matters.

Senator Milne: Perhaps especially with this Prime Minister.

Mr. Tremblay: I will not go there. I want to be appointed to the Senate.

Senator Joyal: You are not running for election.

Mr. Tremblay: I am no longer running. I have been elected now.

Senator Moore: Thank you for being here, Mr. Tremblay. I have a number of questions.

Senator Andreychuk alluded to one reason that she perceived for me to have brought this bill forward, and that is the issue of whether the Senate can function properly with so many vacancies. Senator Milne said that next year there will be up to 30 vacancies.

Yesterday, in his testimony before us, Professor David Smith told us that there is a duty to appoint. The Constitution does not say "may" but "shall." Do you agree with that?

Mr. Tremblay: Yes, but the problem is when.

Le sénateur Milne : Excellente question. C'est vous l'expert. Parlons donc de ce point.

Si cette mesure législative devient loi et qu'elle fait l'objet d'une violation, les peines devraient-elles être de même nature que celles dont on est passible si on viole la loi adoptée récemment sur les élections à date fixe?

M. Tremblay : Selon moi, le tribunal devant trancher déclarerait que cette mesure exprime une obligation ou une directive, mais que le premier ministre ne serait pas destitué s'il ne se conformait pas à la loi. Cela nous ramène à la question de la sanction. Quelle est la sanction?

Le sénateur Milne : Vous avez aussi évoqué l'équilibre des pouvoirs entre le gouvernement fédéral et les provinces. Actuellement, un territoire et des provinces n'ont aucun représentant au Sénat. La moitié des postes de sénateur qui reviennent à une province en particulier sont vacants. Comment pouvons-nous inciter le premier ministre à nommer des sénateurs avant que certains d'entre nous meurent?

M. Tremblay : Je regarde autour de moi et je suis convaincu que vous serez tous encore au Sénat aux prochaines élections.

En droit, il n'y a pas de recours. Le problème, c'est que dès qu'on tente d'intervenir, on soulève d'autres questions. Nous pourrions résoudre le problème que vous signalez si notre régime était semblable à celui des Américains où tous sont élus pour un mandat fixe. Dans un tel système, cela serait possible. Il n'y a jamais de vacance parce qu'il y a des élections à date fixe.

En revanche, l'approche fragmentaire ne me plait pas. Adopter une mesure législative pour régler ce problème, puis une autre pour régler cet autre problème ne fonctionne pas au Canada parce qu'il faut près d'un siècle pour changer quoi que ce soit, surtout en matière constitutionnelle.

Le sénateur Milne : C'est peut-être encore plus vrai pour le premier ministre actuel.

M. Tremblay : Je préfère ne pas répondre. Je veux devenir sénateur.

Le sénateur Joyal : Vous n'êtes pas candidat aux élections.

M. Tremblay : Plus maintenant. J'ai été élu.

Le sénateur Moore : Merci d'être venu, monsieur Tremblay. J'ai plusieurs questions à vous poser.

Le sénateur Andreychuk a fait allusion à une raison qui m'aurait amené, selon elle, à présenter ce projet de loi. Il s'agit de la question de savoir si le Sénat peut fonctionner convenablement quand il y a tant de vacances. Le sénateur Milne a fait remarquer que, d'ici l'an prochain, il y aura 30 postes vacants.

Hier, lors de son témoignage, le professeur David Smith nous a affirmé qu'il existe un devoir de nommer les sénateurs. La Constitution dit bien « mandera (...) au Sénat (...) des personnes », et non pas « pourra mander »; n'est-ce pas?

M. Tremblay : En effet, mais le problème est de savoir à quel moment.

Senator Moore: Exactly. When a vacancy occurs.

Senator Murray: Section 32 states: "When a Vacancy happens."

The Chair: How do you reconcile sections 24 and 32? Section 24 says "from Time to Time" and section 32 says "When a Vacancy happens."

Mr. Tremblay: This is inconsistent. If it is "from Time to Time," what does that mean? Was it only applicable at the beginning because after that it was only vacancies?

The Prime Minister could have taken 10 years at the beginning of the Confederation because it is "from Time to Time," but the minute you have someone, there is a "shall."

Senator Murray: "When," yes.

Mr. Tremblay: But is that the following day?

Senator Murray: That is what we are trying to determine.

Mr. Tremblay: Section 33 is also very interesting. It is even more inconsistent. If it is totally discretionary on the part of the Prime Minister or the Governor General to appoint a senator, how is it the business of the Senate to decide that a senator is not qualified?

Senator Moore: I do not know, but can I get back to the bill? You hinted that if this bill became law and the Governor General did not respect it, there would be no way to sanction a failure to comply except by way of public sanction or general election. Yet, such a provision already exists with respect to the House of Commons, where the Governor General is obliged by statute to exercise the prerogative in 180 days. Why should the same not apply to the Senate?

Mr. Tremblay: That is fine if the act says it must be done within six months. My point was, whether it was the one you just quoted or the one you proposed, what is the sanction if the Governor General does not. It is not particular to that case; it is a general political system.

Senator Moore: I am not happy with governments of any stripe not having filled these vacancies. I will touch on the House of Commons aspect of my bill in a moment. I do not care what political stripe — they have all ignored and abused the rights of the people to have their proper constitutional representation in a timely way in both Houses. I do not think that years and years of waiting are right. I do not think that is what the Fathers of Confederation contemplated. In a modern democracy, I do not think it is reasonable to expect that that is what should prevail.

Based on your approach, would you say that Parliament was making a constitutional amendment when it created the provision in the Parliament of Canada Act to require the Governor General to cause elections within 180 days?

Le sénateur Moore : Oui, quand un poste devient vacant.

Le sénateur Murray : L'article 32 dit : « Quand un siège deviendra vacant ».

La présidente : Que faites-vous des contradictions entre les articles 24 et 32? L'article 24 dit « de temps à autre » alors que l'article 32 dit « quand un siège deviendra vacant ».

M. Tremblay : Il y a en effet contradiction. Si c'est « de temps à autre », qu'est-ce que cela veut dire? Cela ne s'appliquait-il qu'au début, parce que, ce n'est que par la suite qu'il y a eu des vacances?

Le premier ministre aurait pu attendre dix ans après la naissance de la Confédération pour choisir les sénateurs puisque la Constitution dit « de temps à autre », mais dès que le poste est comblé, s'il devient vacant, il y a une obligation.

Le sénateur Murray : Oui, mais quand?

M. Tremblay : Dès le lendemain?

Le sénateur Murray : C'est ce que nous tentons de déterminer.

M. Tremblay : L'article 33 est aussi très intéressant; il est encore plus contradictoire. Si le pouvoir de nommer un sénateur est un pouvoir discrétionnaire afféré au premier ministre ou au Gouverneur général, comment se fait-il que le Sénat décide qu'un sénateur n'est pas qualifié?

Le sénateur Moore : Je ne sais pas, mais pourrions-nous revenir au projet de loi? Vous avez laissé entendre que, si cette mesure législative devient loi, et que le Gouverneur général ne la respecte pas, il n'y aurait d'autres sanctions que la sanction publique ou des élections générales. Hors, une telle disposition existe déjà pour la Chambre des communes : le Gouverneur général est tenu par la loi d'exercer cette prérogative dans les 180 jours. Pourquoi n'en serait-il pas ainsi pour le Sénat?

M. Tremblay : Ce pourrait l'être si la loi disait que cela doit être fait dans les six mois. Moi, je voulais souligner le fait que, que l'on invoque la disposition que vous venez de citer ou celle que vous proposez, si le Gouverneur général ne s'y conforme pas, il n'y a pas de sanction. Ce n'est pas une situation particulière à ce cas; mais plutôt une situation qui découle du système politique en général.

Le sénateur Moore : Je juge inacceptable que les partis au pouvoir, quels qu'ils soient, n'aient pas comblé ces vacances. Je reviendrai dans un moment à la partie de mon projet de loi qui touche à la Chambre des communes. Je doute que les formations politiques qui ont constitué le gouvernement ont négligé et même enfreint les droits des Canadiens à une représentation constitutionnelle convenable, assurée sans retard dans les deux Chambres. C'est inacceptable d'attendre des années et des années. Je ne crois pas que ce soit ce que les Pères de la Confédération ont souhaité. Dans une démocratie moderne, il apparaît très raisonnable qu'on s'attende à cela.

Selon votre approche, diriez-vous que le Parlement a modifié la Constitution quand il a adopté la disposition de la Loi sur le Parlement du Canada obligeant le Gouverneur général à tenir des élections dans les 180 jours qui suivent?

Mr. Tremblay: No.

Senator Moore: That provision has never been challenged?

Mr. Tremblay: No.

Senator Moore: When I worked with my colleagues to put this bill together, I looked at that. I thought it was a reasonable approach, and that is why I put it in. I wanted to make sure this bill was on the same solid constitutional footing. Do you have any comment about that? Do you think I am on good constitutional footing?

Mr. Tremblay: I agree with you. It is like your royal sanction, which is now regulated by an act of Parliament. Normally with a royal sanction, the Queen decides if and when to do it. That is not how it works. That is why I was pointing at section 42 of the Constitution. That means this piece of paper. If it is something short of touching that piece of paper, then what is it? I suppose that Senator Joyal's argument could be that you are doing indirectly what you cannot do directly. It is tantamount to a constitutional amendment because you are binding yourself to something that does not bind you in the act itself.

Senator Moore: Another reason I brought this bill forward is the whole idea of the right of people to have representation in both Houses. Senator Milne mentioned a vacancy in the Yukon. Those people have not been represented since December 2006. British Columbia has only half of its constitutional complement. Nova Scotia, my province, has three vacancies among our ten seats. I think also of the House of Commons and the abuse of the discretion of the Prime Minister calling by-elections not sequentially. We had the Roberval situation within 13 days, but seats in Toronto have been empty for nine months. Again, the citizens are denied representation.

Mr. Tremblay: That is more political than juridical, but I agree that it is abnormal in our system for portions of the population to be unrepresented for any amount of time. That time should be as short as possible. How can you force someone's hand?

Senator Moore: I am trying to put in place a provision that will respect and respond to the right of the people and not the right of one person — regardless of who occupies the office of Prime Minister. My concern is that the people of Canada have representation in both Houses, which they are entitled to but not getting.

Mr. Tremblay: I am talking about the legality here. You are talking about the political side. As a citizen, what you are saying makes sense.

For example, to call an election is the exclusive prerogative of the Prime Minister. He looks at the polls and feels it is the correct time, whether or not it is good for anyone other than him as he

M. Tremblay : Non.

Le sénateur Moore : Cette disposition a-t-elle déjà été contestée?

M. Tremblay : Non.

Le sénateur Moore : J'ai examiné cette question quand mes collègues et moi travaillions à ce projet de loi. Cela m'est apparu comme une approche raisonnable et c'est pourquoi je l'ai incluse dans mon projet de loi. Je voulais m'assurer que cette mesure législative aurait les mêmes solides fondements constitutionnels. Qu'en pensez-vous? Estimez-vous que les fondements constitutionnels de ce projet de loi sont bons?

M. Tremblay : Oui. C'est comme votre sanction royale qui est maintenant régie par une loi. Normalement, c'est la reine qui décide de donner sa sanction et du moment où elle le fait. Ce n'est toutefois pas ainsi au Canada. C'est pourquoi j'ai attiré votre attention sur l'article 42 de la Constitution, ce document-ci. Si cela ne touche pas la Constitution, qu'est-ce? Le sénateur Joyal ferait probablement valoir que vous tentez de faire indirectement ce que vous ne pouvez faire directement. Cela équivaut à une modification de la Constitution parce que vous vous assujetissez à une obligation qui n'est pas prévue par la loi.

Le sénateur Moore : J'ai aussi présenté ce texte législatif parce que j'estime que les Canadiens ont le droit d'être bien représentés aux deux chambres. Le sénateur Milne a fait mention du poste de sénateur représentant le Yukon qui est vacant depuis décembre 2006. La Colombie-Britannique n'a que la moitié des sénateurs que lui confère la Constitution. Trois des dix postes de sénateur de la Nouvelle-Écosse, ma province, sont sans titulaires. Je pense aussi à ce qui se passe à la Chambre des communes où le premier ministre abuse de son pouvoir discrétionnaire et déclenche des élections partielles quand bon lui semble. Dans Roberval, il n'a fallu que 13 jours pour que des élections soient déclenchées, alors que, dans la région de Toronto, des sièges sont restés inoccupés pendant neuf mois. Encore une fois, les citoyens de ces circonscriptions ont été privés de représentant.

M. Tremblay : Cette question est davantage politique que juridique, mais j'estime aussi qu'il est anormal dans notre système que des gens restent sans représentant pendant une période prolongée. Cette période devrait être la plus brève possible. Mais comment forcer le premier ministre à agir?

Le sénateur Moore : Je voudrais mettre en place une disposition qui respecterait le droit de la population et non pas le droit d'une seule personne — peu importe celui ou celle qui occupe les fonctions de premier ministre. Je tiens à ce que les Canadiens soient représentés à la Chambre haute et à la Chambre basse; c'est leur droit mais on ne le respecte pas.

M. Tremblay : Moi, je m'intéresse plutôt à la légalité de la chose. Vous, vous abordez plutôt le côté politique. Comme simple citoyen, j'estime que ce que vous dites est très logique.

Ainsi, seul le premier ministre jouit de la prérogative de déclencher une élection. Il examine les résultats des sondages et quand il juge le moment opportun, il déclenche une élection pour

tries to get his party re-elected. It has been the British tradition for centuries and that is how it is done. In the U.S., the election date is fixed.

Senator Moore: We heard yesterday that that is not quite the system now. I am thinking of by-elections, which are part of that bill.

Mr. Tremblay: At least when he calls elections, it is elections for everyone.

Senator Moore: Yes.

Senator Murray: I want to go over with the witness the four questions that he posed to see if my understanding of his answers is correct.

First, does this bill affect the complete discretion that you say the Constitution otherwise gives to the Governor General? Your answer to that is yes.

Second, can the Governor General acquiesce in limiting her own discretion? The answer to that is yes.

Third, if the Governor General does so, would the proposed legislation affect the constitutional balance? That is, is this within our power as a Parliament of Canada? The answer to that is yes.

The fourth question is one of sanctions, which, I think you say, are entirely political.

For the record, given the requirement that a government must issue a writ for a by-election within 180 days of the vacancy occurring in the House of Commons, if the government fails to issue that writ, what happens? Does the Governor General, on her own initiative, issue the writ? Or does someone go to court and demand a judgment from the court that would require the government to issue the writ?

Mr. Tremblay: That is very interesting. I know of one case from Australia where an injunction was issued. It is always parliamentary sanction, but in this case, an injunction was issued. There is also the Air Canada case, where the court says, "I order the members of cabinet to advise the Queen to go in that direction." Suppose that they do not. Do they all end up in jail or are they given a fine?

Senator Murray: Presumably, that is the same sanction that would exist with regard to Senate vacancies under Senator Moore's bill.

Mr. Tremblay: But you advise the Governor General, and the Governor General says no. The apex of the pyramid would not respect the law.

Senator Murray: In that case, the Prime Minister resigns and maybe the Governor General cannot get someone else to carry on the business of government.

Mr. Tremblay: A crisis over crisis.

faire réélire son parti, que cela convienne aux autres ou non. Il y a des siècles que c'est la tradition en Grande-Bretagne, où on procède encore ainsi, alors qu'aux États-Unis, les élections se tiennent à date fixe.

Le sénateur Moore : On nous a dit hier que ce n'est plus tout à fait vrai. Je pense aux élections partielles, qui sont aussi prévues dans mon projet de loi.

M. Tremblay : Au moins, quand il déclenche des élections, ce sont des élections générales.

Le sénateur Moore : Oui.

Le sénateur Murray : Je veux revenir à quatre questions qui ont été posées au témoin afin de m'assurer d'avoir bien compris ses réponses.

Premièrement, ce projet de loi entame-t-il le pouvoir discrétionnaire total que, selon vous, la Constitution confère au Gouverneur général? Vous avez répondu oui.

Deuxièmement, le Gouverneur général peut-il accepter qu'on limite son pouvoir discrétionnaire? Vous avez répondu oui.

Troisièmement, dans ce cas, le projet de loi aurait-il une incidence sur l'équilibre constitutionnel? Autrement dit, cela relève-t-il de notre compétence de Parlement du Canada? Vous avez répondu oui.

La quatrième question portait sur les sanctions qui sont, selon vous, entièrement politiques.

Aux fins du compte rendu, puisque le gouvernement est tenu de délivrer un bref électoral au plus tard 180 jours après qu'un siège de député ne devienne vacant, que se passe-t-il si le gouvernement omet de le faire? Le Gouverneur général peut-il, de sa propre initiative, délivrer le bref? Doit-on demander au tribunal de rendre une décision exigeant du gouvernement qu'il délivre le bref?

M. Tremblay : C'est une question intéressante. Je sais que dans un cas, en Australie, le tribunal a rendu une ordonnance d'injonction. Il y a aussi la cause Air Canada où la cour a ordonné aux membres du cabinet de conseiller à la reine d'aller dans ce sens. S'ils ne l'avaient pas fait, auraient-ils été condamnés à une amende ou à une peine de prison?

Le sénateur Murray : Je présume que la même sanction serait prévue pour les infractions au projet de loi du sénateur Moore concernant les vacances au Sénat.

M. Tremblay : Mais si vous conseillez au Gouverneur général d'agir et que celui-ci refuse, c'est l'organe suprême du pays qui ne respecte pas la loi.

Le sénateur Murray : Dans ce cas, le premier ministre remet sa décision et peut-être que le Gouverneur général ne peut trouver personne pour le remplacer.

M. Tremblay : Il y aurait donc une crise qui en provoquerait une autre.

Senator Moore: I want to touch on something Senator Andreychuk alluded to. I think she is saying that this bill would affect the appointment process and thereby impact on the federal-provincial balance of power; therefore it would be improper, and a constitutional amendment would be required. Let me suggest to you that by acquiescing, by not acting, by not having our constitutionally-provided-for membership in the Senate, in my case of Nova Scotia, and other people can speak for their own regions, we do not have our proper balance of power. We do not have our 10 people. It is the not acting that creates the disturbance of the balance that was provided for, which is what I am trying to achieve here.

Mr. Tremblay: I agree. I understand your concerns, and many Canadians share them, I am sure. The issue is that some people say that if you touch this thing a little bit, you have to touch it all with everybody concerned around the table. Is it internal? Can we do it without talking to provinces, or should the provinces be invited to the table to resolve this issue? That is all it is. In principle, I am 100 per cent in favour of having people represented all the time.

Senator Moore: That is what the Constitution says. "Shall" does not mean take a year or two or three. That is not "shall." That is ragging the puck.

The Chair: Colleagues, our next witness will be Professor Errol P. Mendes from the Faculty of Law at the University of Ottawa. We are, as we all know, limited to time. This is another extremely learned witness who has given the Senate the benefit of his understanding and experience more than once. Welcome back, Professor Mendes. You know the drill. You make a statement, and then we get to ask you questions.

Errol P. Mendes, Professor, Common Law Section, Faculty of Law, University of Ottawa, as an individual: Thank you. I was just asked by Mr. Tremblay whether I agree with everything he said. In fact, it is the opposite. I will disagree with almost everything he said.

Thank you, Madam Chair, for inviting me. It is an honour to discuss with you some of the most critical issues facing the Senate of Canada.

I will be addressing only the part of Bill S-224 that seeks to amend the Parliament of Canada Act to require the Prime Minister, within 180 days, to fill a vacancy. I do not have the time in this presentation to address the other aspect of the bill, but I will be happy to comment on it in the question period.

Let me begin by suggesting that anyone directly or indirectly attempting to affect the workings of the Senate in its most important deliberative functions must have foremost in his mind the rulings of the Supreme Court of Canada regarding the scope of what is termed "parliamentary privilege." This area has not cropped up in the discussion but should now be front and centre in your discussions on Bill S-224.

Le sénateur Moore : J'aimerais aborder un point auquel le sénateur Andreychuk a fait allusion. Je crois qu'elle estime que ce projet de loi aurait une incidence sur le processus de nomination et, du coup, sur l'équilibre des pouvoirs entre Ottawa et les provinces. Ce serait inacceptable. Il faudrait alors apporter une modification à la Constitution. À mon sens, en donnant son accord, en s'abstenant d'agir, en ne dotant pas le Sénat de tous les sénateurs que prévoit la Constitution, dans le cas de la province de la Nouvelle-Écosse, par exemple, et dans le cas d'autres régions dont d'autres pourront parler, l'équilibre des pouvoirs est déjà compromis. La Nouvelle-Écosse n'a pas ses dix sénateurs. C'est en s'abstenant d'agir qu'on perturbe l'équilibre qui a été prévu et que je tente d'atteindre avec mon projet de loi.

M. Tremblay : Je suis d'accord. Je comprends vos préoccupations et je suis certain que bien des Canadiens les partagent. Cependant, certains estiment que si vous voulez modifier la moindre petite chose, vous devrez le faire en présence de tous les intéressés. Est-ce un problème interne? Peut-on apporter ce changement sans consulter les provinces ou les provinces devraient-elles être invitées à la discussion sur la solution au problème? C'est tout. En principe, je préfère que la population soit toujours bien représentée.

Le sénateur Moore : C'est ce que dit la Constitution. L'emploi du présent ou du futur de l'indicatif ne signifie pas qu'on peut attendre un an, deux ou trois. Ce n'est pas ainsi qu'on respecte l'esprit et la lettre de la Constitution.

La présidente : Chers collègues, notre témoin est maintenant le professeur Errol P. Mendes, de la faculté de droit de l'Université d'Ottawa. Comme vous le savez, nous disposons de peu de temps. Cet autre savant témoin a déjà fait profité le Sénat de ses connaissances et de son expérience à plus d'une reprise. Soyez le bienvenu, monsieur Mendes. Vous savez comment nous procédons. Vous faites votre déclaration puis il y aura une période de questions.

Errol P. Mendes, professeur, Section de common law, faculté de droit, Université d'Ottawa, à titre personnel : Merci. M. Tremblay vient de me demander si j'abonde dans le même sens que lui. En fait, c'est le contraire, je ne suis d'accord avec pratiquement aucune de ses affirmations.

Merci, madame la présidente, de m'avoir invité. C'est un honneur que de discuter avec vous des enjeux les plus cruciaux qui occupent actuellement le Sénat du Canada.

Je n'aborderai que la section du projet de loi S-224 qui vise à modifier la Loi sur le Parlement du Canada afin d'exiger du premier ministre qu'il comble toute vacance dans les 180 jours qui suivent. Je n'ai pas le temps dans cet exposé de traiter des autres aspects du projet de loi, mais je pourrai le faire pendant la période de questions.

Permettez-moi de commencer en affirmant que toute tentative directe ou indirecte de nuire aux travaux du Sénat dans ses plus importantes fonctions délibératives doivent se fonder sur les décisions de la Cour suprême du Canada en ce qui concerne la portée de ce qui est qualifié de privilèges parlementaires. Ce sujet n'a pas été abordé encore, mais j'estime qu'il devrait être au cœur de vos discussions sur le projet de loi S-224.

In particular, it is hoped that the Prime Minister of Canada and his cabinet take into account a decision of the Supreme Court of Canada, which has not got a lot of attention: *New Brunswick Broadcasting Co. v. Nova Scotia*. In this decision, the Supreme Court held that parliamentary privilege was a set of powers and privileges that are necessary to the capacity to function as legislative bodies and are an integral part of the supreme law of Canada, the Constitution of Canada. The court went even further and suggested that this scope of parliamentary privilege, the Senate's powers, is so important that it is on equal footing with the Charter of Rights and Freedoms. That shows how critical it is for you to focus on the scope of your parliamentary privileges as senators.

I have, before this committee and just yesterday in the House of Commons committee on Bill C-20, indicated that any attempt at Senate reform must clearly address whether or not the parliamentary privileges of the Senate are affected. I drew attention in particular to section 38 and section 42, that the powers of the Senate and the method of selecting senators require consultation by the provinces and require ultimately the amending formula to be followed under section 38, seven provinces representing 50 per cent of the population. How would it be any different if a Prime Minister attempted to undermine the Senate's privileges by not filling in vacancies to such an extent that the work of the Senate in its deliberative functions in committees and elsewhere became extremely difficult and perhaps even started to break down? Could a Prime Minister who was re-elected over a very long period even abolish the Senate by stealth by not appointing any senators? It should be noted that the prerogative and constitutional powers of the Prime Minister can be abolished or amended by statute, which is what Bill S-224 is attempting to do.

Some might argue that the present Prime Minister is beginning a very dangerous journey to undermine the Senate by the number of vacancies that now exist in the Senate. There are presently 14 vacancies in the Senate, three in each of Nova Scotia and British Columbia, so 50 per cent of British Columbia's representation is missing. Think about what the founding parts of Canada would have said at the beginning of Confederation if they were told by then future Prime Minister Sir John A. Macdonald, "At some stage, you will be entitled to only half of your representation." Would we even have a country if that had happened?

I give you a table in the handout showing that these vacancies have existed for a long period of time, even, I stress, going back to the previous, Liberal government. The second-longest one is Viola Léger's vacancy, which is now 1,121 days, and the longest is Eileen Rossiter's vacancy, which is now 1,371 days. In addition, there may be three more vacancies this year and possibly twelve more next year, and Senator Moore has tallied the possibility of at least 30 vacancies by 2009 if not more if other resignations follow.

Plus précisément, il est à espérer que le premier ministre du Canada et son cabinet tiennent compte d'une décision de la Cour suprême du Canada qui a reçu peu d'attention, l'arrêt *New-Brunswick Broadcasting Co. c. la Nouvelle-Écosse*. Dans son jugement, la Cour suprême a conclu que les privilèges parlementaires constituaient un ensemble de pouvoirs et de privilèges nécessaires pour que les assemblées législatives puissent fonctionner et qu'ils font partie de la loi suprême du Canada, soit la Constitution du Canada. La cour est même allée plus loin et a soutenu que, dans le cadre de la Constitution du Canada, ces privilèges, les pouvoirs du Sénat, sont si importants qu'ils sont sur le même pied d'égalité que la Charte canadienne des droits et libertés. Cela démontre qu'il est essentiel pour vous de vous pencher d'abord et avant tout sur la portée de vos privilèges parlementaires comme sénateurs.

Comme je l'ai affirmé devant ce comité et hier devant la Commission de la Chambre des communes à propos du projet de loi C-20, toute tentative en vue de réformer le Sénat doit veiller à ce que les privilèges parlementaires du Sénat ne soient pas violés. J'ai signalé tout particulièrement les articles 38 et 42 selon lesquels les pouvoirs du Sénat et la méthode de sélection des sénateurs doivent faire l'objet de consultations auprès des provinces et du recours à la formule de modification prévue à l'article 38, soit sept provinces représentant 50 p. 100 de la population. En quoi est-ce différent si un premier ministre essaie de porter atteinte aux privilèges du Sénat en ne comblant pas les postes vacants et que, en conséquence, le travail du Sénat, le travail de délibération en comité et ailleurs, deviennent extrêmement difficiles si bien qu'ils puissent même ne plus se faire? Un premier ministre réélu sur une très longue période pourrait-il même abolir le Sénat de façon détournée en ne nommant aucun sénateur? Il est à noter que les prérogatives et les pouvoirs constitutionnels dont est investi le premier ministre peuvent être abolis ou modifiés par la loi. C'est ce qu'on tente de faire avec le projet de loi S-224.

Certains avanceront que le premier ministre actuel entreprend ce périple très dangereux pour miner le Sénat en ne comblant pas les sièges vacants. Il y a actuellement 14 vacances au Sénat, trois pour la Nouvelle-Écosse et la Colombie-Britannique, soit 50 p. 100 de sa représentation. Qu'auraient dit les régions fondatrices du Canada au moment de la création de la Confédération si le futur premier ministre Sir John A. Macdonald leur avait annoncé qu'un jour, elles ne jouiraient que de la moitié de leur représentation? Aurions-nous même un pays?

Dans mon texte figure un tableau montrant les vacances qui remontent à assez longtemps, je le souligne, à l'époque du gouvernement libéral. Les postes qui sont restés vacants le plus longtemps sont, premièrement, celui qu'occupait Eileen Rossiter, pendant 1 317 jours, et deuxièmement celui de Viola Léger, qui a quitté son siège il y a 1 121 jours. Il pourrait y avoir trois vacances de plus cette année et douze encore l'an prochain. Le sénateur Moore a calculé que d'ici 2009, au moins 30 sièges seraient vacants si d'autres ne présentent pas leur démission.

If these vacancies are not filled, in effect, the Senate is being slowly throttled by not only an irresponsible neglect of fundamental, constitutional duties, but potentially becoming unconstitutional behaviour. Would anyone argue that it would be unconstitutional for a very long-serving Prime Minister to, in effect, abolish the Senate by not filling any vacancies until there were no senators left? In effect, this would also be bringing the House of Commons to a standstill, as all legislation requires the approval of the Senate before Royal Assent.

The current Prime Minister has named two senators: Senator Fortier, for political representation in the cabinet, and Senator Brown, who was appointed because it fitted in with the Prime Minister's view of how senators should be appointed to the Senate. This again prompts discussion as to whether this is the real purpose behind not filling vacancies. The threat is, "As long as you do not agree with me as to how senators should be appointed, I will slowly throttle you." If that is the case, it is another indication of unconstitutional behaviour.

I will leave out some of my presentation in the interests of time and go on to page 4. I strongly support Bill S-224 because it is an attempt to get the Prime Minister to do one of his most fundamental, conventional and prerogative constitutional duties: to protect the Parliament of Canada as a proper, functioning, deliberative body. Not requesting the Governor General to fill vacancies as they occur, as you have mentioned, in accord with section 32 of the Constitution Act is, in my view, a violation of the Constitution of Canada.

Therefore, Bill S-224 should be regarded as a reasonable attempt to legislate the parliamentary privilege of the Senate to carry out its most critical functions as a deliberative body in the Parliament of Canada. Given the very long period during which vacancies have been not filled, as I have indicated in my table, the Prime Minister surely has sufficient, fit and qualified persons to come within the 180 days that Senator Moore has recommended.

As Senator Moore also pointed out, if the Parliament of Canada Act has a requirement that the Prime Minister must call a by-election for a vacant House of Commons seat within six months, there is no reason why the other House of Parliament should not have a simple drop-dead date by which the Prime Minister must exercise his prerogative powers to recommend to the Governor General appointments to the Senate.

I must stress that these are prerogative powers. They can be overridden by statute. That statute can be enforced by the courts, and I can give you case law. I am surprised Mr. Tremblay did not understand that a statute can be enforced in the courts by interested parties.

Bill S-224 is a legitimate attempt to statutorily curtail the misuse of the prerogative and conventional powers of the Prime Minister to undermine the proper functioning of the Senate as a

Si ces vacances ne sont pas comblées, de fait, on étouffera graduellement le Sénat non seulement par une négligence irresponsable des devoirs constitutionnels fondamentaux, mais par un comportement qui pourrait bien devenir contraire à la Constitution. Quelqu'un pourrait-il faire valoir qu'il serait inconstitutionnel pour un premier ministre en poste depuis de longues années d'abolir le Sénat en ne comblant pas les sièges vacants jusqu'à ce qu'il n'y ait plus de sénateurs? Cela paralyserait aussi la Chambre des communes étant donné que toutes les lois doivent être approuvées par le Sénat avant de recevoir la sanction royale.

Le premier ministre actuel a nommé deux sénateurs : le sénateur Fortier, pour assurer une représentation politique au cabinet, et le sénateur Brown parce qu'il correspondait à la façon dont, selon le premier ministre, les sénateurs devaient être nommés. Ce qui nous amène à nous interroger si ce n'est pas là la raison pour laquelle les postes vacants ne sont pas comblés. « Tant que vous n'êtes pas d'accord avec moi sur la façon dont les sénateurs doivent être nommés, je vous étoufferai lentement. » Dans ce cas, voilà une autre indication d'un comportement contraire à la Constitution.

Pour gagner du temps, je vais sauter une partie de mon exposé pour aller directement à la page 4. J'appuie vivement le projet de loi S-224 parce qu'il vise à faire en sorte que le premier ministre assume l'une de ses fonctions constitutionnelles fondamentales, à savoir protéger le Parlement du Canada en tant qu'assemblée délibérante fonctionnant bien. Ne pas demander au Gouverneur général de combler les vacances à mesure qu'elles arrivent conformément à l'article 32 de la Loi constitutionnelle, comme vous l'avez mentionné, est en violation, à mon sens, de la Constitution du Canada.

Par conséquent, le projet de loi S-224 doit être vu comme une tentative raisonnable d'inscrire dans une loi les privilèges parlementaires du Sénat afin qu'il puisse exercer sa fonction cruciale d'organisme délibérant au Parlement du Canada. Étant donné que les sièges vacants le sont depuis longtemps, le premier ministre peut sûrement trouver des personnes compétentes et ayant les qualifications voulues pour devenir sénateur dans les 180 jours suivant toute vacance au Sénat, ainsi que l'a recommandé le sénateur Moore.

Comme l'a signalé le sénateur Moore, si la Loi sur le Parlement du Canada exige que le premier ministre déclenche des élections partielles dans les six mois à compter du jour où un siège de député se libère, rien ne justifie que l'autre Chambre du Parlement n'ait pas un délai semblable au cours duquel le premier ministre serait tenu d'exercer ses prérogatives et de recommander au Gouverneur général des candidats au poste de sénateur.

Il faut insister sur le fait qu'il s'agit de pouvoirs de prérogative. Une loi peut y déroger. Cette loi peut être appliquée par les tribunaux, et je peux vous citer la jurisprudence afférente. Je suis étonné que M. Tremblay n'ait pas compris qu'une loi puisse être appliquée par les tribunaux, à la demande des parties intéressées.

Le projet de loi S-224 est une tentative légitime de limiter législativement l'abus de prérogatives ou des pouvoirs conventionnels du premier ministre utilisés dans le but de

deliberative body by not requesting the Governor General to appoint qualified candidates. To allow the present Prime Minister to slowly strangle one of the Houses of Parliament is a profound violation of the fundamental principles of Canadian democracy.

Senator Andreychuk: Thank you, Mr. Mendes. You certainly are provocative. You seem to have based your assessments on some negativity about this Prime Minister. Would that be correct?

Mr. Mendes: If you call negativity attempting to change the Constitution by stealth, then yes, that is negative.

Senator Andreychuk: You have come to the conclusion that it is by stealth and not by incremental means. We have had great debate in this country about the fact that changing the Constitution is not as easy in Canada as elsewhere. We have had reflective, thoughtful debate about whether one does so as a package or incrementally.

Mr. Mendes: Have you had reflective, thoughtful consultation?

Senator Andreychuk: I asked the question and I would like an answer.

Mr. Mendes: I will answer the question. Take Bill C-20 as an example. Have you had any consultation with any of the provinces on Bill C-20? You know that major provinces like Quebec and some of the Atlantic provinces have clearly stated their opposition to Bill C-20. Ontario has as well.

That represents, in my view, more than 50 per cent of the section 38 provinces, the seven provinces. Therefore have you really done that thoughtful, careful consultation with the partners in Confederation? My answer to that is clearly not.

Senator Andreychuk: You are talking about Bill C-20, on which you have just given some evidence to the other side, and you are basing it on that. I am talking about Bill S-224.

You have come to the conclusion, despite the fact that there have been many prime ministers who, for motives, reasons, or objectives that may or may not have been laudable at the time, have not filled vacancies quickly, that this is the crunch moment that this bill is necessary. You are basing that conclusion on future actions. You asked whether a prime minister who is re-elected over a very long period could even abolish the Senate by stealth by not appointing any senators.

We now have elections every four years. We have had witnesses say that the sanction would be political. Therefore, are you basing this on legal premises or on political premises? I would agree with you, if you make your submissions on the political ground that you do not particularly like what is happening now and therefore you want to change it.

Mr. Mendes: I base it on the fundamental legal premises of the Constitution, which include the notion of parliamentary privilege that requires both Houses of Parliament to be able to carry on their functions as deliberative bodies. That is the core of your

miner le fonctionnement du Sénat, un organisme délibérant, en ne demandant pas au Gouverneur général de nommer des candidats adéquats. En permettant au premier ministre d'étouffer doucement l'une des Chambres du Parlement, on porte gravement atteinte aux principes fondamentaux de la démocratie canadienne.

Le sénateur Andreychuk : Merci, monsieur Mendes. Vous êtes certainement un provocateur. Vous semblez fonder votre analyse sur un certain négativisme du premier ministre, n'est-ce pas?

M. Mendes : Si c'est du négativisme d'essayer de changer la Constitution de manière sournoise, alors oui, c'est le cas.

Le sénateur Andreychuk : Vous en venez à la conclusion que c'est une manière sournoise, et non progressive. Au Canada, nous avons eu de grands débats au sujet de la difficulté qu'il y a ici de modifier la Constitution, une difficulté supérieure à celle des pays étrangers. Nous avons eu des débats de réflexion sur la façon de procéder, de manière progressive ou soudaine.

M. Mendes : Vous avez eu des consultations réfléchies?

Le sénateur Andreychuk : J'ai posé la question et je voudrais une réponse.

M. Mendes : Je vais vous répondre. Prenez l'exemple du projet de loi C-20. Avez-vous consulté l'une ou l'autre des provinces au sujet du projet de loi C-20? Vous savez que des provinces importantes comme le Québec et certaines des provinces de l'Atlantique ont clairement manifesté leur opposition au projet de loi C-20. Même chose pour l'Ontario.

À mon avis, cela représente plus de 50 p. 100 des provinces prévues à l'article 38, soit les sept provinces. Par conséquent, peut-on dire qu'il y a eu une consultation réfléchie et rigoureuse des partenaires au sein de la Confédération? Je vous dirai qu'il est clair que ce n'est pas le cas.

Le sénateur Andreychuk : Vous parlez du projet de loi C-20, pour lequel vous venez de témoigner dans un comité de l'autre endroit, et vous vous fondez là-dessus. Je vous parle du projet de loi S-224.

De nombreux premiers ministres, pour des raisons, des motifs ou des objectifs plus ou moins louables se sont traîné les pieds pour combler les vacances au Sénat, auparavant. Pourtant, vous en venez à la conclusion que maintenant, ce projet de loi est nécessaire. Vous fondez cette conclusion sur des mesures futures. Vous vous demandez même si un premier ministre qui a un long mandat pourrait même en venir à abolir le Sénat de manière sournoise, en ne nommant pas de nouveaux sénateurs.

Nous avons maintenant des élections tous les quatre ans. Des témoins nous ont dit que la sanction pour le premier ministre serait d'ordre politique. Pour vos déclarations, vous fondez-vous sur des prémisses juridiques ou politiques? Je comprends que vous puissiez dire, pour des raisons politiques, que vous n'aimez pas particulièrement ce qui se passe maintenant et que vous voulez y remédier.

M. Mendes : Je me fonde sur les prémisses juridiques fondamentales de la Constitution, qui englobent le privilège parlementaire exigeant que les deux Chambres du Parlement puissent fonctionner comme organismes délibérants. C'est au

functions. If, over time, you are deprived of the ability to do that in committees, if you are deprived of the ability to actually scrutinize your constitutional duties in terms of legislation, that could not be more legal. That is part of the fundamental legal constitutional basis of the Senate of Canada.

Senator Andreychuk: That is precisely what I would like you to address. There are 14 vacancies now. Portions of your presentation talk about the future, and we may have a totally different situation in the future which may warrant some action.

Are you saying, from a legal point of view, that 14 vacancies gives legitimacy to Bill S-224, but four vacancies, say, would not?

Mr. Mendes: I will put forward to you, Senator Andreychuk, that one of the fundamental duties of legislatures is to look at not only the present danger but also the future danger. That underlies almost every piece of legislation that you have scrutinized. It would be very unusual for a Senate to focus only on a present danger and not look at the consequences of future dangers arising from legislation.

If it is clear that there is a present future danger, which could arise as close as the end of next year when there may be 30 vacancies, it is clear that the danger then is one that this Senate is correctly apprised of dealing with and putting forward proposals.

Senator Andreychuk: I am asking you at what point those dangers arise. You have showed us the threats that we will not be able to do committees or pass legislation, and so on. I want to know at what point that is. Is it at 14 vacancies that we are now not doing our job and cannot do our job, or is it in the future, and if in the future, at what point?

Mr. Mendes: I will suggest that it is a very present danger for two reasons. First, as I mentioned, if you go back to the 1864 deliberations of the resolutions that created the British North America Act, there was greater focus on the Senate than there was on the division of powers. Part of the deliberations was the representation of the founding provinces in Confederation. Is it not a present danger that British Columbia now has 50 per cent of its representation? Is it not a present danger that the Atlantic provinces, one of the founding partners of Confederation, are down to one or two senators now?

My answer is that, given the founding partners of our Constitution, the present danger exists right now. The lack of the territories not having any representation is a present danger.

Senator Joyal: There is an essential element that we cannot ignore on both the follow up and the questions raised by Senator Andreychuk. In the past there were 12 or 14 vacancies. However, the fundamental difference between then and now is that we currently have a Prime Minister who has stated quite clearly, repeatedly, that he will not recommend to the Governor General until either of two things occurs: either the provinces adopt a

cœur même de vos fonctions. Si, avec le temps, on vous enlève cette capacité de fonctionner en comité, de bien examiner les lois comme l'exige votre devoir constitutionnel, ce serait illégal. Cela fait partie des fondements constitutionnels juridiques du Sénat du Canada.

Le sénateur Andreychuk : C'est précisément ce dont je veux vous entendre parler. Il ya actuellement 14 vacances. Dans votre exposé, vous parliez de l'avenir, quand la situation pourrait être tout à fait différente, et justifierait que des mesures soient prises.

D'un point de vue juridique, diriez-vous que 14 vacances rendent légitime le projet de loi S-224, mais, par exemple, pas quatre vacances seulement?

M. Mendes : Madame le sénateur Andreychuk, je vous répondrais que l'un des devoirs fondamentaux des assemblées législatives, c'est de tenir compte non seulement des risques actuels, mais aussi des risques pour l'avenir. C'est un principe qui sous-tend l'examen de tous les projets de loi dont vous êtes saisis. Il serait très inusité que le Sénat ne se concentre que sur les risques actuels, sans tenir compte des conséquences éventuelles des mesures législatives.

Il est clair qu'il y a un risque à court terme, qui pourrait se présenter dès la fin de l'année prochaine, quand 30 postes pourraient être vacants. Ce risque justifie que le Sénat s'en occupe et formule des propositions.

Le sénateur Andreychuk : Je voulais savoir à quel moment, à votre avis, le risque se présente. Vous avez parlé du risque que les comités ne puissent plus fonctionner ou que nous ne puissions plus adopter des lois, par exemple. Je veux savoir quel est le point critique. Est-ce lorsqu'il y a 14 vacances, est-ce que nous ne pouvons pas déjà faire notre travail, ou est-ce plus tard, et à quel moment?

M. Mendes : Je vous dirais qu'il y a un risque très réel, pour deux raisons. D'abord, je l'ai déjà dit, si nous remontons aux délibérations de 1864 entourant les résolutions qui ont mené à l'adoption de l'Acte de l'Amérique du Nord britannique, on constate qu'on s'y est consacré davantage sur le Sénat que sur la répartition des pouvoirs. Les délibérations ont porté notamment sur la représentation des provinces fondatrices de la Confédération. N'y a-t-il pas actuellement un risque, quand la Colombie-Britannique n'a que 50 p. 100 de sa représentation? N'y a-t-il pas aussi un risque, quand les provinces atlantiques, qui sont des fondatrices de la Confédération, n'ont plus qu'un ou deux sénateurs pour les représenter?

Ma réponse, c'est qu'étant donné les partenaires fondateurs de la Constitution, il y a véritablement un risque, maintenant. Le fait que certains territoires sont sous représentés est un risque.

Le sénateur Joyal : Il y a un élément essentiel dont on ne peut faire fi dans les questions, notamment complémentaires, posées par le sénateur Andreychuk. Autrefois, il y avait 12 ou 14 postes vacants. La différence, actuellement, c'est que nous avons un premier ministre qui a déclaré clairement, à maintes reprises, qu'il ne ferait pas de recommandation à la Gouverneure générale, à moins que deux choses se produisent : que les provinces adoptent

so-called consultation or election of senators, such as the Alberta Election Act, which I think is unconstitutional and invalid; or Parliament adopts a mechanism to "consult" — that is to say, elect senators — which I think is reasonably held by some parliamentarians and senators and by a large number of provinces representing more than 50 per cent of the Canadian population, Quebec, Ontario and New Brunswick and probably Newfoundland, to be a mechanism to change the method of selection of senators under section 42(1)(*b*). This Prime Minister we have now stated that he will not recognize that, holding the institution as a hostage. That is a different situation than a prime minister not caring to appoint. It is not about not caring; rather, there is a specific purpose, which is either to compel provinces or to go in a direction that provinces have stated clearly they question the legality of. Provinces said that if that bill were to be adopted, they would challenge it in court. We are in a different context than just a careless prime minister not bothering about the Senate and not thinking it is important enough in the legislative process.

Mr. Mendes: That is the core of the reason I think your rights as parliamentarians and senators are being undermined in terms of your privileges. If that is on the record — and I am not sure where he said it or when — then it is clear evidence that your parliamentary privileges are being violated.

Senator Joyal: That is why the argument of Senator Andreychuk is valid. We know now, if there is a general election only in October 2009, according to the predictability of retirement — and there is predictability because there is a compelling date of retirement — exactly when this house will be short almost one third of its membership and that some regions will be directly affected under regional representation because a majority of seats will become vacant. That is why I think there is a specific context into which this bill is put, and the bill must be seen and evaluated or analyzed in the political context we are in.

To return to the essential element that you stated, the constitutional element, can Parliament frame a prerogative power? If so, under which conditions? How have the courts interpreted the framing of the prerogative power? This is one of the key questions that underpin section 32 or section 96 of the Constitution. Let us stay with section 32 because I think it is the section of the Constitution that is under consideration in Bill S-224. It is a fundamental issue, it seems to me, that we must be satisfied that Bill S-224 is a reasonable answer to the conditions of the framing of the prerogative.

Mr. Mendes: It is absolutely possible to frame the exercise of the prerogative and a conventional power. It is done all the time. There is nothing to stop Parliament passing statutes that limit or curtail the prerogative powers. That is a clear constitutional principle. Ordinary statutes can override and curtail prerogative powers.

Senator Joyal: In this case, in your opinion, Bill S-224, which in a way is the framing of the prerogative of the Prime Minister to recommend to the Governor General in a specific period of time, is within the Parliament of Canada's capacity to introduce a bill

le processus de soi-disant consultation ou d'élection des sénateurs prévue par la Loi électorale de l'Alberta, qui est à mon avis inconstitutionnelle et sans effet, ou que le Parlement adopte un mécanisme de « consultation », c'est-à-dire d'élections des sénateurs, dont un certain nombre de députés, de sénateurs et beaucoup de provinces représentant plus de 50 p. 100 de la population canadienne, soit le Québec, l'Ontario, le Nouveau-Brunswick et probablement Terre-Neuve-et-Labrador pensent que c'est un mécanisme visant à modifier le mode de sélection des sénateurs prévu à l'alinéa 42(1)*b*). Notre premier ministre a déclaré qu'il ne reconnaissait pas cette méthode, et a pris en otage cette institution. Ce n'est pas la même chose qu'un premier ministre qui ne se donne pas la peine de nommer des sénateurs. Il ne s'agit pas simplement de négligence, c'est délibéré, de manière à forcer la main aux provinces ou pour agir d'une manière dont elles ont clairement contesté la légalité. Les provinces ont affirmé que si le projet de loi était adopté, elles le contesteraient devant les tribunaux. Ce n'est plus le même contexte, il ne s'agit pas d'un premier ministre négligent qui se désintéresse du Sénat, qu'il juge trop peu important au sein du processus législatif.

M. Mendes : C'est principalement la raison pour laquelle je crois que vos droits et privilèges comme parlementaires et de sénateurs sont menacés. S'il l'a dit de manière officielle, et je ne sais trop quand ni où cela a été dit, cela prouve qu'il y a eu atteinte à vos privilèges de parlementaires.

Le sénateur Joyal : Et voilà qui explique la validité de l'argument du sénateur Andreychuk. Si la prochaine élection n'a lieu qu'en octobre 2009, comme on peut prédire les retraites au Sénat, puisqu'il y a pour chacun une date prévue, nous savons très précisément que notre Chambre sera amputée du tiers de sa composition, et que certaines régions seront directement touchées, au niveau de leur représentation régionale, avec une majorité de sièges vacants. Voilà pourquoi je pense que ce projet de loi s'insère dans un contexte précis, et qu'il faut le considérer, l'évaluer et l'analyser dans le contexte politique actuel.

Revenons à l'élément essentiel dont vous avez parlé, l'élément constitutionnel. Le Parlement peut-il accorder un pouvoir de prérogative? Le cas échéant, à quelles conditions? Comment les tribunaux ont-ils interprété les limites à cette prérogative? C'est l'une des questions clés qui touche les articles 32 et 96 de la Constitution. Tenons-nous-en à l'article 32, l'article de la Constitution qui est modifié par le projet de loi S-224. C'est une question fondamentale, à mes yeux. Nous devons nous assurer que le projet de loi S-224 est une solution raisonnable pour limiter cette prérogative.

M. Mendes : Il est absolument possible d'accorder la prérogative et le pouvoir conventionnel. Cela se fait couramment. Rien n'empêche le Parlement d'adopter des lois qui limitent ou réduisent la prérogative. C'est un principe constitutionnel clair. Les lois ordinaires peuvent limiter la prérogative.

Le sénateur Joyal : Vous pensez donc que le projet de loi S-224, qui est d'une certaine façon le cadre de la prérogative du premier ministre à recommander des nominations à la Gouverneure générale, en lui donnant des délais précis, respecte la capacité du

and to accept a bill that would limit the time frame within which the Prime Minister exercises a prerogative to recommend to the Governor General a candidate for a Senate position.

Mr. Mendes: Absolutely. If you go into the historical background of the prerogative powers, the reason Parliament in Great Britain came into existence was to curtail the prerogative powers of the monarch. That is the role of ordinary statutes, to reflect the democratic will of the people to determine the residual power left to the monarch. This is one more example of that. It happens all the time. I do not understand what the problem is in terms of the ability of Parliament to limit or curtail the exercise of the prerogative power.

Senator Joyal: An argument can be made to the contrary, because before Confederation there was an elected legislative council. In other words, they framed the prerogative of appointment of legislative counsellors when Confederation took place. When the British North America Act was adopted, the prerogative was reinstated with a certain number of limitations that we have in terms of age, qualification and so on.

In other words, we can do and undo the prerogative that might be the privilege or the purview of the Crown.

Mr. Mendes: Absolutely. Keep in mind that the very office of the Prime Minister is a conventional device, apart from one very tiny reference to it in the 1982 Constitution. The entirety of our system of responsible government is, in some respects, based both on conventions and prerogative powers, but that has not stopped us, over the history of this country and over the history of Great Britain, to legislate parameters to that.

Senator Joyal: In your opinion, at which point would the framing of the prerogative of the Prime Minister affect the position of the Governor General? As you know, section 41 of the Constitution provides that the unanimity rule applies if we are touching the office of the Queen. At which point does a change in the prerogative under section 32 affect the office of the Queen, that is, the Governor General?

Mr. Mendes: In my view, you are not so much affecting the prerogative of the Governor General. Keep in mind that, while she makes the appointment, it is the recommendation part that you are dealing with right now. That is purely a conventional power of the Prime Minister. There is nothing to stop you from legislating on the conventional aspect of the appointment process to the Senate.

Senator Joyal: In your opinion, this bill does not affect the power of the Governor General — that is, the Queen — under section 41 in relation to the office of the Governor General.

Mr. Mendes: No; I do not think so. It is the way that the recommendation is made to the Governor General.

Senator Joyal: I asked that question clearly because I think it is important to the fundamental structure of the whole exercise of appointing a senator. There are a certain number of constitutional questions that we must ask ourselves in order to come to the conclusion that this bill is constitutionally valid.

Parlement du Canada de déposer et d'adopter un projet de loi imposant un délai pour l'exercice de la prérogative du premier ministre de recommander à la Gouverneure générale un candidat au poste de sénateur.

M. Mendes : Tout à fait. Si on considère le contexte historique de la prérogative, la raison même de la création du Parlement de la Grande-Bretagne était de limiter les pouvoirs de prérogative du monarque. C'est le rôle des lois ordinaires, de refléter la volonté démocratique du peuple de déterminer les pouvoirs résiduels du monarque. Ce n'est qu'un autre exemple. Cela se fait couramment. Je ne vois pas où est le problème quant à la capacité du Parlement de limiter l'exercice de la prérogative.

Le sénateur Joyal : On pourrait prétendre le contraire, puisque avant la Confédération, il y avait un conseil législatif élu. Autrement dit, on a fixé les conditions de la prérogative de nomination des conseillers législatifs au moment de la Confédération. À l'adoption de l'Acte de l'Amérique du Nord britannique, la prérogative a été rétablie et assortie de certaines limites associées à l'âge, à la compétence, et cetera.

Autrement dit, on peut modifier la prérogative qui peut être un privilège de l'État.

M. Mendes : Absolument. N'oubliez pas que le cabinet du premier ministre n'est qu'une convention, hormis une petite référence à son sujet dans la Constitution de 1982. Tout notre régime de gouvernement responsable est à certains égards fondé sur des conventions et des prérogatives, sans que cela nous ait empêchés, pendant toute l'histoire du pays et pendant celle de la Grande-Bretagne, de légiférer pour en déterminer les paramètres.

Le sénateur Joyal : À votre avis, à quel point la formulation de la prérogative du premier ministre touche-t-elle la fonction du Gouverneur général? Comme vous le savez, l'article 41 de la Constitution prévoit que la règle de l'unanimité s'applique, quand on traite de la charge de la reine. Comment une prérogative accordée en vertu de l'article 32 touche-t-elle la charge de la reine, c'est-à-dire le poste de Gouverneur général?

M. Mendes : À mon avis, il n'y a pas d'effet sur la prérogative du Gouverneur général. N'oubliez pas que si c'est la Gouverneure générale qui fait la nomination, vous traitez actuellement de la recommandation formulée par le premier ministre en vertu d'un pouvoir découlant de la convention. Rien ne vous empêche de légiférer sur l'aspect conventionnel des nominations au Sénat.

Le sénateur Joyal : À votre avis, le projet de loi n'affecte en rien le pouvoir de la Gouverneure générale, c'est-à-dire de la reine, en vertu de l'article 41.

M. Mendes : Non, je ne pense pas. Le projet de loi porte sur la recommandation qui est faite à l'intention de la Gouverneure générale.

Le sénateur Joyal : Je pose la question de manière précise parce qu'à mon avis, c'est important pour la structure fondamentale du processus de nomination des sénateurs. Il y a un certain nombre de questions constitutionnelles que nous devons nous poser pour déterminer la constitutionnalité de ce projet de loi.

Mr. Mendes: Yes; I agree.

Senator Joyal: Similarly, when the Prime Minister introduced Bill C-20 or Bill C-43, we must ask ourselves at which point the bill might be constitutional or unconstitutional or at which point are there questions that need to be answered, and then, of course, we need to seek outside opinion from the court.

The Chair: You are correct; this is a core element. Do you think we have covered it, at least on the first round?

Senator Joyal: Yes. I will reflect on it.

The Chair: I believe you said you had case law in connection with the prerogative. I will not ask you to cite it now.

Mr. Mendes: I think one of you asked Mr. Tremblay if there is any way you can enforce a statute.

The Chair: Could you give those references to the clerk so that we can circulate them?

Senator Di Nino: I will leave the technical questions and discussions to those better qualified than I. However, it seems to me that you phrased your whole presentation this morning with the suggestion, indeed maybe even a verbal fabrication, of a potential crisis. I think you talked about future danger. Those are very strong words. I suggest to you that that is probably inappropriate at this time. We do also run the institutions from past practices and past conventions, and I think you would agree with me that in the past 20 or so years the body called the Senate of Canada has had vacancies much greater than the 14 that exist today. Is that correct?

Mr. Mendes: Yes.

Senator Di Nino: Under Prime Minister Mulroney, it was something like 24 or 25, and the Senate seemed, maybe with a little extra effort, to conduct itself and do its business reasonably well. Am I correct?

Senator Moore: He would not know that.

Senator Di Nino: He has expressed the opinion that there will be a huge crisis.

Mr. Mendes: There is a present crisis in terms of representation, which is the foundation of this august body. I made the same answer to Senator Andreychuk and will say again that there is a present crisis because 50 per cent of British Columbia is not represented and there is no representation from the territories. That is a present crisis.

Senator Di Nino: Would you agree that, if you call this a crisis, there have been a number of occasions in the past that were at least as bad if not a worse crisis, and the Senate functioned?

Mr. Mendes: The added function is what Senator Joyal indicated, which is that there is a stated intention that this will get worse. If it is on the record, I have not seen it, but if it is on the record that there will be no further appointments unless he gets his way, that is a crisis.

M. Mendes : Oui, j'en conviens.

Le sénateur Joyal : Ainsi, lorsque le premier ministre a déposé le projet de loi C-20 ou le projet de loi C-43, nous devons nous demander dans quel cas le projet de loi est constitutionnel ou inconstitutionnel, quelles questions doivent trouver réponse et ensuite, bien entendu, obtenir l'avis d'un tribunal.

La présidente : Vous avez raison, c'est un élément essentiel. Pensez-vous avoir fait le tour de la question, du moins pour la première ronde?

Le sénateur Joyal : Oui. Je vais y réfléchir.

La présidente : Je crois que vous avez déclaré qu'il y avait une jurisprudence relative à la prérogative. Je ne vous demanderai pas de la citer immédiatement.

M. Mendes : Je pense que l'un de vous a demandé à M. Tremblay s'il était possible d'appliquer une loi.

La présidente : Pourriez-vous donner les références au greffier, afin qu'on les distribue?

Le sénateur Di Nino : Je vais laisser à mes collègues plus compétents les questions aux discussions d'ordre technique. Il me semble que tous vos propos de la matinée reposent sur la suggestion, peut-être même l'hypothèse exprimée d'une crise potentielle. Vous avez parlé de risque futur. Ce sont des mots très forts. Je vous dirai que c'est probablement inapproprié, pour l'instant. Nos institutions sont gérées aussi en fonction des pratiques et conventions du passé et vous conviendrez avec moi qu'au cours des 20 dernières années, environ, le Sénat du Canada a connu des moments où il y avait bien plus que 14 vacances, n'est-ce pas?

M. Mendes : Oui.

Le sénateur Di Nino : Sous le premier ministre Mulroney, il y en avait 24 ou 25 et avec un peu d'effort, le Sénat semblait se débrouiller et s'acquitter de ses tâches raisonnablement bien, n'est-ce pas?

Le sénateur Moore : Il ne le saurait pas.

Le sénateur Di Nino : Il a exprimé l'opinion selon laquelle il y aura une grave crise.

M. Mendes : Il y a déjà une crise de la représentativité, le fondement même de cette auguste institution. J'ai donné la même réponse au sénateur Andreychuk. Je le répète, il y a actuellement une crise, puisque 50 p. 100 de la Colombie-Britannique n'est pas représenté, et qu'il n'y a pas de représentation non plus pour les territoires. C'est une crise, déjà maintenant.

Le sénateur Di Nino : Seriez-vous d'accord pour dire, puisque vous qualifiez la situation de crise, qu'il y a eu plusieurs crises dans le passé qui étaient aussi graves sinon pires, et le Sénat a néanmoins continué de fonctionner?

M. Mendes : L'élément supplémentaire a été signalé par le sénateur Joyal, c'est-à-dire qu'il y a une volonté déclarée d'aggraver les choses. Je n'ai pas vu une telle déclaration, mais si telle déclaration a été faite pour indiquer qu'il n'y aura plus de nominations jusqu'à ce que la volonté du premier ministre soit respectée, alors là il y a crise.

Senator Di Nino: That was going to be my next question. Frankly, I have never heard this Prime Minister say that he would allow the Senate to become dysfunctional or allow the Senate to reach a point where it could not function. I have never heard that, and I would like to see it. You have not heard that either, have you?

Mr. Mendes: I am repeating what Senator Joyal said. The difference now is that this pattern will continue as long as the advisory elections — which I think is also unconstitutional — are not passed by this Parliament.

Senator Di Nino: It is also true, is it not, that this Prime Minister has made two appointments in the short two-plus years he is been in power, so he is appointing people.

Mr. Mendes: I would suggest that they are there for two very interesting reasons, one to have political representation in the cabinet and the other to be a reflection of his position that unless there are advisory elections he will not appoint.

Senator Di Nino: For whatever reason, the fact is that he has made two appointments in the period of time he has been there.

Mr. Mendes: It is very interesting what the reasons are.

Senator Di Nino: I appreciate that.

Senator Milne: Professor Mendes, you say that statutes clearly can curtail the prerogative powers of the Prime Minister.

Mr. Mendes: Yes.

Senator Milne: To come around to Senator Andreychuk's question, and mine as well, what are the possible sanctions? If we pass this bill and the Prime Minister still does not do what his constitutional duties require him to do, what are the possible sanctions, other than political?

Mr. Mendes: If a statute has been duly passed by Parliament and mandates the Prime Minister to fill vacancies, as section 32 says, on a vacancy arising, jut as if he disobeyed the equivalent provision in the House of Commons, anyone could go to court, under the public interest standing rules, and ask for either a declaration or one of the administrative remedies to force the Prime Minister to do it. It has happened in the past, and it could happen in this situation too.

Senator Milne: What, then, are the administrative remedies? Would the Governor General to do it on her own?

Mr. Mendes: No, it would be directed towards the Prime Minister. It would be shocking if a Prime Minister disobeyed a declaration from the courts of this country. It would be a direct violation of the rule of law.

Le sénateur Di Nino : C'était ma prochaine question. En toute franchise, je n'ai jamais entendu dire le premier ministre qu'il allait laisser le Sénat devenir un canard boiteux ou encore d'être hors d'état de fonctionner. Je n'ai jamais entendu une telle déclaration et j'aimerais bien qu'on m'en montre la preuve. Vous non plus, vous ne l'avez pas entendu, n'est-ce pas?

M. Mendes : Je répète les propos du sénateur Joyal. Ce qui distingue la situation actuelle, c'est que cette tendance se poursuivra tant que le projet de loi sur les élections consultatives — qui, à mon avis, ne sont pas conformes à la Constitution — n'aura pas été adopté par le Parlement.

Le sénateur Di Nino : N'est-il pas vrai que le premier ministre a nommé deux sénateurs depuis qu'il a accédé au pouvoir, c'est-à-dire depuis deux ans et des poussières? Il fait des nominations.

M. Mendes : Je vous dirais que ces deux nominations ont été faites pour deux raisons fort intéressantes, d'une part pour assurer une représentation politique au Cabinet et, d'autre part, pour renforcer sa position voulant qu'il n'y aura pas d'autres nominations jusqu'à ce qu'il y ait des élections consultatives.

Le sénateur Di Nino : Quelle que soit la raison, il demeure qu'il ait fait deux nominations depuis son arrivée au pouvoir.

M. Menses : Les raisons sont fort intéressantes.

Le sénateur Di Nino : Je le comprends.

Le sénateur Milne : Monsieur Mendes, vous avez indiqué que la législation permet clairement de contrecarrer la prérogative du premier ministre.

M. Mendes : Oui.

Le sénateur Milne : Pour revenir à la question du sénateur Andreychuk, qui est la mienne aussi d'ailleurs, quelles sont les sanctions possibles? Si nous adoptons ce projet de loi et le premier ministre continue de se soustraire à ses obligations constitutionnelles, quelles sont les sanctions possibles à part les sanctions politiques?

M. Mendes : Si le Parlement a adopté un projet de loi en bonne et due forme, projet de loi qui oblige le premier ministre à combler des vacances au fur et à mesure qu'elles sont créées, tel que l'indique l'article 32, le recours serait le même comme s'il avait désobéi à une disposition équivalente à la Chambre des communes. N'importe quel citoyen pourrait invoquer le Règlement sur l'intérêt public et demander aux tribunaux d'exiger une déclaration ou d'imposer un recours administratif afin d'obliger le premier ministre à respecter ses obligations. De telles mesures ont été prises dans le passé et cela pourrait se reproduire dans la situation actuelle.

Le sénateur Milne : Quels sont les recours administratifs? La Gouverneure générale agirait-elle seule?

M. Mendes : Non, le recours viserait le premier ministre. Ce serait choquant si un premier ministre désobéissait à une déclaration émanant des tribunaux canadiens. Ce serait une violation directe de la primauté du droit.

Senator Moore: Thank you, professor, for being here. I want to touch on the point Senator Andreychuk seemed to be focusing on with regard to the current 14 vacancies and the Senate's being able to function and what is the critical number. Others have mentioned that within a year there could be as many as 30 vacancies. That is only one aspect of this.

One of the main reasons for my initiating this bill is the constitutional right of the people of Canada to have representation in both Houses of Parliament. You mentioned the Maritime region. We are entitled to 24 senators under the Constitution, and we now have five vacancies. We are down almost 25 per cent. The functioning of the Senate in terms of doing its job, committee work and having the manpower to do all that, is one aspect of it, but before that, the reason my province entered Confederation was a compromise, and the Senate and the filling of those seats is the compromise that we agreed to. If a prime minister wants to reduce Nova Scotia's representation in Parliament, is it legitimate for him or her to achieve that by attrition rather than by an amendment to the Constitution?

Mr. Mendes: This goes back to the discussion that you had with the previous witness and with me. Section 32 clearly says that the Governor General shall appoint on a vacancy arising. I link that to the concept of parliamentary privilege, which means that when you refuse to appoint when a vacancy arises, and when that has the effect of undermining this body as a deliberative body, plus undermining the adequate representation of the partners in confederation, you have a serious constitutional problem.

The Chair: Colleagues, we will be going in camera for a short period of time, maximum five minutes, so there is certainly time for a second round.

Senator Andreychuk: I want to go back to my point, because I am preoccupied with Bill S-224. If the Prime Minister made no statement, although you claim he has —

Mr. Mendes: I have not claimed. I said I heard Senator Joyal say that.

Senator Andreychuk: Let us assume there are no statements made by the Prime Minister. We just have no appointments, no statements whatsoever and no Bill C-20. Would your position still be that we are at a point of crisis? I am asking for an academic and a legal point of view. Take away Bill C-20 or any other bills floating around somewhere about changes in the Senate, and no statements from the present Prime Minister or anyone about changes in methodology. As Senator Moore is saying, he has a bill here because of 14 vacancies and the duty to appoint. I do not want to misrepresent Senator Moore's point.

Senator Moore: I will not let you.

Senator Andreychuk: Good. I knew you were a good lawyer.

Le sénateur Moore : Monsieur le professeur, merci d'être venu. J'aimerais aborder le sujet qu'a soulevé le sénateur Andreychuk, c'est-à-dire les 14 vacances actuelles et la capacité de fonctionner du Sénat, ainsi que la masse critique. D'autres personnes ont indiqué que d'ici un an, il pourrait y avoir jusqu'à 30 sièges vacants. Il s'agit d'un seul aspect de la question.

L'une des raisons qui ont motivé mon projet de loi, c'est le droit constitutionnel du peuple canadien à une représentation dans les deux Chambres du Parlement. Vous avez mentionné la région maritime. En vertu de la Constitution, nous avons droit à 24 sénateurs, et actuellement il y a cinq vacances. C'est presque 25 p. 100. Le bon fonctionnement du Sénat, des travaux des comités et les effectifs nécessaires, c'est bien sûr un aspect de la question. Ce qui est encore plus important, c'est que ma province a fait un compromis en entrant dans la Confédération, contre lequel elle a obtenu de sièges au Sénat. Si un premier ministre veut réduire la représentation de la Nouvelle-Écosse au Parlement, il peut y parvenir légitimement par attrition plutôt que par modification de la Constitution?

M. Mendes : Vous faites référence à la discussion que vous avez eue avec le témoin précédent et avec moi-même. L'article 32 indique clairement que le Gouverneur général nommera un sénateur lorsqu'une vacance se produit. Je fais le lien entre cette disposition et la notion du privilège parlementaire, ce qui veut dire que lorsqu'on refuse de nommer une personne à un siège vacant, et lorsque ce refus mine l'appareil dans ses délibérations ainsi que la représentation adéquate des membres de la confédération, il y a un problème constitutionnel grave.

Le président : Chers collègues, nous allons délibérer à huis clos pendant une courte période, cinq minutes au plus, donc il nous reste certainement assez de temps pour une deuxième série de questions.

Le sénateur Andreychuk : J'aimerais revenir à ma question, car le projet de loi S-224 me préoccupe. Si le premier ministre n'a pas fait de déclaration, je crois que vous affirmez le contraire...

M. Mendes : Je n'ai rien affirmé. J'ai dit que j'avais entendu le sénateur Joyal le dire.

Le sénateur Andreychuk : Disons qu'il n'y a pas eu de déclaration de la part du premier ministre. Il n'y a pas de nomination, pas de déclaration et pas de projet de loi C-20. Seriez-vous toujours de l'avis que nous sommes en période de crise? Je vous le demande pour obtenir une réponse théorique et juridique. Faites abstraction du projet de loi C-20 et de tous les autres projets de loi portant sur la réforme du Sénat, et faites abstraction de toute déclaration de la part du premier ministre actuel ou de qui que ce soit en ce qui concerne la modification de la méthodologie. Comme le dit le sénateur Moore, il a déposé son projet de loi en raison des 14 sièges vacants et de l'obligation de nommer des personnes à ces sièges. Je ne veux pas déformer la position du sénateur Moore.

Le sénateur Moore : Je ne vous laisserai pas faire.

Le sénateur Andreychuk : C'est bien. Je savais que vous étiez un avocat compétent.

As I understand it, the point of the bill is that "shall" means now, and having 14 vacancies warrants moving on this bill.

Mr. Mendes: Again, I refer to section 32, shall appoint on a vacancy, and I tie in Senator Moore's comments adding that some provinces now are down to 50 per cent of their representation. You link the two together, and even if there were no other statements by the Prime Minister and Bill C-20 did not exist and Bill S-4 did not exist and Bill C-19 did not exist, it is still the same issue.

Senator Andreychuk: Therefore would it have been the same issue with other prime ministers?

Mr. Mendes: Absolutely. I put the table before you, and I think it is legitimate to say that even under Liberal administrations, these vacancies have gone on for too long. I basically stated that this should be changed both for Liberal and for Conservative administrations.

Senator Andreychuk: Or any other party that may come along.

Mr. Mendes: Yes.

Senator Joyal: I have a comment on this point. I think the Prime Minister himself, when he appeared at the Special Senate Committee on Senate Reform, the Hays committee, is on the record in answer to that question.

Senator Oliver: It was a hypothetical.

Senator Joyal: Of course. I only wanted to add that.

Mr. Mendes, I have a slight nuance to your introductory remarks in relation to the powers and privileges of the Senate, and including the membership on the Senate within the definition of the powers and privileges of the Senate.

It might look a little nuanced but, as I understand, the privileges of the Senate are the sets of special powers of the Senate to be able to perform its legislative duty as much as the House of Commons enjoys the same power and privileges under section 18 of the Constitution. You know this very well; you quoted it. In the *Vaid* case, the Supreme Court of Canada unanimously ruled on that quite recently.

You include in those powers and privileges the membership or the composition of the Senate. I do not think we are in the realm of the power and the privileges, unless I misread or misunderstand your presentation. There is a nuance, in my humble opinion, to the power and privileges versus the composition.

Mr. Mendes: It is basically a logical set of analyses asking this question: When does the lack of sufficient senators affect your ability to perform your critical functions? It is more a logical exercise. Will it reach a point where you will not be able to perform your critical functions because of the lack of appointments?

D'après ce que je comprends, le mot « shall » dont la version anglaise désigne une mesure immédiate, et le fait qu'il y ait 14 vacances justifie le traitement accéléré du projet de loi.

M. Mendes : Là encore, je fais référence à l'article 32, qui indique que le Gouverneur général nommera un sénateur lorsqu'une vacance se produit, et je tiens compte de l'observation faite par le sénateur Moore, selon laquelle certaines provinces ont vu leur représentation baissée de 50 p. 100. Vous faites le lien entre ces deux choses, et même s'il n'y a pas de déclaration faite par le premier ministre, même si les projets de loi C-20 et, S-4 et C-19 n'existaient pas, la question demeurerait entière.

Le sénateur Andreychuk : Donc, la situation aurait été la même sous d'autres premiers ministres?

M. Mendes : Tout à fait. Je vous ai fourni un tableau, et je crois qu'il est légitime d'affirmer que même sous les libéraux, les sièges sont demeurés vacants trop longtemps. Mon observation visait à la fois les libéraux et les conservateurs.

Le sénateur Andreychuk : Ou n'importe quel autre parti.

M. Mendes : Oui.

Le sénateur Joyal : J'ai quelque chose à ajouter. Je crois que le premier ministre lui-même, lorsqu'il a comparu devant le Comité sénatorial spécial sur la réforme du Sénat, le comité Hays, a répondu à la question.

Le sénateur Oliver : C'était une question hypothétique.

Le sénateur Joyal : Bien sûr, mais je voulais le dire.

Monsieur Mendes, j'aimerais commenter votre exposé sur les pouvoirs et les privilèges du Sénat, notamment la composition du Sénat compte tenu de ses pouvoirs et privilèges.

C'est peut-être une nuance, mais à ma connaissance, les privilèges du Sénat sont les pouvoirs particuliers qui lui permettent de s'acquitter de ses devoirs législatifs, tout comme le fait la Chambre des communes en vertu de l'article 18 de la Constitution. Vous le savez très bien, vous l'avez même cité. La Cour suprême du Canada a rendu une décision unanime sur la question récemment dans l'affaire *Vaid*.

Selon vous, les pouvoirs et privilèges sont inhérents à la composition du Sénat. J'ai peut-être mal compris vos propos, mais je ne crois pas que nous évoluons dans le domaine des pouvoirs et privilèges. Il y a nuance, à mon humble opinion, entre les pouvoirs et privilèges et la composition.

M. Mendes : En fait, c'est une série d'analyses logiques qui nous amènent à poser la question suivante : à quel point le manque de sénateurs a-t-il une influence sur votre capacité de vous acquitter de vos fonctions essentielles? Ce serait plutôt un exercice de logique. Y aura-t-il un point où vous ne serez pas en mesure d'assumer vos fonctions essentielles à cause de l'absence de nominations?

Senator Joyal: I agree. However, it is our duty to give our advice and consent under section 91 of the Constitution, as you know, to the legislative powers. It is essentially an exercise in which you have to two concurring on advice and consent to one specific bill.

Mr. Mendes: That is right.

Senator Joyal: Then the Governor General or the Queen legislates. It is the Queen who legislates, but only on the concurring advice and consent. It needs both at the same time, on the same issue.

When you arrive at that element of consent, you need a specific power. For instance, you need freedom of expression. You cannot be sued in court for what we say here around this table. It is a very specific power, in our deliberative function trying to understand a bill, trying to debate a bill, trying to exercise the democratic debate, which is opinion, counter-opinion, replica and so forth as the court has defined democratic debate.

Therefore, the composition of the chamber of the Senate or the composition of the House of Commons is not an essential element of the privileges; it is not a specific power. It is an essential element to achieve, of course, the consent. If there is no one around the table, there is no consent or advice.

Mr. Mendes: Absolutely. That is why that logical conclusion has to be that.

Senator Joyal: I think that if the Senate were deprived of an opposition party, there would be a fundamental convention also breached in our democratic system. As the Supreme Court has said clearly, the preamble of the Constitution provides for arguments and counter-arguments. I think we would probably be faced with exactly the same Bill S-224 if one of the parties represented in the Senate were to be totally deprived of its membership.

Mr. Mendes: That is the logical conclusion that I have tried to draw.

Senator Joyal: You understand there is a nuance between the composition of the Senate and the specific powers and privileges that the Senate has, as much as the House of Commons, to express its advice and consent — that is, to deliberate, to exercise its legislative function. That is why, when I read and listen to your presentation, there is a nuance we must make sure that we understand.

Mr. Mendes: I agree.

Senator Murray: I want to add briefly to the arguments that you have made, Professor Mendes, regarding the seriousness of the situation. That British Columbia has only 50 per cent of its representation in the Senate at the moment is a gravely urgent situation. Getting more serious is that Nova Scotia is missing three of its representatives, and even little Prince Edward

Le sénateur Joyal : Je suis d'accord. Toutefois, il nous incombe, en vertu de l'article 91 de la Constitution, qui porte sur les pouvoirs législatifs, de fournir des conseils et d'accorder notre consentement. Au fond, il s'agit d'un exercice où l'on s'entend sur les conseils et le consentement visant un projet de loi en particulier.

M. Mendes : C'est ça.

Le sénateur Joyal : C'est ensuite au tour du Gouverneur général ou de la reine de légiférer. C'est la reine qui légifère, en se fiant cependant aux conseils et au consentement. Il faut donc qu'il y ait ces conseils et ce consentement parallèles sur un projet de loi donné.

Pour ce qui est du consentement, cela exige un pouvoir particulier. Par exemple, il faut avoir la liberté d'expression. Aucun d'entre vous ne sera poursuivi en justice pour ses propos tenus ici pendant une séance. C'est un pouvoir très particulier qui vise nos délibérations servant à comprendre un projet de loi, à en débattre, à entretenir un débat démocratique. La cour a défini le débat démocratique comme étant un échange d'opinions, de répliques et ainsi de suite.

On peut en conclure donc que la composition du Sénat ou de la Chambre des communes ne fait pas partie inhérente des privilèges, ce n'est pas un pouvoir particulier. Cette composition s'avère nécessaire toutefois pour l'obtention du consentement. Si personne n'est présent, il n'y a ni consentement ni conseils.

M. Mendes : Tout à fait. C'est la seule conclusion logique.

Le sénateur Joyal : Je crois que si l'on privait le Sénat de son parti de l'opposition, il y aurait violation de l'une des conventions fondamentales de notre système démocratique. Comme l'a indiqué clairement la Cour suprême, le préambule de la Constitution autorise des affirmations et des contre-affirmations. Je crois qu'un projet de loi pareil au projet de loi S-224 serait déposé si l'un des partis représentés au Sénat n'y avait plus un seul membre.

M. Mendes : C'est la conclusion logique à laquelle je suis arrivé.

Le sénateur Joyal : Vous comprenez qu'il existe une nuance entre la composition du Sénat et ses pouvoirs et privilèges particuliers l'autorisant, tout comme la Chambre des communes, à exprimer ses conseils et son consentement, c'est-à-dire, délibérer, exercer une fonction législative. C'est la raison pour laquelle j'insiste pour dire qu'il y a une nuance à faire afin que nous puissions comprendre votre exposé.

M. Mendes : Je suis d'accord.

Senator Murray : J'aimerais renchérir rapidement sur les arguments avancés par le professeur Mendes quant à la gravité de la situation. La Colombie-Britannique, qui n'a que 50 p. 100 de sa représentation au Sénat actuellement, se trouve dans une situation on ne peut plus urgente. Ce qui est encore plus grave, c'est que la Nouvelle-Écosse est privée de trois de ses

Island, which sets great store by its Senate representation as a balance to representation by population, is down by 25 per cent.

There are other aspects of the situation, actual and potential, that are perhaps more familiar to those of us who sit in this place. For many years we were concerned about what happens during long periods of one-party domination when the ranks of the official opposition in the Senate get dangerously thinned out. When Mr. Diefenbaker became Prime Minister after 22 years of Liberal rule, there were I think six or seven members in the official opposition. No one can pretend that the Senate functioned as it should as a proper legislative body under those circumstances. I remember it and I remember that the Senate would shut down for three weeks at a time, if it pleased it to do so.

When Mr. Clark became Prime Minister, there were 10 or 12 Progressive Conservatives left. He was able to appoint 11.

None of us ever foresaw a situation in which the government would be reduced to a quarter or fewer of the seats in the Senate. However, that is the situation we face today. The government members are very thinly spread across the many active committees that we have; they are too thinly spread. I make no comment and, if I had a comment to make, it would be positive one about the quality of those who are left. However, they are too thinly spread across committees.

It is a convention that it is the responsibility of government senators to maintain quorum. I am telling you that on most days the government senators could not maintain quorum in this place. It is only because of mostly Liberal senators and a few independents that they are able to maintain quorum.

"Crisis" may be too strong a word to describe the situation today, but it is heading in that direction inevitably and inexorably under the situation that we now face. At one point when the opposition ranks were very thin we discussed trying to establish a convention where the government would agree that we would never allow the opposition ranks to diminish below one third of the members of the Senate.

The problem now is that the government ranks are too thin to provide proper leadership to the Senate.

There is a serious problem today. It is urgent in how it affects British Columbia and is affecting Nova Scotia, Prince Edward Island and Newfoundland and Labrador in terms of representation. It is a growing problem heading for crisis as matters now stand.

Mr. Mendes: I agree with you. That is why, in my discussion with Senator Joyal, I said that you must start thinking about your privileges. Having quorum is part of your privileges. You can see how my logic takes me to that step.

représentants, et même la petite Île-du-Prince-Édouard, qui tient énormément à sa représentation au Sénat pour pallier sa représentation proportionnelle, n'a que 75 p. 100 de ses représentants.

Il y a d'autres aspects de la situation, réels et hypothétiques, que connaissent peut-être mieux les membres qui se trouvent dans cette enceinte. Pendant de nombreuses années, nous étions inquiets en raison des longues périodes dominées par un parti pendant lesquelles l'opposition officielle au Sénat s'amenuisait dangereusement. Lorsque M. Diefenbaker est devenu premier ministre après 22 années de régime libéral, je crois qu'il ne restait que six ou sept membres de l'opposition officielle. Nul ne peut prétendre que le Sénat a fonctionné correctement sur le plan législatif dans de telles circonstances. Je me souviens bien de cette époque pendant laquelle le Sénat cessait ses activités pendant des périodes de trois semaines, selon son gré.

Lorsque M. Clark est devenu premier ministre, il ne restait que dix ou 12 progressistes conservateurs. Il a pu en nommer 11.

Aucun d'entre nous n'a anticipé une situation dans laquelle le gouvernement n'aurait que le quart ou même moins de sièges au Sénat. Toutefois, voilà la situation à laquelle nous sommes confrontés aujourd'hui. Les membres du gouvernement sont répartis parmi les nombreux comités actifs du Sénat et ils ne sont pas en nombre suffisant. Je ne porte aucun jugement, cependant si je devais le faire, je louerais les compétences des membres restants. Il demeure, toutefois, qu'ils sont trop peu pour participer aux comités.

La convention veut qu'il incombe aux sénateurs représentant le gouvernement d'assurer le quorum. Je peux vous affirmer que la plupart des jours, les sénateurs représentant le gouvernement ne peuvent pas assurer le quorum dans cette enceinte. Ce n'est que grâce aux sénateurs pour la plupart libéraux, et à quelques indépendants, que le quorum est maintenu.

Le mot « crise » est peut-être trop fort pour décrire la situation actuelle, mais compte tenu des circonstances, nous nous dirigeons inévitablement et inexorablement vers une crise. À une époque, lorsque les rangs de l'opposition étaient clairsemés, nous avons discuté de la possibilité d'instaurer une convention selon laquelle le gouvernement ne permettrait jamais que les rangs de l'opposition se situent en deçà du tiers.

Nous avons maintenant le problème suivant, à savoir que les rangs du gouvernement sont trop clairsemés pour offrir un leadership adéquat au Sénat.

Le problème est grave. Il urge parce qu'il nuit à la représentation de la Colombie-Britannique, de la Nouvelle-Écosse, de l'Île-du-Prince-Édouard et de Terre-Neuve-et-Labrador. C'est un problème croissant et si rien n'est fait, nous nous dirigeons vers une crise.

M. Mendes : Je suis d'accord avec vous. C'est la raison pour laquelle j'ai dit, lorsque je discutais avec le sénateur Joyal, que vous devez commencer à songer à vos privilèges. Le quorum fait partie de vos privilèges. Vous comprenez bien ma progression logique.

The Chair: Colleagues, I will close this portion of this meeting at one o'clock. We will then take less than five minutes for a meeting in camera, which will give us ten minutes before the bells begin to ring. With that in mind, colleagues, we have Senator Moore and a final question from Senator Joyal.

Senator Moore: Professor Mendes, you mentioned at the outset of your comments that you did not have time to address the part of the bill that deals with the sequential calling of by-elections in the House of Commons. However, you said that you would be prepared to answer questions about that issue.

Recently, in the riding of Roberval—Lac-Saint-Jean, the elapsed time between vacancy and writ was 13 days and the time between the vacancy and voting day was 50 days. In the riding of Toronto Centre, the time between vacancy and writ was 172 days and the time between vacancy and voting day was 259 days. Do you think that situation is proper in a modern democracy?

Mr. Mendes: No, I do not, and I will tell you why. I do not think that democracy should be a kind of wrestling match where you basically try to wrestle your opponent into a corner and see what happens. We have inherited our democratic system from Great Britain. Obviously, countries like Great Britain have come to the conclusion that that situation should not go on, and they have put in a limit of about 90 days, if I am correct.

Senator Moore: No, it is shorter than that.

Mr. Mendes: Maybe it is shorter. That occurred in Great Britain because of the understanding that, ultimately, if trust and the avoidance of cynicism by the public are to prevail, you cannot have these types of World Wrestling Federation political tactics that force opponents into a corner and then try to get advantage out of it. That is more a political argument than a legal one, but given that the preamble to our Constitution clearly states that our Constitution is similar to Great Britain's and given that Great Britain has gone through this process and has come to the conclusion that this should be changed, then I think we should take a serious lesson from that.

Senator Moore: Do you have any comment with regard to the Commons by-elections in light of my comment about the constitutional right of citizens to have representations, in this case in the House of Commons? I do not see why one group of people should have a member representing them within 50 days while another group has to wait 8 or 9 months.

Mr. Mendes: That, unfortunately, I think is more a misuse of democratic powers rather than a constitutional violation. However, I think we should take that situation very seriously. If our mother Parliaments have looked at it and gone to a different system, then we should take that seriously.

Le président : Chers collègues, cette partie de la réunion prendra fin à 13 heures. Nous aurons ensuite une séance à huis clos de moins de cinq minutes, ce qui nous laissera dix minutes avant que le timbre ne retentisse. Cela dit, le sénateur Moore a la parole et ensuite le sénateur Joyal pourra poser une dernière question.

Le sénateur Moore : Monsieur Mendes, vous avez indiqué au début de votre exposé que vous n'aviez pas le temps de parler des dispositions du projet de loi qui portent sur le déclenchement d'élections partielles des députés à la Chambre des communes. Toutefois, vous avez indiqué que vous seriez prêt à répondre aux questions à ce sujet.

Tout récemment, dans la circonscription de Roberval—Lac-Saint-Jean, le temps qui s'est écoulé entre la vacance et l'émission du bref a été de 13 jours et le temps qui s'est écoulé entre la vacance et le jour de scrutin a été de 50 jours. Dans la circonscription de Toronto-Centre, il s'est écoulé 172 jours entre la vacance et l'émission du bref et 259 jours entre la vacance et le jour de scrutin. Trouvez-vous que de telles situations conviennent à une démocratie moderne?

M. Mendes : Non, et je vous dirai pourquoi. Je ne crois pas que la démocratie devrait être un bras-de-fer dans le cadre duquel on tente d'écraser son opposant. Nous avons hérité du système démocratique de la Grande-Bretagne. C'est évident que des pays comme la Grande-Bretagne sont arrivés à la conclusion que de telles situations ne peuvent perdurer. Ils ont prévu un délai maximal de 90 jours, si ma mémoire est bonne.

Le sénateur Moore : Non, le délai est encore plus court.

M. Mendes : Peut-être. Le gouvernement de la Grande-Bretagne a pris cette décision parce que s'il voulait jouir de la confiance du public et éviter le cynisme, il faut éviter ces tactiques politiques à la Hulk Hogan qui permettent de coincer ses opposants et d'en tirer parti. Cet argument est davantage politique que juridique, mais compte tenu que le préambule de notre Constitution indique clairement que celle-ci ressemble à la Constitution de la Grande-Bretagne, et compte tenu que la Grande-Bretagne a déjà connu cette situation et est arrivée à la conclusion qu'il fallait changer sa façon de procéder, je crois que le Canada devrait en tirer la même leçon.

Le sénateur Moore : Voulez-vous dire quelque chose au sujet des élections partielles à la Chambre des communes à la lumière de ce que j'ai dit sur le droit constitutionnel des citoyens d'être représentés, en l'occurrence à la Chambre des communes? Je ne comprends pas comment il se fait qu'un groupe de citoyens soit représenté par un député après moins de 50 jours alors qu'un autre groupe doit patienter huit à neuf mois.

M. Mendes : Malheureusement, je pense qu'il s'agit d'un mauvais usage de pouvoirs démocratiques plutôt qu'une violation de la Constitution. Toutefois, je pense que nous devons prendre cette situation très au sérieux. Si les Parlements dont notre système s'est inspiré se sont penchés sur cette question et ont changé de système, nous avons intérêt à prendre cela au sérieux.

What do we want to achieve with this type of game playing? When you see the turnouts in elections these days, that should be one of the most worrying aspects for anyone interested in keeping our democratic system stable. The turnouts in Alberta, and potentially now in other provinces, is something to be really concerned about. Why is that? It is because of the increasing cynicism and lack of trust by the population in the games that are being played.

Senator Moore: Did you look at that aspect of Bill S-224, or did you just focus on the Senate?

Mr. Mendes: As much as I support what you are doing, I would recommend splitting it because there is less of a constitutional focus on the by-elections than there is on the Senate. I think you have a strong piece of legislation if you focus only on the Senate and discuss the differences between the practice now in Great Britain and ourselves on the political level.

Senator Moore: We had evidence yesterday about that from other witnesses.

Senator Joyal: Professor Mendes, I want to draw your attention to the element that I was referring to in my earlier question regarding the need for contradictory debates in the chambers of Parliament to maintain democracy. I want to refer you to the Supreme Court decision of 1938 in the *Reference re Alberta Statutes* case, a very famous case presided over by Justice Duff. I am sure that Professor Oliver will know who Justice Duff is. I am quoting from *Protecting Canadian Democracy*. In all fairness, I am not quoting from my own writing, senator; I am quoting from Professor Rémillard's writing.

The quotes from Justice Duff's decision are as follows:

> Under the Constitution established by [*The Constitution Act, 1867*], legislative power for Canada is vested in one Parliament consisting of the Sovereign, an upper house styled the Senate, and the House of Commons. . . .
>
> The preamble of the statute, moreover, shows plainly enough that the constitution of the Dominion is to be similar in principle to that of the United Kingdom. The statute contemplates a parliament working under the influence of public opinion and public discussion. There can be no controversy that such institutions derive their efficiency —

That is the quote I want to insist upon. It goes on to state:

> — from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest political proposals.

À quoi ça sert, ce jeu? Si on veut vraiment s'assurer que notre système démocratique demeure stable, eh bien nous devrions nous préoccuper davantage des faibles taux de participation aux élections de nos jours. Le taux de participation en Alberta, et éventuellement dans d'autres provinces, est très inquiétant. Pourquoi? Eh bien, la population fait de moins en moins confiance aux élus et est de plus en plus cynique face aux jeux politiques.

Le sénateur Moore : Vous vous êtes penché sur cet aspect-là du projet de loi S-224, ou est-ce que vous avez simplement mis l'accent sur le Sénat?

M. Mendes : Même si j'appuie votre démarche, à mon avis, il vaudrait mieux scinder le projet de loi puisqu'on met moins l'accent sur la constitutionalité des élections partielles que sur le Sénat. C'est un projet de loi qui a le potentiel d'être robuste, mais seulement si on met l'accent sur le Sénat et tient compte des différences au niveau des pratiques politiques entre la Grande-Bretagne et le Canada.

Le sénateur Moore : Nos invités d'hier en ont témoigné.

Le sénateur Joyal : Monsieur Mendes, je veux attirer votre attention sur la question que j'ai posée tout à l'heure concernant la nécessité de débats contradictoires dans les Chambres du Parlement qui permettent de maintenir notre démocratie. J'aimerais vous parler de la décision de la Cour suprême en 1938 dans l'affaire *Reference re Alberta Statutes*, une affaire célèbre présidée par le juge Duff. Je suis certain que M. Oliver sait de qui je parle. Je cite le livre *Protéger la démocratie canadienne*. Je dois dire que je ne cite pas mes propres propos, sénateur; je cite les propos du professeur Rémillard.

Alors, voici les citations tirées de la décision du juge Duff :

> En vertu de la Constitution établie par [l'Acte de l'Amérique du Nord de 1867], la compétence législative du Canada est conférée dans un Parlement constitué du Souverain, d'une Chambre haute appelée le Sénat, et de la Chambre des communes, qui est investie du pouvoir législatif pour le Canada [...]
>
> En outre, le préambule de la Loi indique assez clairement que la Constitution du Dominion doit ressembler en principe à celle du Royaume-Uni. La loi prévoit un Parlement dont l'activité est influencée par l'opinion et la discussion publique. Il ne peut y avoir de controverse au sujet du fait que ces institutions tirent leur efficience...

Et c'est sur cette citation que je veux insister. Ça se poursuit comme suit :

> ... de la libre discussion publique des affaires, de la critique, de la réponse et de la contre-critique, des attaques qui visent les politiques et l'administration, de leur défense et de leur contre-attaque, des propositions publiques les plus libres et les plus complètes.

It is quite clear that in order for a chamber to act, there must be contradiction. We must be of different views. We must attack one another not personally, but on the merits of what we propose and what we suggest.

This principle is enshrined in the preamble, as Justice Duff said in 1938, more than 50 years ago. If the Senate, as a chamber, is not in a position to act efficiently — that is, to have those kinds of differences of opinions, ideas, nuances, amendments, sub-amendments, and all the deliberative functions and legislative functions that we enjoy — then we cannot give the advice and consent that is requested from us.

Mr. Mendes: You have just explained in a different way what I am talking about in terms of your parliamentary privileges being undermined.

The Chair: Senator Joyal was asking whether you agree.

Professor Mendes, thank you very much. As usual, this was a most stimulating and interesting session. We are very grateful to you.

The committee continued in camera.

Il est assez clair que pour que la Chambre intervienne, il doit y avoir contradiction. Il doit y avoir une divergence d'opinions. Il faut s'en prendre les uns aux autres non pas sur le plan personnel, mais sur les mérites de ce que nous proposons et ce que nous faisons valoir.

Ce principe est enchâssé dans le préambule, comme l'a dit le juge Duff en 1938, depuis plus de 50 ans. Si le Sénat, en tant que Chambre, n'est pas à même d'intervenir avec efficience — c'est-à-dire, d'être confronté à des divergences d'opinions, d'idées, des nuances, des modifications, des sous-amendements, et toutes les fonctions délibératives et législatives dont nous jouissons — eh bien, nous ne sommes pas en mesure de prodiguer les conseils et de donner le consentement voulus.

M. Mendes : Vous venez d'expliquer d'une autre façon ce que je disais au sujet de vos privilèges parlementaires et de la manière dont ils sont minés.

Le président : Le sénateur Joyal vous demandait si vous étiez d'accord.

Merci beaucoup, professeur Mendes. Comme d'habitude, c'était une discussion fort intéressante et palpitante, et nous vous en sommes très reconnaissants.

Le comité poursuit ses travaux à huis clos.

Second Session
Thirty-ninth Parliament, 2007-08

SENATE OF CANADA

Proceedings of the Standing Senate Committee on

Legal and Constitutional Affairs

Chair:
The Honourable JOAN FRASER

Wednesday, May 7, 2008
Thursday, May 8, 2008

Issue No. 17

Sixth (final) meeting on:

A comprehensive review of the amendments made by An Act to amend the Canada Elections Act and the Income Tax Act (S.C. 2004, c. 24)

and

Third and Fourth (final) meetings on:

Bill S-224, An Act to amend the Parliament of Canada Act (vacancies)

INCLUDING:
THE ELEVENTH REPORT OF THE COMMITTEE
(Amendments made by An Act to amend the Canada Elections Act and the Income Tax Act (S.C. 2004, c. 24))
THE TWELFTH REPORT OF THE COMMITTEE
(Bill S-224)

APPEARING:
The Honourable Peter Van Loan, P.C., M.P., Leader of the Government in the House of Commons and Minister for Democratic Reform

WITNESSES:
(*See back cover*)

Deuxième session de la
trente-neuvième législature, 2007-2008

SÉNAT DU CANADA

Délibérations du Comité sénatorial permanent des

Affaires juridiques et constitutionnelles

Présidente :
L'honorable JOAN FRASER

Le mercredi 7 mai 2008
Le jeudi 8 mai 2008

Fascicule n° 17

Sixième (dernière) réunion concernant :

L'examen complet des modifications apportées par la Loi modifiant la Loi électorale du Canada et la Loi de l'impôt sur le revenu (L.C. 2004, ch. 24)

et

Troisième et quatrième (dernière) réunions concernant :

Le projet de loi S-224, Loi modifiant la Loi sur le Parlement du Canada (sièges vacants)

Y COMPRIS :
LE ONZIÈME RAPPORT DU COMITÉ
(Modifications apportées par la Loi modifiant la Loi électorale du Canada et la Loi de l'impôt sur le revenu (L.C. 2004, ch. 24))
LE DOUZIÈME RAPPORT DU COMITÉ
(Le projet de loi S-224)

COMPARAÎT :
L'honorable Peter Van Loan, C.P., député, leader du gouvernement à la Chambre des communes et ministre de la réforme démocratique

TÉMOINS :
(*Voir à l'endos*)

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EVIDENCE

OTTAWA, Wednesday, May 7, 2008

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill S-224, An Act to amend the Parliament of Canada Act (vacancies), met this day at 4 p.m. to give consideration to the bill.

Senator Joan Fraser (*Chair*) in the chair.

[*English*]

The Chair: Honourable senators, we are continuing our study of Bill S-224, An Act to amend the Parliament of Canada Act (vacancies).

We have the great pleasure this afternoon of welcoming as a witness the Honourable Peter Van Loan, who is the Leader of the Government in the House of Commons and Minister for Democratic Reform. He has with him witnesses from the Privy Council; Dan McDougall, Director, Strategic Analysis and Planning, Democratic Reform; and David Anderson, Senior Policy Adviser, Democratic Reform. Welcome, minister.

Honourable senators, the minister has not one but two engagements at five o'clock. Therefore we must be careful to listen closely to him and to put other questions in an appropriately concise form.

Minister, the floor is yours to make your opening statement.

Hon. Peter Van Loan, P.C., M.P., Leader of the Government in the House of Commons and Minister for Democratic Reform: Thank you. It is a pleasure to be here. There are many familiar faces around the table discussing familiar issues.

The debate over the future of our democratic institutions, in my view, comes down to a simple choice: Either you support change or you support the status quo. Those who support change will work to find ways of achieving that change. Those who support the status quo will not only argue creatively and vociferously against any change, but will seek to find ways to entrench the status quo and to make change even more difficult to achieve in the future.

Our government believes firmly that our institutions must become more democratic, more accountable and more transparent. In short, they must change. In this area, our government has led the way. Since forming the government, we have substantially changed the way business is done in Ottawa.

[*Translation*]

We've passed the Federal Accountability Act which banned union and corporate donations to candidates and riding associations; limited individual donations to political parties to $1,100 per year; expanded access to Information laws to include crown corporations such as Canada Post, VIA Rail, and the CBC as well as organizations such as the Canadian

TÉMOIGNAGES

OTTAWA, le mercredi 7 mai 2008

Le Comité sénatorial permanent des affaires juridiques et constitutionnelles auquel a été renvoyé le projet de loi S-224, Loi modifiant la Loi sur le Parlement du Canada (sièges vacants), se réunit aujourd'hui à 16 heures pour examiner le projet de loi.

Le sénateur Joan Fraser (*présidente*) occupe le fauteuil.

[*Traduction*]

La présidente : Honorables sénateurs, nous poursuivons donc notre étude du projet de loi S-224, Loi modifiant la Loi sur le Parlement (sièges vacants).

Nous avons le grand plaisir d'accueillir l'honorable Peter Van Loan qui est leader du gouvernement à la Chambre des communes et ministre de la réforme démocratique. Il est accompagné de témoins du Conseil privé en la personne de Dan McDougall, directeur, Analyse et planification stratégique, Réforme démocratique, et de David Anderson, conseiller principal en politiques, Réforme démocratique. Bienvenue, monsieur le ministre.

Honorables sénateurs, le ministre n'a pas un, mais bien deux engagements à 17 heures et nous allons devoir l'écouter attentivement afin de lui adresser des questions qui soient les plus concises possible.

Monsieur le ministre, vous avez la parole pour vos remarques liminaires.

L'honorable Peter Van Loan, C.P., député, leader du gouvernement à la Chambre des communes et ministre de la réforme démocratique : Merci. Je suis heureux de me trouver parmi vous et de voir tous ces visages familiers pour parler de sujets également familiers.

Le débat concernant l'avenir de nos institutions démocratiques repose en fait sur un choix tout simple : le changement, ou le statu quo. Les personnes en faveur du changement s'efforceront de trouver des solutions afin d'aller de l'avant. Celles en faveur du statu quo non seulement s'insurgeront contre tout changement, parfois au moyen d'arguments rusés, mais tenteront d'implanter encore plus le statu quo et de faire obstacle au changement.

Notre gouvernement croit fermement que nos institutions doivent être davantage démocratiques, responsables et transparentes. Autrement dit, elles doivent changer. En ce sens, le gouvernement a préparé le terrain. Depuis notre arrivée au pouvoir, nous avons modifié considérablement les façons de faire à Ottawa.

[*Français*]

Le Parlement a adopté la Loi fédérale sur la responsabilité qui prévoit des mesures telles que l'interdiction pour les syndicats et les entreprises de faire des dons à des candidats ou à des associations de circonscription; la limite de 1 100 $ par année concernant les dons individuels à des partis politiques; l'élargissement des mesures législatives touchant l'accès à

Wheat Board; and created new independent officers of Parliament such as the recently appointed Parliamentary Budget Officer.

Legislation was passed which improves voter identification rules and strengthens the electoral process. The extension of the Afghanistan mission was put twice to a vote in Parliament.

Parliamentary hearings were held into the appointment of Justice Rothstein to the Supreme Court, and two bills were introduced to modernize the Senate to make it consistent with 21st century democratic values, principles, and traditions. On the other hand, we have faced a stiff resistance by the opposition to these and other measures.

For example, the Federal Accountability Act was resisted by the Liberals and the Bloc. Our bill to expand the opportunities for people to vote was gutted in committee by the opposition and our Bill to require voters to show their face before voting is being delayed by the opposition in committee.

Our bill to make incremental changes to the Senate by introducing 8-year term limits — instead of potentially 45 year terms — and to consult Canadians on who they want representing them in the Senate, have run into considerable delay and obstruction at the hands of those defending the status quo.

[*English*]

This leads us today to Bill S-224. It seeks to compel the Prime Minister to make appointments to the Senate within six months of a vacancy occurring. As I have noted earlier, there are those who seek to achieve change and those who seek to maintain and entrench the status quo. This bill seeks to do the latter — entrench the status quo — by entrenching the existing appointment process and making it more difficult to achieve a modern, democratic, accountable Senate.

This bill is unacceptable to the government. We will not support a bill that seeks to force the Prime Minister to make undemocratic appointments to an institution that is not consistent with modern democratic principles.

Some have suggested this bill is nothing more than an attempt by the Liberal Party to legitimize patronage appointments to the Senate by a future Liberal Prime Minister. Given the lack of support by the Liberal Party for real reforms to the Senate, it is easy to understand why such a view is credible and believable. I can picture it now: A future Liberal prime minister justifying patronage appointments to the Senate by saying, "I had no option. The law forced me to do it."

l'information afin d'y inclure Postes Canada, VIA Rail, la Société Radio-Canada, ainsi que des organisations telles que la Commission canadienne du blé; la création de postes d'agents indépendants du Parlement, par exemple le poste à la Direction parlementaire des budgets, poste comblé récemment.

Une mesure législative a été adoptée pour renforcer les règles concernant l'identification des électeurs et pour améliorer le processus électoral. La question du prolongement de la mission en Afghanistan a été mise aux voix au Parlement à deux reprises.

Des audiences parlementaires ont été tenues concernant la nomination du juge Rothstein à la Cour suprême du Canada et deux projets de loi ont été déposés en vue de moderniser le Sénat afin d'en faire une institution démocratique reflétant les valeurs, les principes et les traditions du XXI^{e} siècle. Mais l'opposition s'est montrée extrêmement rigide à l'égard de ces mesures et des autres propositions.

Par exemple, le Parti libéral et le Bloc québécois se sont opposés à la Loi fédérale sur la responsabilité. Le projet de loi visant à offrir aux électeurs davantage de possibilités pour exercer leur droit de vote a été disséqué par l'opposition à l'étape de l'étude en comité, et celui exigeant que les électeurs montrent leur visage au moment de voter est bloqué par l'opposition à l'étape de l'étude en comité.

Le projet de loi concernant une réforme sénatoriale graduelle et qui vise à limiter les mandats des sénateurs à huit ans — comparativement au maximum de 45 ans — et à consulter les Canadiens en ce qui touche leur choix concernant leurs représentants au Sénat, a été retardé et bloqué par les défenseurs du statu quo.

[*Traduction*]

Cela nous amène au projet de loi S-224, qui vise à obliger le premier ministre à faire des nominations au Sénat dans les six mois suivant la date à laquelle un siège est devenu vacant. Comme je l'ai mentionné plus tôt, il y a ceux qui souhaitent que les choses changent, et il y a ceux qui veulent maintenir voire renforcer le statu quo. Ce projet de loi maintient le statu quo : il aurait pour effet de consolider le processus de nomination actuel et de rendre encore plus complexe tout effort visant à rendre le Sénat plus moderne, démocratique et responsable.

Le gouvernement estime que cela est inacceptable. Nous n'appuierons pas un projet de loi qui obligerait le premier ministre à faire des nominations non démocratiques au sein d'une institution qui ne respecte pas les principes modernes de la démocratie.

Certains sont d'avis qu'il ne s'agit rien de plus qu'une tentative du Parti libéral pour justifier les nominations partisanes au Sénat par un futur premier ministre libéral. Si l'on considère le manque d'enthousiasme des libéraux à l'égard d'une véritable réforme du Sénat, cette hypothèse est loin d'être invraisemblable. Je peux très bien m'imaginer un futur premier ministre libéral justifiant de telles nominations en disant : « Je n'avais pas le choix, c'est la loi qui le veut. »

Respectfully, I say to the members of this committee, you do have an option. You can say no to the old ways of doing things, you can say no to the status quo and you can say no to this bill. You can work with our government to achieve real change to our parliamentary institutions such as the Senate; change that will modernize and reform our institutions, including the Senate, to make them consistent with 21st century democratic values, principles and traditions.

For example, we have consistently stated that we are open to different approaches to reforming the Senate. Therefore, in the context of a process for selecting senators, such as that envisioned in Bill C-20, the Senate consultations bill, if a similar proposal were to be included in Bill S-224, it could be seen as enhancing democracy, as well as the legitimacy of the Senate. Absent a democratic process, Bill S-224 will simply maintain the status quo by entrenching the lack of democratic legitimacy of the Senate.

Those are my views and I will be pleased to take any questions.

Senator Joyal: I had the opportunity to read the presentation of the minister. Minister, when Bill S-4 was referred to this chamber by the government, this committee conducted an extensive study of the bill and made recommendations to the government to refer to the Supreme Court the question of the constitutionality of section 44; how much power was vested in Parliament to change essential characteristics of the Senate without the concurrence of the provinces. I think this committee came to that conclusion on the basis of briefs it received from the provincial Government of Quebec, from Ontario, from New Brunswick, from Newfoundland and Labrador and from other provinces who expressed a similar concern.

When this report was published, why did the government not act upon it? Today, we could have had parameters available to Parliament whereby the government, or Parliament as such, could act and proceed with changes in respect of the letter of the Constitution.

Mr. Van Loan: I have indicated our view in the past that we believe those two bills are entirely constitutional. Every considered, thoughtful opinion by leading academics says the same thing. If you believe the bills are not constitutional, if that is your considered opinion, then, to be consistent, you will find that the bill in front of you today is not constitutional. The two have their constitutional grounds for the exact same reason. They draw their basis on the notion that we can make some kind of incremental reform as to how appointments to the Senate are made without violating the Constitution. You cannot vote in favour of Bill S-224 and then suggest that Bill C-19 and Bill C-20 as they are now are unconstitutional. That view would be entirely inconsistent.

Chers membres du comité, je vous dis très respectueusement que vous avez le choix. Vous pouvez embrasser le changement et rejeter le statu quo. Vous pouvez vous opposer à ce projet de loi. Vous pourrez collaborer avec le gouvernement pour véritablement changer nos institutions parlementaires telles que le Sénat, les moderniser, les transformer; autrement dit, faire en sorte qu'elles reflètent les valeurs, les principes et les traditions, ancrés dans la démocratie, du XXI^{e} siècle.

Par exemple, nous avons répété que nous étions prêts à considérer d'autres approches. Donc, si un processus de sélection des sénateurs — comme celui que prévoit le projet de loi C-20 — était inclus dans le projet de loi S-224, ce dernier serait considéré comme renforçant la démocratie et la légitimité au Sénat. Mais puisqu'il ne prévoit aucun processus démocratique, le projet de loi S-224 ne fera que maintenir le statu quo en renforçant l'absence de légitimité démocratique au Sénat.

Je viens de vous exprimer mon point de vue et je serai heureux de répondre à vos questions.

Le sénateur Joyal : J'ai eu l'occasion de lire le texte de l'allocution du ministre. Monsieur le ministre, quand le gouvernement a renvoyé le projet de loi S-4 à notre Chambre, notre comité a effectué une étude approfondie de ce texte et recommandé au gouvernement qu'il fasse un renvoi à la Cour suprême relativement à la constitutionnalité de l'article 44. En effet, de quel pouvoir le Parlement dispose-t-il pour modifier des caractéristiques essentielles du Sénat sans l'aval des provinces. Notre comité était arrivé à cette conclusion à partir de mémoires qu'il avait reçus des gouvernements du Québec, de l'Ontario, du Nouveau-Brunswick, de Terre-Neuve-et-Labrador ainsi que d'autres provinces qui avaient exprimé les mêmes réserves.

Pourquoi le gouvernement n'a-t-il pas donné suite à ce rapport, après sa publication? S'il l'avait fait, nous disposerions aujourd'hui de paramètres en fonction desquels le gouvernement ou le Parlement pourrait apporter des changements dans le respect de la Constitution.

M. Van Loan : J'ai déjà dit que, selon nous, ces deux projets de loi sont tout à fait constitutionnels. Tous les théoriciens ayant émis des avis réfléchis sur cette question se sont dit du même avis. Si vous estimez que ces projets de loi ne sont pas constitutionnels, si c'est la conclusion à laquelle vous parvenez après y avoir mûrement réfléchi, alors la logique veut que vous concluiez également que le texte qui vous est soumis n'est pas plus constitutionnel. Les deux s'articulent autour du même fondement constitutionnel. Ils partent du principe voulant que l'on peut apporter des réformes progressives au Sénat dans la façon de nommer les sénateurs sans enfreindre la Constitution. Dès lors, vous ne pouvez voter pour le projet de loi S-224 et insinuer par ailleurs que les projets de loi C-19 et C-20, tels qu'ils se présentent aujourd'hui, sont inconstitutionnels. Voir les choses ainsi c'est faire preuve d'incohérence.

I am not challenging you that Bill S-224 is unconstitutional, but I can tell you that it will take considerable mental and academic gymnastics to suggest that it is somehow constitutional when the other two are not.

Senator Joyal: You are a lawyer. I am sure you understand the scope of section 44 of the Constitution and the limits placed on Parliament by section 42(1)(*b*) that specifically mentions the selection, appointment or choosing of senators is within the confines of the general amending formula of the Constitution. That formula provides for the concurrence of at least seven provinces representing 50 per cent of the Canadian population. That issue is the fundamental one at stake.

When I say the provinces, it is not a political speech; the provinces tabled a brief with this committee. You know government machinery; therefore, I am sure that when the brief was signed by their ministers of intergovernmental affairs, it went through the Attorneys General and ministers of justice to ensure that the position put forward by the provinces is sound.

In the end, they may be compelled to defend that position in a court of justice. Statements made by provincial Attorneys General are on record stating that if the bills are adopted as the government has defined them, they will take the issue to court.

If we are to embark on a long process of judicial squabble, why not solve it at the beginning and seek reference from the Supreme Court of Canada to clear the case?

You will remember, that approach was taken in 1977 when the then government introduced Bill C-60. The provinces challenged the position taken in the bill and the government concluded it was better to refer the bills to the Supreme Court. Hence, the Senate reference was given to Canadians in 1979. That reference helped to define the context in which changes to the Senate could take place and proceed.

I do not see why the government stubbornly refuses this approach. The provinces are participants in defining the structure of the Senate. At least four provinces representing more than 50 per cent of the Canadian population have advised the federal Parliament and Canadians that they want to clarify the question and proceed with reform.

I am sure that if the government would have made that reference to the court, the Supreme Court of Canada would have clearly defined the scope of federal Parliament powers in relation to section 44, that is, Senate tenure. Then, this chamber would have considered the parameters of the court and acted upon the bill.

Je ne suis pas en train de vous dire que le projet loi S-224 est inconstitutionnel, mais je peux vous garantir que les universitaires de tout acabit devront se livrer à une véritable gymnastique intellectuelle pour arriver à conclure que ce texte est constitutionnel tandis que les deux autres ne le sont pas.

Le sénateur Joyal : Comme vous êtes juriste, je suis certain que vous comprenez la portée de l'article 44 de la Constitution ainsi que les limites que l'alinéa 42(1)*b*) impose au Parlement en précisant que la sélection, la nomination ou le choix des sénateurs doit se faire dans le respect de la formule générale d'amendement de la Constitution. Cette formule exige que sept provinces au moins représentant 50 p. 100 de la population du Canada soient d'accord sur tout amendement proposé. C'est précisément de cela dont il est question ici.

Quand je parle des provinces, je ne suis pas en train de tenir un discours politique, parce qu'elles nous ont envoyé des mémoires. Vous connaissez l'appareil gouvernemental et je suis donc certain que les mémoires qui nous sont parvenus et qui ont été signés par les ministres provinciaux des Affaires intergouvernementales sont passés par les procureurs généraux et les ministres de la Justice qui ont dû s'assurer que la position énoncée par leur province était solide.

Tous ces gouvernements risquent fort de devoir un jour défendre leur position en justice. Les procureurs généraux des provinces ont officiellement déclaré que si les projets de loi étaient adoptés tels quels, ils se rendraient devant les tribunaux.

Puisque nous risquons de nous retrouver aux prises avec une longue bataille judiciaire, pourquoi ne pas essayer de régler tout de suite la question dès le début par le truchement d'un renvoi à la Cour suprême du Canada afin de tirer les choses au clair?

Vous vous souviendrez que c'est l'approche qui avait été adoptée en 1977 quand le gouvernement de l'époque avait déposé le projet de loi C-60. Les provinces avaient contesté la position adoptée dans ce projet de loi et le gouvernement avait conclu qu'il valait mieux faire un renvoi à la Cour suprême au sujet du Sénat. Celui-ci, qui fait l'objet d'une décision en 1979, a permis de définir le cadre dans lequel il était possible d'apporter des changements au Sénat.

Je ne vois pas pourquoi le gouvernement s'entête à rejeter cette approche. Les provinces participent de plein titre à la définition de la structure du Sénat. Quatre provinces au moins, qui représentent plus que 50 p. 100 de la population du Canada, ont avisé le Parlement fédéral et l'ensemble des Canadiens qu'elles voulaient tirer la question au clair et s'attaquer à la réforme.

Je suis certain que, si le gouvernement avait accepté de faire ce renvoi à la Cour suprême du Canada, celle-ci aurait pu clairement définir la portée des pouvoirs du Parlement fédéral en regard de l'article 44, c'est-à-dire la durée du mandat des sénateurs. Notre Chambre aurait alors pu tenir compte des paramètres fixés par la cour et disposer du projet de loi en conséquence.

I do not understand the political stubbornness of the government, unless it wants to depict the Senate as the bad player. When you put the question in pure legal and constitutional terms, it makes sense to follow a logical and rational path to ask the court to clarify those questions.

Mr. Van Loan: We, of course, have responsibilities as legislators. We do not refer every question to the Supreme Court before we determine them as legislators. We carry out our responsibility. We take advice and counsel.

As I indicated in the first instance, when your committee studied the subject matter of those bills, it found that they were entirely constitutional.

With regard to the provinces' opinions, you know full well that there is a diversity of opinions among the provinces. In choosing to adopt the views of one or two of those provinces, you choosing not to adopt the views of others on the same subject. In no way can one say the views of one or two provinces, however politically motivated and whatever those political interests may be, are definitive when other provinces have contrary views. I do not consider the views of one or two provinces are definitive at all.

The key question is whether the structure of the Senate is affected. It is not. It is not affected by Bill S-224 in front of you today for study, and it is not affected by Bill C-19 or Bill C-20. None of those bills affects the manner in which the Senate is composed regarding the representation of the various provinces or the discretion of the Crown to continue to make appointments.

In fact, the most coercive of all those three pieces of legislation is the one before you today that compels the Prime Minister or the government to act in a particular fashion that the other bills do not. In terms of entrenching constitutionality, which is the basis on which Bill S-224 is justified, the other bills are far more justified as being proper and constitutional.

That is something your committee will need to wrestle with. How can you find in one direction on one set and another direction on another set?

I believe they are all constitutional. However, all of you who have made decisions in one regard must then decide how you can make the opposite decisions and pirouette on the head of a pin. I look forward to watching that.

The Chair: The deputy chair of the committee has graciously volunteered to yield what would normally be her slot to the sponsor of this bill, Senator Moore.

Senator Moore: Thank you minister, for coming today. In your statement, you say:

Je ne comprends pas l'entêtement politique du gouvernement, à moins qu'il ne veuille faire passer le Sénat pour un mauvais joueur. Si l'on aborde cette question sous des angles purement juridiques et constitutionnels, il apparaît logique de demander à la cour de tirer toutes ces questions au clair.

M. Van Loan : Les législateurs que nous sommes doivent assumer leurs responsabilités. Nous ne pouvons pas renvoyer toutes les questions que nous nous posons à la Cour suprême avant même d'en avoir débattu entre législateurs. Nous assumons nos responsabilités en la matière et nous prenons les avis qui nous sont donnés, juridiques et autres.

Comme je l'ai indiqué d'entrée de jeu, quand votre comité a étudié ces projets de loi, il a constaté qu'ils étaient tout à fait constitutionnels.

Par ailleurs, vous savez fort bien que les opinions varient énormément d'une province à l'autre. Quand vous adoptez le point de vue d'une province ou deux, vous décidez, délibérément, de faire fi de ce que pensent les autres. On ne peut certainement pas affirmer que les vues de deux provinces, peu importe leurs motivations ou les intérêts politiques en jeu, sont définitives quand d'autres provinces n'ont pas le même point de vue. Je ne considère certainement pas que les points de vue d'une province ou deux marquent la fin du débat.

La grande question revient à savoir si la structure du Sénat est visée. Eh bien non! Elle n'est pas visée par le projet de loi S-224 dont nous sommes saisis et elle n'est pas visée non plus par les projets de loi C-19 et C-20. Aucun de ces textes ne modifie la composition du Sénat en ce qui a trait à la représentation des provinces ou à la discrétion de la Couronne de nommer des sénateurs.

D'ailleurs, le plus contraignant de ces trois projets de loi est celui dont vous êtes saisis aujourd'hui parce qu'il oblige le premier ministre ou le gouvernement à agir d'une manière particulière, ce qui n'est pas le cas des deux autres textes. Si l'on veut juger la chose sous l'angle de la constitutionnalité des dispositions proposées, ce qui justifie le projet de loi S-224, force est de constater que les deux autres textes se tiennent davantage, parce qu'ils sont constitutionnels.

Votre comité devra trancher cette question. Comment pouvez-vous conclure à une certaine orientation pour un projet de loi et à une autre pour les deux autres textes?

J'estime qu'ils sont tous trois constitutionnels, mais ceux d'entre vous qui ont tranché dans un sens pour un texte devront se demander s'il leur est possible de changer d'avis et de faire une pirouette pour les deux autres. J'ai hâte de voir ce que vous allez faire.

La présidente : La vice-présidente du comité a gracieusement accepté de céder ce qui aurait normalement été son temps au parrain de ce projet de loi, le sénateur Moore.

Le sénateur Moore : Merci, monsieur le ministre de vous être déplacé. Dans votre déclaration, on peut lire :

We will not support a bill that seeks to force a prime minister to make undemocratic appointments to an institution that is not consistent with modern democratic principles.

We have a Constitution in this country, which is to be observed. When the Constitution changes, people will follow the new rule of law. I do not understand your comment about undemocratic appointments. I am from Nova Scotia. Under the compromise that created this country, we were guaranteed 10 Senate seats in our Maritime division. We currently have three vacancies, some of which have been outstanding for over two years.

I want to hear from you about your democratic adherence to the Constitution of Canada. We are entitled to having those vacancies filled. You can appoint Progressive Conservatives, Conservatives, Reformers or whomever you like. Preferably, they would be all women — if I had my way — to increase the gender balance in the chamber.

I do not understand your comment vis-à-vis the law of the land. Without that compromise from Nova Scotia and the other provinces, there would be no Canada. You cannot ignore that compromise and say it is undemocratic now to adhere to the law of the land.

Mr. Van Loan: I fail to follow your point there. My view is one about the principle of democracy and what democracy represents in the 21st century.

Senator Moore: That is exactly the point.

Mr. Van Loan: I think everyone, even Nova Scotians, believe strongly that the Senate needs to be reformed. If I look at a recent poll from Angus Reid, it asks the question: Which of these statements is closest to your point of view? First is that Canada does not need a Senate. All legislation should be reviewed by the House of Commons. Thirty-eight per cent of Atlantic Canadians believe that statement. Second is that Canada needs a Senate, but Canada should be allowed to take part in the process to choose senators. Forty-four per cent of Atlantic Canadians believe that statement. That is the dominant view. Third is that Canada needs a Senate and the current guidelines that call for appointed senators should not be modified. Four per cent of Atlantic Canadians agree with that sentiment.

Those are the Nova Scotians of whom you speak. You stand here —

Senator Moore: It is also —

Mr. Van Loan: If I may finish, you stand here saying that you are representative of those individuals. You have no democratic mandate from them. You were appointed by someone who was not from Nova Scotia. It is true that you

Nous n'appuierons pas un projet de loi qui obligerait le premier ministre à faire des nominations non démocratiques au sein d'une institution qui ne respecte pas les principes modernes de la démocratie.

Nous avons une Constitution qu'il faut respecter. Quand celle-ci est changée, le peuple suit la nouvelle règle de droit. Je ne comprends pas vos propos quand vous parlez de nominations non démocratiques. Je viens de la Nouvelle-Écosse. Eh bien, en vertu de l'entente qui a donné naissance à ce pays, on nous avait garanti 10 sièges au Sénat pour les Maritimes. Actuellement, trois de ces sièges sont vacants dont certains depuis plus de deux ans.

Parlez-moi donc de votre sens du respect démocratique de notre Constitution. Nous avons le droit de veiller à ce que ces vacances soient comblées. Vous pouvez toujours nommer des progressistes conservateurs, des conservateurs, des réformateurs ou peu importe. Personnellement — si la décision m'appartenait — je préférerais qu'il ne s'agisse que de femmes pour favoriser l'équilibre des sexes à la Chambre haute.

Je ne comprends pas ce que vous avez dit au sujet de la loi du pays. Sans l'entente signée par la Nouvelle-Écosse et les autres provinces, il n'y aurait pas eu de Canada. Vous ne pouvez faire fi de cette entente et dire qu'il est maintenant non démocratique de respecter la loi du pays.

M. Van Loan : J'ai du mal à vous suivre. Je m'exprime au sujet d'un principe de la démocratie et de ce que la démocratie représente au XXI^{e} siècle.

Le sénateur Moore : C'est précisément ce dont il est question.

M. Van Loan : Tous les Canadiens, mêmes les Néo-Écossais, sont fortement convaincus qu'il faut réformer le Sénat. Prenons un récent sondage d'Angus Reid où l'on a posé la question suivante : laquelle de ces déclarations exprime le mieux votre point de vue? D'abord : le Canada n'a pas besoin du Sénat. Toutes les lois devraient être examinées par les députés à la Chambre des communes. En réponse à cette question, 38 p. 100 des résidents de l'Atlantique se sont dit d'accord avec l'énoncé. Deuxièmement, on leur a demandé si, partant du principe que le Canada a besoin d'un Sénat, les Canadiens ne devraient pas avoir voix au chapitre dans le processus de sélection des sénateurs. Quarante-quatre pour cent des résidents de l'Atlantique se sont identifiés à cet énoncé. C'est le point de vue dominant. Troisièmement 40 p. 100 des résidents de l'Atlantique se sont dit d'accord avec le fait que le Canada a besoin d'un Sénat et qu'il ne faut pas modifier les actuelles lignes directrices régissant la nomination des sénateurs.

Voilà les Néo-Écossais dont vous parlez. Vous êtes en train...

Le sénateur Moore : C'est aussi...

M. Van Loan : Permettez-moi de terminer. Vous êtes en train de nous dire que vous représentez ces personnes-là. Or, ces gens-là ne vous ont pas donné de mandat démocratique. Vous avez été nommé par quelqu'un qui n'était même pas originaire de la

sit in a spot allocated to Nova Scotia. However, to say that is a kind of democratic representation in the 21st century, clearly the people of Atlantic Canada do not feel that way.

Senator Moore: That happens to be the law of the land today whether you like it or not.

Mr. Van Loan: They do not feel their senators should be selected that way.

Senator Moore: It is interesting that the Progressive Conservative Party, as you may know, is the party currently in power in the minority government of Nova Scotia. At its recent annual provincial convention, members decided that they did not want elected senators. I put that on the table for your information, minister.

I turn to the House of Commons aspect of this bill with regard to calling by-elections sequentially. In the Roberval—Lac Saint-Jean riding, between the time of vacancy and the time of the vote, 50 days transpired. With regard to the riding of Toronto Centre, 259 days transpired. The people in Toronto Centre were without their constitutionally guaranteed representative in the House of Commons for that period of time.

What public good was served by having a by-election eight and a half months after the vacancy occurred?

Mr. Van Loan: To answer your main question, which is the question of the provision in the private member's bill or the senator's bill regarding the dates, I do not have strong views on the order in which by-elections should be called. I am not sure it would solve the problem or the evil that you identified and are concerned with. I do not think it is problematic to require by-elections to be called. In the current context, however, you know that the writ for a by-election can be any length of time.

Senator Moore: I know that.

Mr. Van Loan: As such, the situation you are concerned about could still arise, even if this bill were to pass.

If this bill in front of us became law, the situation that you describe — where one seat can be open and vacant for a long time before having an elected representative and another for a shorter time — could still be the case.

Senator Moore: The six-month deadline is there, and it would mean the calling of the by-election sequentially. I am not sure that you are right on that point.

Mr. Van Loan: Those comments are both accurate, but there is no restriction on the period of time for the writ itself. It is an interesting concept; I do not know that it will change

Nouvelle-Écosse. Il est vrai que vous occupez un siège réservé à la Nouvelle-Écosse. Cependant, j'ai l'impression que les résidents de l'Atlantique ne sont pas du même avis que vous quand vous dites que vous illustrez un type de représentation démocratique au XXI^{e} siècle.

Le sénateur Moore : Il se trouve que c'est la loi du pays à l'heure actuelle, que vous soyez d'accord ou pas.

M. Van Loan : Ils n'ont pas l'impression que leurs sénateurs devraient être choisis de cette façon.

Le sénateur Moore : Il est intéressant que le Parti progressiste conservateur, comme vous le savez sans doute, soit le parti qui constitue l'actuel gouvernement minoritaire de la Nouvelle-Écosse. Lors d'un récent congrès annuel, les membres du parti ont dit qu'ils ne voulaient pas élire les sénateurs. Je vous transmets cela à titre d'information, monsieur le ministre.

Passons à l'aspect de ce projet de loi qui concerne la Chambre des communes plus précisément au déclenchement des élections partielles dans l'ordre de réception des demandes d'émission des brefs. Cinquante jours se sont écoulés dans la circonscription de Roberval—Lac Saint-Jean entre le moment où le titulaire est parti et la tenue du vote. S'agissant de la circonscription Toronto-Centre, cette période a été de 259 jours. Les résidents de Toronto-Centre ont ainsi, durant tout ce temps, été privés d'une représentation à la Chambre des communes qui leur est garantie par la Constitution.

Quel bien public peut-on voir dans le fait de tenir une élection complémentaire huit mois et demi après le début de la vacance?

M. Van Loan : Pour ce qui est de votre question principale, soit celle qui touche aux dispositions du projet de loi d'intérêt privé ou plus exactement du projet de loi du sénateur concernant les dates, je n'ai pas d'opinion bien tranchée quant à l'ordre dans lequel il faut déclencher des élections partielles. Je ne suis pas certain que cela réglerait le problème que vous avez mentionné ou qui vous préoccupe. Je ne vois pas de problème à ce que l'on exige que des élections partielles soient déclenchées dans un certain délai. Cependant, dans le contexte actuel, vous savez qu'il n'y a pas de délai fixé à cet égard.

Le sénateur Moore : Je le sais.

M. Van Loan : Cela étant, la situation qui vous préoccupe pourrait tout de même se reproduire dans l'avenir, malgré l'adoption de ce projet de loi.

Si ce projet de loi devenait loi, la situation que vous décrivez — c'est-à-dire qu'un siège peut être ouvert et demeuré vacant très longtemps avant qu'un autre député soit élu, tandis qu'un autre siège serait comblé plus rapidement — pourrait se reproduire.

Le sénateur Moore : Le délai de six mois est là et il obligerait la tenue d'une élection partielle en conséquence. Je ne pense pas que vous ayez raison sur ce point.

M. Van Loan : Vous avez raison dans vos deux remarques, mais aucun délai n'est imposé pour le dépôt des brefs d'élection. C'est un concept intéressant, mais je ne vois pas en quoi il va

a great deal. There are reasons why we want to have flexibility. I am not terribly wedded to them.

We have a situation right now, for example, with an existing vacancy in the riding of Guelph; we anticipate a vacancy in Don Valley West. Should the by-election in Guelph go ahead right away? Should we wait until Don Valley West is ready at the same time? We do not know that. That situation is similar to what happened in Quebec. There were two vacancies already; there was an announced resignation coming, and there was an anticipation of that resignation, which is why one of the vacancies in Quebec was significantly shorter than the other, with the notion that there were efficiencies in holding all the by-elections on the same day.

All those things were legitimate considerations. I do not feel strongly, but I do not feel that the concern you raise is something that the bill will do anything about.

Senator Andreychuk: If this bill passes, the witnesses before the committee to this point have indicated that it will compel and fetter the Prime Minister to act according to the terms of this bill. When asked what the sanctions would be against any particular prime minister who chose not to follow through, the sanctions seemed to come down to political sanctions. The remedy would not be a legal one in the broadest sense of the word. Therefore, we are back to public opinion. The next polls would determine whether that prime minister acted appropriately or not.

Is your opinion also that there would not be a legal remedy compelling the Prime Minister? There is no sanction, in other words?

Mr. Van Loan: That is my understanding of the bill, as I have read it.

Senator Andreychuk: One other issue that we have wrestled with here is that there have been vacancies, and Senator Murray put on the floor of the chamber that other prime ministers have not filled vacancies in the Senate for some considerable times, particularly in some regions. We have all that evidence from the start of this country.

Some witnesses came to this committee saying there is a crisis at this point, that we have hit that point. However, when pressed, are we doing our job? Am I, as a senator, doing my job? Are the senators opposite doing their job? They said yes but maybe with more difficulty, and of course, there are always reasons for those difficulties. They said it would be in the future that this would be critical. One witness said it was the nature of this Prime Minister, and cast aspersions that I would not.

changer quoi que ce soit. Il y a des raisons pour lesquelles nous voulons disposer d'une certaine souplesse. Nous n'y tenons pas particulièrement.

À l'heure actuelle, par exemple, la circonscription de Guelph est vacante et nous nous attendons à une autre vacance à Don Valley-Ouest. Devrait-on déclencher tout de suite les élections partielles de Guelph? Devrait-on attendre que la circonscription de Don Valley-Ouest se libère pour que les deux circonscriptions soient prêtes en même temps? Je ne sais pas. Cette situation est semblable à ce qui s'est passé au Québec. Il y avait déjà deux vacances, une démission annoncée et une démission à laquelle on s'attendait, ce qui explique pourquoi l'une des vacances au Québec a été comblée beaucoup plus rapidement que les autres étant entendu qu'il est plus rentable de tenir toutes les élections partielles le même jour.

Tous ces aspects sont autant de considérations légitimes. Je n'ai pas d'opinion bien arrêtée à ce sujet, mais je n'ai pas l'impression que ce projet de loi puisse contribuer à régler le genre de préoccupations que vous avez exprimées.

Le sénateur Andreychuk : Les témoins qui ont comparu devant le comité jusqu'ici nous ont dit que, si ce projet de loi était adopté, il contraindrait le premier ministre à agir en vertu de ce qu'il stipule. Quand nous leur avons demandé quel genre de sanction il conviendrait d'adopter contre un premier ministre qui déciderait de ne pas se plier aux exigences de ce texte, on nous a dit qu'il s'agirait de sanctions politiques. Le remède ne serait donc pas juridique au sens général du terme. Ce faisant, nous nous en remettrions à l'opinion du public. Ce sont les sondages suivants qui détermineraient si le premier ministre a agi correctement.

Estimez-vous également qu'il n'y a pas de disposition juridique contraignante pour le premier ministre? Autrement dit, que nous n'aurions aucune sanction?

M. Van Loan : C'est ainsi que j'ai compris le projet de loi.

Le sénateur Andreychuk : L'un des problèmes avec lequel nous sommes aux prises ici, c'est qu'il y a actuellement des sièges vacants et le sénateur Murray a déclaré au Sénat que les autres premiers ministres n'avaient pas comblé les vacances de la Chambre haute pendant très longtemps, surtout dans le cas de certaines régions. Il est possible de retracer cet historique depuis les origines du Canada.

Certains témoins que nous avons entendus au comité nous ont dit que nous en sommes à une situation de crise, que nous avons atteint un point critique. Cependant, quand nous leur avons demandé si nous faisons notre travail, si le sénateur que je suis fait son travail, si les sénateurs de l'opposition font leur travail, ces témoins nous ont dit que c'était peut-être le cas, mais que nous avions un peu plus de difficultés à le faire, étant entendu qu'il y a toujours de bonnes raisons pour expliquer ces difficultés. Ils nous ont dit que c'est dans l'avenir que la situation deviendrait particulièrement critique. Un témoin nous a précisé en des termes peu flatteurs pour le premier ministre — termes que je ne reprendrai pas — que cette situation de crise à venir est attribuable à la nature même de l'actuel premier ministre.

Therefore, on September 7, 2006, before the Special Senate Committee on Senate Reform, Prime Minister Harper stated:

> The government prefers not to appoint senators unless it has the necessary reasons to do so. I mentioned one of these reasons in the case of Senator Fortier. Frankly, we are concerned about the representation in the Senate and about the number and the age of our Senate caucus. It is necessary for the government, even in the present system, to have a certain number of senators to do the work of the government in the Senate. We have not reached a point where it is necessary to appoint certain senators to meet this objective. At this time, I prefer to have an election process where we can consult the population rather than to appoint senators traditionally.

Is that still the position of this Prime Minister and the government?

Mr. Van Loan: It most certainly is. That statement goes to the core of our concern with this bill. We made a commitment to Canadians in the last election to move to a process where they have a say in electing their senators. We have a bill that seeks to achieve that process. It is being studied right now at a special legislative committee of the House of Commons. The hope is that the bill will ultimately pass, become law and there will be an opportunity for Canadians to have a say in filling those vacancies so that those who are in the Senate can truly be representative of the people of the provinces that they say they are here representing so there is a genuine democratic element there. That is what we seek to do.

Were this law in place before that occurred, then the situation could arise where all the opportunities that exist to legitimatize the Senate — you spoke to a crisis being addressed. If there is a crisis of legitimacy of the Senate among Canadians, it is not that there are not enough of them; it is not that they are overworked; it is that they are not democratically elected and there is no democratic element. That is what Canadians say loud and clear is their concern about the legitimacy of the Senate.

I appreciate that there are senators who work hard; I appreciate it is a challenge particularly for the government side having to carry its weight, its workload, with relatively small numbers. However, the resolution is not, we think, one where we continue the deeper illegitimacy of an appointed body that is inappropriate in the 21st century. We think the appropriate solution is to allow that transition to occur from what has been, yes, a proud part of our tradition. The Senate is part of our history, and those old ways in which it operated reflect our roots; there is no doubt of that. There was a legitimate place for an appointed body that reflected, as is still in our Constitution, a propertied class of elite that needed to be protected against those masses. That place was part of our history. It is undeniable and

Voici ce qu'a déclaré le premier ministre Harper, le 7 septembre 2006, devant le Comité sénatorial permanent sur la réforme du Sénat :

> Le gouvernement préfère ne pas nommer de sénateurs à moins d'avoir des raisons nécessaires. J'ai mentionné une de ces raisons dans le cas du sénateur Fortier. Je peux être franc en disant que nous sommes préoccupés par la représentation au Sénat et par le nombre et l'âge de notre caucus sénatorial. Il est nécessaire pour le gouvernement, même dans le système actuel, d'avoir un certain nombre de sénateurs pour faire le travail du gouvernement au Sénat. Nous ne sommes pas au point où il est nécessaire de nommer certains sénateurs pour remplir cet objectif. Je préfère avoir, à ce moment-ci, un processus électoral où nous pouvons consulter la population au lieu de nommer des sénateurs de façon traditionnelle.

Cela demeure-t-il la position de ce premier ministre et de son gouvernement?

M. Van Loan : Très certainement. Cette déclaration illustre l'essentiel de nos préoccupations face à ce projet de loi. Lors des dernières élections, nous nous sommes engagés envers les Canadiennes et les Canadiens à adopter un processus qui leur permettrait d'avoir voix au chapitre dans le choix de leurs sénateurs. Nous avons déposé un projet de loi qui vise à y parvenir. Il est actuellement à l'étude par un comité législatif spécial de la Chambre des communes. Nous espérons que ce texte finira par être adopté, qu'il deviendra loi et que les Canadiennes et les Canadiens auront leur mot à dire dans le choix des personnes qui combleront les postes vacants pour que les sénateurs soient véritablement représentatifs de la population des provinces qu'ils prétendent représenter et que nous insufflions un peu de démocratie dans tout cela. C'est ce que nous voulons faire.

Si cette loi avait été adoptée avant que tout cela ne se produise, nous aurions pu sauter sur toutes les occasions possibles pour légitimer le Sénat, puisque vous avez vous-même parlé d'une crise. S'il y a une crise de légitimité du Sénat parmi les Canadiens, ce n'est pas parce qu'il n'y a pas suffisamment de sénateurs, ce n'est pas parce qu'ils sont surchargés de travail, c'est parce qu'ils ne sont pas démocratiquement élus et que le processus actuel n'est pas démocratique. C'est cela que les Canadiens expriment haut et fort quand ils parlent de la légitimité du Sénat.

Je suis conscient que des sénateurs travaillent fort et j'apprécie tout à fait le défi qui incombe plus particulièrement aux sénateurs du parti gouvernemental qui doivent faire leur part, qui doivent faire leur travail, bien qu'ils soient relativement peu nombreux. Quoi qu'il en soit, je pense que nous avons décidé de ne pas continuer à avaliser l'illégitimité d'un corps législatif nommé qui ne correspond pas aux réalités du XXI^{e} siècle. Nous estimons que la solution consiste à favoriser la transition à partir de la situation actuelle qui, je le reconnais, s'inscrit dans une tradition dont il y a lieu de s'enorgueillir. Le Sénat fait partie de notre histoire et les vieux mécanismes en fonction duquel ils fonctionnent reflètent nos racines, c'est indéniable. La Chambre haute a été et demeure dans notre Constitution un lieu constitué de personnes nommées

still there in our Constitution. The time has come to grow beyond that, to reflect the fact that we are in the 21st century. That is still the policy of the government.

This bill, if passed, would make that transition much more difficult and lengthy.

Senator Andreychuk: If it came to a crisis point, I understand that the Prime Minister is saying that the institution needs to continue and that situation may be a cause for appointment at some time but is not the case we are in now.

Mr. Van Loan: I have not heard a suggestion from Canadians that we have a crisis. We do not believe that crisis has occurred, and while I occasionally hear from Conservative senators who feel they are stretched and working hard, none of them are telling me it is time to abandon Bill C-20 and start filling other spots first.

Senator Baker: Minister, as you are aware, presently the Senate is dealing with Bill C-10 that passed the elected chamber with a provision of nine pages that nobody in the House of Commons knew existed. The word "film" was not used in any of the stages, any of the debates or any of the committee reports. You did not know it was there. Nobody else knew it was there. It was the unelected Senate that discovered it.

A short time ago, minister, you appeared before this committee and said we must pass the Elections Act without amendment, and of course there was a provision in there that would have released everyone's date of birth. We would have had telemarketers phoning every senior citizen if the Senate had not stepped in and overruled the elected chamber of the House of Commons.

In your speech, you said that the Federal Accountability Act was resisted by the Liberals. It is true, minister, that it was resisted by a great many Liberals in the Senate. One thing we objected to, minister, was that a summary conviction offence committed by a candidate or an official agent could be prosecuted 10 years after the fact. It was a disgraceful piece of legislation. From a search warrant that goes into the Conservative Party headquarters, a prosecution could result 10 years later for a minor infraction, whereas the Criminal Code says that for everything else it is six months. It was our recommendation to change it, but you said no.

The point is that we have important work to do here. We fix what the House of Commons does. Senator Moore is trying to say that we need to fill some Senate vacancies. More and more vacancies are coming open. They are not filled unless you have someone who wants to be in the cabinet but cannot be

représentant une classe de possédants, une classe d'élites qu'il fallait protéger contre les masses. Cela fait partie de notre histoire. C'est indéniable et ce mode de fonctionnement demeure entériné dans notre Constitution. Or, l'heure est venue d'aller au-delà, de réfléchir sur le fait que nous sommes au XXI[e] siècle. Voilà la politique de notre gouvernement.

Si ce projet de loi était adopté, cette transition serait plus difficile et prendrait plus de temps.

Le sénateur Andreychuk : J'ai compris de ce que le premier ministre a dit que, si nous en arrivons à un stade de crise, il faudra maintenir l'institution en vie et éventuellement nommer des sénateurs à un moment donné, mais que nous n'en sommes pas encore là.

M. Van Loan : Les Canadiens ne nous ont pas laissé entendre que nous étions en crise. Nous ne pensons pas être en crise et même si j'entends parfois les sénateurs conservateurs dire qu'ils sont débordés et qu'ils travaillent très fort, aucun d'eux ne m'a indiqué qu'il fallait renoncer au projet de loi C-20 et commencer à combler les vacances.

Le sénateur Baker : Monsieur le ministre, comme vous le savez, le Sénat est en train d'étudier le projet de loi C-10 qui a été adopté à la Chambre basse, projet de loi qui comporte une disposition de neuf pages dont personne n'a entendu parler à la Chambre des communes. Le mot « film » n'a été employé à aucune des étapes de l'étude du projet de loi, dans aucun débat ni aucun rapport de comité. Vous ne saviez pas qu'il était là. Tout le monde l'ignorait. Eh bien, c'est un Sénat non élu qui s'en est rendu compte.

Monsieur le ministre, vous avez récemment rencontré notre comité pour nous dire que nous devions adopter la Loi électorale sans la modifier, mais voilà que celle-ci comportait une disposition qui aurait permis de publier la date de naissance de tous les électeurs. Des entreprises de télémarketing auraient pu appeler toutes les personnes âgées au Canada si le Sénat ne s'en était pas mêlé et n'avait pas renversé la décision de la chambre élue, c'est-à-dire de la Chambre des communes.

Dans votre discours, vous aviez dit que les libéraux s'étaient opposés à la Loi fédérale sur la responsabilisation. Il est vrai, monsieur le ministre, qu'un grand nombre de libéraux au Sénat étaient entrés en résistance contre ce texte. Nous nous étions alors objecté à l'adoption d'une infraction punissable par procédure sommaire, dans le cas des candidats ou des agents officiels, infraction qui aurait pu faire l'objet de poursuites 10 ans après les faits. Cette mesure législative était tout simplement honteuse. Ainsi, une poursuite intentée à la suite d'une perquisition au siège du Parti conservateur aurait pu donner lieu à une inculpation, 10 ans après les faits, tandis que le Code criminel parle de six mois. Nous avions recommandé de changer cette disposition, mais vous avez refusé.

Tout ce que je veux dire, c'est que nous effectuons un important travail ici. Nous réparons ce que fait la Chambre des communes. Le sénateur Moore essaie de vous dire que nous devons combler certaines vacances au Sénat. De plus en plus de postes sont en train de se libérer à la Chambre haute. Or, vous ne

elected. All these vacancies are increasing. We have this important work to do; the check, the sober second thought, on you. The examples are so numerous. We probably would not do it if we were elected because we would behave like politicians; like you people do.

The logical conclusion to what the minister has said here before this committee is this: Vacancies will not be filled, and if this government is re-elected, they still will not be filled. Second reading of the elected Senate bill never appeared in the Senate. It has been stuck in second reading in the House of Commons for four years. Ontario will probably take the Prime Minister to court.

The problem is that you have all these vacancies in the Senate, and we will soon be down to nothing. Is it your intent to eliminate that necessary check that Canadians need on your government?

The Chair: That was his question.

Mr. Van Loan: I know it was a question. When someone is bitter, you can never get a word in edgewise.

In any event, the question was about, as I gather it, sober second thought. I look at the issues you have covered, and it seems to me the place where the sober second thought needs to occur is within the Liberal caucus. I do not know what happens in the Liberal caucus.

We can look at the first issue you raised, which was that of the disclosure of birth dates on electoral lists. That proposal was supported by the Liberal Party at committee in the House of Commons and opposed by the Conservative members.

Senator Baker: You voted for it.

Mr. Van Loan: No, the Conservatives at committee voted against it.

Senator Baker: You voted for it in the House of Commons.

Mr. Van Loan: Only as part of an agreement to have the bill passed to the Senate.

Senator Baker: That is my point.

Mr. Van Loan: We objected. However, it was clear that, without that provision, unless we went along with it, it would not be supported.

Senator Baker: "I had no choice."

Mr. Van Loan: The Liberals in the Senate disagreed with the Liberals in the House of Commons who reversed their decision and restored the Conservative view of things, so we appreciated that. However, it would have been much easier had that position been worked out in the Liberal caucus in the first place.

les combler pas sauf quand vous voulez nommer quelqu'un au Cabinet qui ne peut se faire élire. Le nombre de vacances augmente. Nous avons un important travail à faire, nous devons vérifier, jeter un nouveau regard sur ce que vous faites. Les exemples abondent. Nous n'agirions certainement pas de la même façon si nous étions élus, parce que nous nous comporterions comme des politiciens, comme vous aux communes.

Voici la conclusion logique à laquelle nous conduisent les propos du ministre devant ce comité : les vacances ne seront pas votées et si ce gouvernement est réélu, rien ne changera. Le projet de loi sur un Sénat élu n'a pas été soumis à la Chambre haute parce qu'il n'a pas franchi l'étape de la deuxième lecture aux Communes. Il est demeuré bloqué à cette étape à la Chambre des communes pendant quatre ans. L'Ontario traduira sans doute le premier ministre devant les tribunaux.

Le problème, c'est qu'il y a tous ces sièges vacants à combler au Sénat et qu'il n'y aura bientôt plus personne ici. Avez-vous l'intention de supprimer cette étape de vérification nécessaire dont les Canadiens ont besoin face à l'action de votre gouvernement?

La présidente : C'était sa question.

M. Van Loan : Je sais que c'était une question. Face à quelqu'un d'amer, on ne peut pas en placer une.

Quoi qu'il en soit, si j'ai bien compris, vous posez la question du second regard. Quand je songe à tous les dossiers que vous avez énumérés, je ne peux m'empêcher de penser que ce second regard concerne le caucus libéral. Or, je ne sais pas ce qui se passe au sein du caucus libéral.

Prenons le premier dossier que vous avez mentionné, celui de la divulgation des dates de naissance des électeurs. Cette proposition avait été appuyée par le Parti libéral au comité de la Chambre des communes et ce sont les conservateurs qui s'y étaient opposés.

Le sénateur Baker : Vous avez voté en faveur de la proposition.

M. Van Loan : Non, les conservateurs siégeant au comité s'étaient prononcés contre.

Le sénateur Baker : Mais vous avez voté pour à la Chambre des communes.

M. Van Loan : Uniquement en vertu d'une entente que nous avions conclue pour que le projet de loi soit adopté au Sénat.

Le sénateur Baker : C'est ce que je veux dire.

M. Van Loan : Nous nous y sommes objectés. Quoi qu'il en soit, il était évident que, sans cette disposition et à moins que nous nous prononcions en faveur de ce texte, il n'aurait pas reçu l'appui des conservateurs.

Le sénateur Baker : Autrement dit, « je n'avais pas le choix ».

M. Van Loan : Les libéraux au Sénat n'étaient pas d'accord avec les libéraux à la Chambre des communes qui avaient retourné leur veste et épousé le point de vue des conservateurs, ce que nous avons apprécié. Cependant, les choses auraient été beaucoup plus faciles si le caucus libéral avait commencé par adopter cette position.

In Bill C-10, the provision we are dealing with is one that the Conservative Party position has never changed on. The Liberals are, of course, the ones who created that provision. It was first introduced by Sheila Copps for concerns she has laid out about funding films that she thought were inappropriate, and there seemed to be a broad public consensus for that position. It was repeatedly introduced by Liberal governments and voted for by Liberals. Although I am sure that bill was presented at caucus, every time it was introduced, Liberal senators were not doing the job at caucus to raise the issue, but they raised the issue once it reached the Senate.

I think the real concerns are, why does the Liberal Party keep changing its mind on where it stands? Why do the senators keep disagreeing with the Liberals in the House of Commons on where they stand? On those questions, Conservatives have been consistent throughout. We have not had need for sober second thought. We were in the right place the first time.

The Chair: Minister, for the record, may I say that this committee was the one that recommended removing birth dates from the electoral list.

Mr. Van Loan: I am well aware of that.

The Chair: The committee did so after evidence presented by the Privacy Commissioner. This decision was not a partisan one.

Mr. Van Loan: You will recall that I was at this committee and pointed out to this committee in evidence that the Conservative Party had opposed the introduction of that provision, and it was introduced by the other party.

Senator Baker: You did, minister. You certainly did. However, you prove my point, do you not? We are not politicians here. We are the chamber of sober second thought.

Mr. Van Loan: Right.

Senator Baker: Senator Moore suggests that, until that you have this constitutional problem straightened out that you are attacking here on how senators are elected or appointed or how they arrive here, for goodness sake, at least fill the seats. We have important work to do. I have described a portion of the work we do. You are making terrible mistakes in legislation in the House of Commons. The errors you have made are outrageous. You prove my point.

Mr. Van Loan: I say briefly in response that I do not believe there is any magic in the sober second thought if you people are appointed rather that elected, or rather than the product of some consultative process. I do not think it is a good thing. I do not think we should throw away the notion of democracy because some people happen to be unelected and can review things. While I appreciate the views of the aristocratic Newfoundlander on the importance of unelected people passing views on matters, I think that democracy is a good way of doing

Le Parti conservateur n'a jamais changé de position en ce qui concerne la disposition dont nous parlons dans le projet de loi C-10. Ce sont les libéraux qui sont à l'origine de cette disposition qui avait été proposée par Sheila Copps parce qu'elle pensait qu'elle était nécessaire afin de régler le genre de préoccupation qu'elle avait au sujet du financement de l'industrie du cinéma, outre que cette position semblait bénéficier d'un large consensus public. Elle a été régulièrement reprise par les gouvernements libéraux qui se sont succédé et les libéraux ont régulièrement voté pour la faire adopter. Je suis certain que ce projet de loi a été présenté au caucus chaque fois qu'il a été déposé en chambre, mais les sénateurs libéraux n'ont pas soulevé le lièvre lors de ces réunions de caucus et ont attendu que le texte arrive au Sénat pour le faire.

La véritable question est de savoir pourquoi le Parti libéral ne cesse de changer d'avis. Pourquoi les sénateurs sont-ils régulièrement en désaccord avec la position des libéraux de la Chambre des communes? Du côté conservateur, en revanche, nous sommes tout à fait cohérents. Nous n'avons pas eu à jeter un second regard. Nous avons adopté la bonne position dès le début.

La présidente : Monsieur le ministre, je tiens à vous préciser pour mémoire que c'est ce comité qui a recommandé de retirer la date de naissance des listes électorales.

M. Van Loan : Je le sais bien.

La présidente : Nous l'avons fait après avoir entendu le témoignage du commissaire à la vie privée. Cette décision était non partisane.

M. Van Loan : Vous vous souviendrez que je suis venu devant ce comité et que je vous ai signalé, dans mon témoignage, que le Parti conservateur était opposé à l'adoption de cette disposition qui avait été introduite par l'autre parti.

Le sénateur Baker : Effectivement, monsieur le ministre. C'est ce que vous avez fait. Toutefois, vous venez juste d'abonder dans mon sens, n'est-ce pas? Nous ne sommes pas des politiciens ici. Nous sommes la Chambre du second regard.

M. Van Loan : C'est ça.

Le sénateur Baker : Le sénateur Moore dit que, tant que ce problème constitutionnel ne sera pas réglé, soit la façon dont les sénateurs sont élus ou nommés ou se retrouvent ici d'une façon ou d'une autre, vous devriez pour le moins commencer par combler les sièges vacants. Nous sommes investis d'une mission importante. Je vous ai expliqué une partie de notre travail. Vous commettez d'horribles erreurs dans les textes législatifs à la Chambre des communes. Ces erreurs sont scandaleuses. Vous venez de confirmer ce que j'affirme.

M. Van Loan : Je vous répondrai brièvement en vous disant que je ne pense pas que la magie de ce second regard tienne au fait que vous soyez nommés plutôt qu'élus ou désignés à la suite d'un processus de consultation quelconque. Je ne pense pas que ce soit une bonne chose. Je ne pense pas que nous devrions renoncer à la notion de démocratie sous prétexte que certains non élus peuvent jeter un second regard. J'apprécie, certes, le point de vue d'un aristocrate terre-neuvien sur l'importance de recueillir l'avis de non-élus sur certaines questions, mais j'estime que la démocratie

things. Nothing will ever be perfect. That is why there are so many readings of these bills. I believe that elected senators will do as good a job, if not better, but they will at least enjoy legitimacy in the eyes of Canadians that will make it more acceptable when they make those decisions.

Senator Baker: The chair will not allow me to respond.

The Chair: The chair will put you down for a second round.

Senator Cowan: Welcome, minister. I want to repeat again the phrase that Senator Moore put to you from your own speech:

> We will not support a bill that seeks to force the Prime Minister to make undemocratic appointments to an institution that is not consistent with modern democratic principles.

Do you believe that only elected chambers are democratic?

Mr. Van Loan: I certainly believe that, in the 21st century, the time has come where people want to have a voice in who represents them. I think Canadians —

Senator Cowan: Do you believe that only elected chambers are democratic?

Mr. Van Loan: I believe that the core of democracy is elections, and any legislative body should have a democratic election.

Senator Cowan: The answer is yes?

Mr. Van Loan: Yes.

Senator Cowan: Do you also believe that only democratic institutions, as you describe them, elected institutions, are legitimate?

Mr. Van Loan: We have all kinds of institutions in our society. We have institutions like the court.

Senator Cowan: I am not talking about the court, minister. I am talking about legislative bodies.

Mr. Van Loan: We have a role that our head of state plays, ultimately, with legislation, which I believe is legitimate in our industry.

Senator Cowan: You believe that unless the Senate of Canada, as a legislative body, is elected or selected, that it is neither democratic nor legitimate?

Mr. Van Loan: I think it is certainly not democratic, and it certainly lacks legitimacy that Canadians wish to see in it.

Senator Cowan: You would say that the only way to make a Senate or this Senate legitimate or democratic is to have elected senators?

demeure une bonne façon de faire les choses. La perfection n'est pas de ce monde et c'est pour cela que les projets de loi sont soumis à autant de lectures. Je crois que les sénateurs élus feront un aussi bon travail, si ce n'est meilleur, et qu'en plus ils jouiront d'une véritable légitimité aux yeux des Canadiens ce qui rendra leurs décisions encore plus acceptables.

Le sénateur Baker : La présidente me permettra-t-elle de rétorquer?

La présidente : La présidente vous inscrit pour un second tour.

Le sénateur Cowan : Bienvenue parmi nous, monsieur le ministre. Je vais répéter la phrase que le sénateur Moore vous a lue et qui est extraite de votre discours :

> Nous n'appuierons pas un projet de loi qui obligerait le premier ministre à faire des nominations non démocratiques au sein d'une institution qui ne respecte pas les principes modernes de la démocratie.

Estimez-vous que seules les chambres élues sont démocratiques?

M. Van Loan : Je suis effectivement convaincu qu'au XXI[e] siècle, il est temps que le peuple ait voix au chapitre dans le choix de ses représentants. J'estime que les Canadiennes et les Canadiens...

Le sénateur Cowan : Croyez-vous que seules les chambres élues sont démocratiques?

M. Van Loan : J'estime que la démocratie repose sur les élections et que tout corps législatif devrait être choisi par le biais d'élections démocratiques.

Le sénateur Cowan : Donc, vous répondez par oui?

M. Van Loan : Oui.

Le sénateur Cowan : Estimez-vous que seules les institutions démocratiques, à la façon dont vous le décrivez, les institutions élues, sont légitimes?

M. Van Loan : Nous avons toutes sortes d'institutions dans notre société. Il y a également des institutions comme les tribunaux.

Le sénateur Cowan : Je ne vous parle pas des tribunaux, monsieur le ministre. Je vous parle de corps législatifs.

M. Van Loan : Le chef de l'État a un rôle à remplir en ce qui concerne la législation qui, je crois, est légitime au sein de notre industrie.

Le sénateur Cowan : Vous croyez qu'à moins que le Sénat du Canada, en tant qu'organe délibérant, soit élu ou choisi, il n'est ni démocratique ni légitime?

M. Van Loan : J'estime qu'il n'est certainement pas démocratique et qu'il n'a pas le genre de légitimité que les Canadiens recherchent.

Le sénateur Cowan : Selon vous, la seule façon de faire en sorte qu'une Chambre haute où ce Sénat soit légitime ou démocratique, consiste à faire élire les sénateurs?

Mr. Van Loan: There are all kinds of models on how one could do it. I prefer the approach that our government has laid out, where we consult Canadians and ask them who they wish to represent them at a provincial level. There are many ways of going about it. There are many variations on length of term and many variations on rotations of term. Americans have six-year terms and they rotate elections every two years. There are all kinds of different ways of approaching it, but we certainly believe there should be a democratic consultative element in selecting our senators.

Senator Cowan: Without some election, selection and consultation, this Senate is illegitimate and undemocratic; is that your position?

Mr. Van Loan: I do not think it meets the test for legitimacy in the 21st century.

Senator Cowan: Is that your position?

Mr. Van Loan: I do not want to be too critical of a body that is a legitimate part of our history.

Senator Cowan: I realize you do not want to be critical of the Senate.

Mr. Van Loan: We believe that we want it to change.

Senator Cowan: Do you suggest, minister, that you can move from an appointed Senate to some form of elected or selected consultative Senate without a constitutional amendment and without consulting the provinces?

Mr. Van Loan: Of course, the ideal would be a fully formalized process with the kind of consensus that would address issues like representations of the provinces, changes in growth and the representation formula that exists in the Constitution. I think everyone agrees that formula is less than perfect.

Senator Cowan: Minister, I was not talking about the composition of the Senate. I was talking about the method of selecting, electing or consulting senators. I want an answer to the question.

The Chair: Give him a chance to answer.

Mr. Van Loan: These are, of course, all related issues.

I know many on your side believe full-scale reform should be the only way that reform is carried out, or at least that was the message delivered in the past. However, this bill suggests otherwise.

Full-scale reform would involve all those issues and would involve a constitutional amendment. However, the consensus for that reform is absent at this time for a variety of reasons, which are all understandable based on the interests of the provinces involved.

M. Van Loan : Il existe toutes sortes de modèles que nous pourrions suivre, mais je préfère l'approche proposée par notre gouvernement voulant que l'on consulte les Canadiens et qu'on leur demande par qui ils veulent être représentés à l'échelon provincial. Il y a bien des façons d'y parvenir. Il existe de nombreuses variantes quant à la durée des mandats et au rythme de renouvellement des sénateurs. Chez les Américains, les mandats sont de six ans et il y a des élections tous les deux ans. Il existe bien des façons d'aborder la chose, mais nous croyons qu'il faudrait ajouter une pincée de démocratie dans la façon dont nous choisissons les sénateurs.

Le sénateur Cowan : Autrement dit, sans élection, sélection ou consultation, ce Sénat est illégitime et anti-démocratique. C'est ce que vous pensez?

M. Van Loan : Je ne pense pas qu'il réponde aux critères de la légitimité au XXI^{e} siècle.

Le sénateur Cowan : C'est ce que vous pensez?

M. Van Loan : Je ne veux pas trop critiquer un organe qui a joué un rôle légitime dans notre histoire.

Le sénateur Cowan : Je me rends bien compte que vous ne voulez pas critiquer le Sénat.

M. Van Loan : Je pense toutefois qu'il doit changer.

Le sénateur Cowan : Monsieur le ministre, êtes-vous en train de laisser entendre que vous pourriez passer d'un Sénat nommé à un Sénat élu ou composé de sénateurs dont la nomination aura fait l'objet d'une consultation sans toutefois apporter d'amendement à la Constitution et sans consulter les provinces?

M. Van Loan : L'idéal serait bien sûr d'officialiser ce processus en parvenant au genre de consensus qui nous permettrait de régler des questions comme la représentation des provinces, les changements sur le plan de l'évolution de la représentation et la formule de représentation qui est prévue dans la Constitution. Je crois que tout le monde est d'accord sur le fait que cette formule est moins que parfaite.

Le sénateur Cowan : Monsieur le ministre, je ne parlais pas de la composition du Sénat, mais de la méthode de sélection, ou d'élection des sénateurs ou du choix de ces derniers après une consultation. Je veux que vous répondiez à la question.

La présidente : Donnez-lui une chance de vous répondre.

M. Van Loan : Toutes ces questions sont liées.

Je sais que beaucoup de sénateurs de votre parti estiment que seule une réforme d'envergure est envisageable, du moins c'est le message que vous aviez envoyé dans le passé. Force nous est toutefois de constater que ce projet de loi pointe dans une autre direction.

Une réforme à grande échelle porterait sur toutes ces questions et exigerait un amendement constitutionnel. Toutefois, on ne s'entend actuellement pas sur la réforme, pour toute une diversité de raisons, toutes compréhensibles, dépendant des intérêts de chaque province concernée.

That lack of consensus should not stand as a barrier to improving the situation by doing what we can within our authority now to enhance the democratic legitimacy of the Senate through changes such as the consultation envisioned in Bill C-20 and the term limits envisioned in Bill C-19.

Senator Cowan: Which is part of a package.

Mr. Van Loan: They are all free standing. Each of those improvements would be good on their own, but bringing them together even further strengthens the legitimacy of the Senate. I think people may have trouble with elected 45-year terms, but they are better than appointed 45-year terms.

Senator Cowan: You would be hard-pressed to find people who have served in the Senate for 45 years, minister.

To be clear, your view is that is possible for the federal Parliament to move from the present appointed Senate to a selected or elected Senate without consultation, without the input of the provinces and without following through on the provisions of the Constitution Act with respect to amendment of the Constitution. Is that your position?

Mr. Van Loan: I will put it to you this way. You have a Senate colleague, Bert Brown, who is the product of a consultative process. Do you think in any way his position in the Senate is illegitimate?

Senator Cowan: Absolutely not; he was appointed in accordance with the Constitution. We were delighted to have him.

Mr. Van Loan: He was appointed following a democratic process. We believe that is a significantly improved approach.

Senator Cowan: That is your choice.

Senator Merchant: In practical terms can you tell me when you envision that you will start making appointments? Will there be a critical point when you will say we need more people in the Senate? You have talked about change, but we do not know how this change will come about. What are you doing as a government to set the stage so you can start filling some of these vacancies?

Mr. Van Loan: Our intention is to start filling vacancies after the process envisaged by Bill C-20 is adopted. If any province were to move ahead with a democratic consultation in advance of that process to recommend senators for vacancies that existed, I cannot say for sure that the Prime Minister would fill them. However, he has indicated by his actions already that that is what he would do and I expect he would.

Senator Merchant: When do you think that will be?

L'absence de consensus ne devrait toutefois pas être un obstacle à l'amélioration de la situation, parce que nous devrions faire ce que nous pouvons, dans les limites de nos pouvoirs actuels, pour améliorer la légitimité démocratique du Sénat en apportant des changements, comme la consultation envisagée dans le projet de loi C-20 et les limites de mandat prévues dans le projet de loi C-19.

Le sénateur Cowan : Ce qui fait partie d'un ensemble.

M. Van Loan : Ce sont des propositions indépendantes. Chacune de ces améliorations seraient valables en soi, mais si on les appliquait en même temps, on se trouverait à renforcer davantage la légitimité du Sénat. Je crois que les gens ont des problèmes avec des mandats d'élus qui dureraient 45 ans, mais ce serait toujours mieux que d'avoir des gens nommés pour la même période.

Le sénateur Cowan : Vous aurez du mal à trouver un sénateur ayant passé 45 ans à la Chambre haute, monsieur le ministre.

Soyons clairs. Selon vous, il est possible que le Parlement fédéral passe d'un Sénat nommé, comme à l'heure actuelle, à un Sénat sélectionné ou élu sans consultation, sans la participation des provinces et sans un amendement aux dispositions concernées de la loi constitutionnelle. C'est ce que vous pensez?

M. Van Loan : Laissez-moi vous dire une chose. Vous avez un sénateur parmi vous, Bert Brown, qui a été choisi à la suite d'un processus de consultation. Pensez-vous que sa position au Sénat est illégitime?

Le sénateur Cowan : Absolument pas. Il a été nommé conformément aux dispositions de la Constitution. Nous avons été ravis de l'accueillir.

M. Van Loan : Il a été nommé à la suite d'un processus démocratique. J'estime que cela a considérablement amélioré le mécanisme de désignation au Sénat.

Le sénateur Cowan : C'est votre position.

Le sénateur Merchant : Sur le plan pratique, pourriez-vous me dire quand vous envisagez de faire des nominations? Va-t-on en arriver à un stade critique où vous allez dire que nous avons besoin de plus de sénateurs? Vous avez parlé de changement, mais nous ne savons pas comment ce changement va se dérouler. Que fait votre gouvernement pour préparer le terrain afin que nous commencions à combler les postes vacants?

M. Van Loan : Nous avons l'intention de combler les postes vacants après l'adoption du processus proposé dans le projet de loi C-20. Si des provinces désirent entamer les consultations démocratiques avant l'adoption du processus en question, afin de recommander des sénateurs pour combler les postes vacants, je ne suis pas certain que le premier ministre nommera qui que ce soit. Cependant, il a déjà prouvé par ses actes que c'est ce qu'il ferait et je m'attends à ce qu'il le fasse.

Le sénateur Merchant : Quand pensez-vous qu'il le fera?

Mr. Van Loan: It depends on each province. My hope is that we will be able to pass Bill C-20 in this Parliament. If not, perhaps it will pass in a subsequent Parliament.

Senator Merchant: I understand that by the end of 2009, there will be almost 30 vacancies in the Senate, a third of its members.

Mr. Van Loan: I keep anticipating an election two months from now. The latest I heard was July, but then it is October. I do not know. We have set October 2009. It is not in our hands.

In any event, we have lots of time and opportunity to adopt Bill C-20 and put it in place. If the next federal election occurs later than this spring, we could select democratically elected senators or at least recommended senators. I think Canadians would be happy to see that development and that opportunity in the next federal election.

Senator Merchant: Do you feel that the government can act unilaterally to set up the process by which senators are elected? This process will be a long one because some provinces have indicated they will challenge it. I think this change will take longer than only a few months.

Mr. Van Loan: Provinces may well challenge it. I expect if that were to occur, courts will act quickly in making a determination, being aware of the issues at play. I have that confidence in the courts.

Senator Tardif: I take offence to your comments about the lack of legitimacy of the Senate. The Senate as it exists now is duly constituted as per our Constitution.

If you want to change the process, then you must begin the process of changing the Constitution. That process requires consultation with the provinces and, according to the process set out, agreement from seven provinces with 50 per cent of the population.

Why are you refusing to go in that direction?

Mr. Van Loan: I do not share your view that the bill before you requires seven provinces and 50 per cent of the vote. That is the view you expressed, that change to select people for the Senate —

Senator Tardif: No, you are talking about Bill C-19 and Bill C-20.

Mr. Van Loan: No, I am talking about Bill S-224, the legislation before us. You said that any change to the process requires including the provinces.

Senator Tardif: The Constitution —

Mr. Van Loan: You said the Constitution sets it up and I need to go to the provinces if I want to change it. That is one issue with this bill. You cannot be —

M. Van Loan : Cela dépendra de chaque province. J'espère que nous pourrons adopter le projet de loi C-20 durant cette législature. Dans la négative, il sera peut-être adopté lors de la prochaine législature.

Le sénateur Merchant : Si j'ai bien compris, d'ici la fin 2009, près de 30 sièges seront vacants au Sénat, soit un tiers de nos effectifs.

M. Van Loan : Je m'attends à ce qu'il y ait une élection d'ici deux mois. On m'a parlé du mois de juillet dernièrement, mais j'ai aussi entendu parler d'octobre. Je ne sais pas. La date fixe tombe en octobre 2009. Cela ne nous appartient pas.

Quoi qu'il en soit, nous aurons amplement la possibilité d'adopter le projet de loi C-20 et de le mettre en œuvre. Lors des prochaines élections fédérales, plus tard au printemps, nous pourrions choisir des sénateurs démocratiquement élus, ou du moins nous pourrions les recommander. Je pense que les Canadiens seront heureux de voir cela, peut-être dès les prochaines élections fédérales.

Le sénateur Merchant : Pensez-vous que le gouvernement puisse agir unilatéralement pour mettre en œuvre le processus d'élection des sénateurs? Sinon, il faudra du temps pour le mettre en œuvre, parce que certaines provinces ont indiqué qu'elles allaient le contester. Je pense que ce type de changement ne se fera pas en quelques mois seulement.

M. Van Loan : Des provinces pourront toujours le contester. Je pense que si tel devait être le cas, les tribunaux seraient rapidement appelés à trancher, étant donné les enjeux. J'ai confiance dans les tribunaux pour cela.

Le sénateur Tardif : Je suis offusqué par ce que vous avez dit au sujet du manque de légitimité du Sénat. Le Sénat, tel qu'il existe actuellement, a été dûment constitué dans le respect de la Constitution.

Si vous voulez changer le processus de sélection des sénateurs, vous devrez commencer par changer la Constitution. Pour cela, il vous faudra consulter les provinces et, d'après la formule prévue, vous devrez recueillir l'accord de sept provinces représentant 50 p. 100 de la population.

Refusez-vous de vous orienter dans ce sens?

M. Van Loan : Je ne suis pas d'accord avec ce que vous dites à propos de ce projet de loi qui exigerait l'accord de sept provinces représentant 50 p. 100 de la population. Votre position, c'est que pour changer la formule et passer à un Sénat élu...

Le sénateur Tardif : Non, vous parlez des projets de loi C-19 et C-20.

M. Van Loan : Non, je parle du projet de loi S-224, du texte dont vous êtes actuellement saisis. Vous avez dit que tout changement de processus exigera la participation des provinces.

Le sénateur Tardif : La Constitution...

M. Van Loan : Vous avez dit que la formule est enchâssée dans la Constitution et que je dois obtenir l'accord des provinces pour la changer. C'est un des problèmes que pose ce projet de loi. Vous ne pouvez être...

Senator Tardif: That is if you want to change the Constitution. The Constitution says when there is a vacancy in the Senate, the Governor General, upon the advice of the Prime Minister, shall name someone — shall name.

Mr. Van Loan: Upon the advice, yes.

Senator Banks: It does not say that. It says the Governor General shall name.

Senator Tardif: Shall.

Mr. Van Loan: It does not say the Prime Minister shall.

Senator Tardif: Therefore, the Governor General shall. It is not an option.

Mr. Van Loan: It is exactly the same. That will not be altered in any way by Bill C-19, Bill C-20 or Bill S-224. That will not be altered by any of those three pieces of legislation. If you think constitutional amendments are necessary, then you believe Constitution amendments are necessary for Bill S-224 as well.

That is case you made and that is the point I raised at beginning. I do not have that problem with it. I think the bills are all legitimate. You can debate them and make those changes if you want without a constitutional amendment. If you think we need a constitutional amendment for the others, we need it for this bill as well.

Senator Tardif: Not for Bill S-224, minister.

Mr. Van Loan: What is the difference? Enlighten me. I cannot see the distinction.

Senator Tardif: This bill does not change the essential characteristics.

Mr. Van Loan: Neither do the others.

Senator Tardif: They absolutely do.

The Chair: We will go to a second round, but before we do, I have a question, minister.

As you know, section 32 of the Constitution Act, 1867 says:

> When a Vacancy happens in the Senate by Resignation, Death or otherwise, the Governor General shall by Summons to a fit and qualified Person fill the Vacancy.

It says "when" a vacancy happens. It does not say from time to time, or at pleasure or when the sun comes out from behind a cloud one day. It says "when" a vacancy happens.

Now, I am not a lawyer. To me, the meaning of those words is plain. However, you are a lawyer, so I ask you to tell me what you think those words mean.

Le sénateur Tardif : Sauf si vous êtes prêts à changer la Constitution. La Constitution dit qu'en cas de vacance au Sénat, le gouverneur général, sur avis du premier ministre, doit nommer quelqu'un — on dit bien « doit nommer ».

M. Van Loan : Effectivement, sur l'avis du premier ministre.

Le sénateur Banks : Ce n'est pas ce que ça dit. Ça dit que le gouverneur général doit nommer...

Le sénateur Tardif : Doit.

M. Van Loan : On ne dit pas que c'est le premier ministre qui doit le faire.

Le sénateur Tardif : Donc, c'est le gouverneur général qui doit le faire. Ce n'est pas une option.

M. Van Loan : C'est exactement la même chose. Cela ne sera absolument pas modifié par le projet de loi C-19, le projet de loi C-20 ou le projet de loi S-224. Ce ne sera modifié par aucun de ces trois textes. Si vous jugez que les amendements constitutionnels sont nécessaires, à ce moment-là vous estimez que des amendements constitutionnels s'imposent également dans le cas du projet de loi S-224.

C'est la position que vous soutenez et c'est ce que j'ai dit au début. Je n'ai pas de problème avec cela. Je crois que ces projets de loi sont légitimes. Vous pourrez toujours en débattre et apporter ces changements sans avoir à modifier la Constitution. Si vous estimez qu'un amendement constitutionnel s'impose pour les autres textes, à ce moment-là il faudra aussi des changements du même ordre pour ce projet de loi.

Le sénateur Tardif : Pas pour le projet de loi S-224, monsieur le ministre.

M. Van Loan : Quelle est la différence? Éclairez ma lanterne. Je ne vois pas de distinguo.

Le sénateur Tardif : Ce projet de loi ne change rien aux caractéristiques essentielles du Sénat.

M. Van Loan : Les autres non plus.

Le sénateur Tardif : Mais si.

La présidente : Nous allons passer à une seconde série de questions, mais avant cela, je veux poser moi-même une question au ministre.

Comme vous le savez, l'article 32 de la Loi constitutionnelle de 1867 dit ceci :

> Quand un siège deviendra vacant au Sénat par démission, décès ou toute autre cause, le gouverneur-général remplira la vacance en adressant un mandat à quelque personne capable et ayant les qualifications voulues.

On dit bien « quand un siège deviendra vacant ». On ne parle pas de temps en temps, ni au bon plaisir du gouvernement, ni quand le soleil percera par une journée ennuagée. On dit « quand un siège deviendra vacant ».

Je ne suis pas avocate. Personnellement, j'estime que ces mots sont évidents. Cela étant, comme vous êtes avocat, dites-moi ce que ces mots signifient, selon vous.

Mr. Van Loan: I would want to instruct my opinion based on the practice in the past. I am unaware of any vacancies that were filled the same day that they occurred.

The Chair: The second most recent appointment was within a week, I think.

Mr. Van Loan: Generally speaking, that time would be about the shortest. Lots of vacancies have existed for a long time. That does not create a compelling situation that this legislation would foresee. Otherwise, I do not know why you would bother with the legislation if you think it is already in the law.

The Chair: One uses the tools one has, I suppose.

Senator Murray: I want clarification. The constitutional issue that the provinces of Ontario, Quebec and New Brunswick raise, as you know, with regard to Bill C-20, is that in their view, it is not within our unilateral power as the Parliament of Canada to cause elections or selections, whatever you call them, to be made for Senate seats.

When you suggest that Bill S-224 is in the same category, I do not follow the argument. Surely no one suggests that it is not within our unilateral power to do what Bill S-224 seeks to do with regard to vacancies in the Senate or the House of Commons. Why do we need to invoke the general amending formula for Bill S-224? What is the argument there?

Mr. Van Loan: I no more agree that you need to invoke it for Bill C-19 or Bill C-20 than for Bill S-224 because neither of those affects the representation of the provinces or the essential composition of the Senate.

Senator Murray: It is the method of selection, and as you know from the Senate reference case a long time ago, it relates to whether a change to the duration of the mandate changes an essential characteristic of the Senate. The argument our provincial friends make is that the general amending formula must be invoked for Bill C-20. You say if that is the case, then it needs to be invoked for Bill S-224. I do not follow that argument at all.

We are constraining or seeking to constrain the prerogative of the Prime Minister with regard to by-elections in the House of Commons and the Senate. Those matters are surely within our own unilateral jurisdiction, as you constrained the Prime Minister's prerogative when you passed Bill C-16, the bill for the fixed election dates, so I do not follow your argument.

Mr. Van Loan: I believe that none of the three bills, for the exact same reason, have the problem. In terms of the method of selection, the fundamental legal elements that are provided for the Prime Minister to recommend to the Governor General or the monarch to appoint remain unaffected in their discretion; it remains unaffected by all three bills. Requiring a selection to

M. Van Loan : Il faudrait que je fonde mon opinion sur la pratique passée. Je n'ai jamais entendu parler de sièges qui, s'étant libérés, ont été comblés le jour même.

La présidente : Si je ne m'abuse, l'avant-dernière nomination a été faite dans la semaine qui avait suivi la vacance.

M. Van Loan : Disons que ce serait sans doute la période la plus courte. Bien des sièges sont demeurés vacants pendant longtemps. Cela ne donne pas forcément lieu au genre de situation extraordinaire envisagée dans cette mesure. Je ne vois pas, sinon, pourquoi vous vous embêtez à pousser ce projet de loi si vous pensez que tout cela est déjà prévu dans la loi.

La présidente : Je suppose que c'est parce qu'on utilise les outils qu'on a.

Le sénateur Murray : Je voudrais une précision. Le problème constitutionnel soulevé par les provinces de l'Ontario, du Québec et du Nouveau-Brunswick au sujet du projet de loi C-20 tient à ce que, selon elles, le Parlement du Canada n'a pas le pouvoir d'imposer l'élection ou la sélection, peu importe la terminologie retenue, des sénateurs.

Quand vous dites que le projet de loi S-224 appartient à la même catégorie, je dois vous dire que je ne parviens pas à suivre votre argumentation. Personne n'est en train de dire qu'il n'est pas de notre pouvoir unilatéral de faire ce que le projet de loi S-224 envisage au sujet des vacances au Sénat ou à la Chambre des communes. Pourquoi devrait-on invoquer la formule d'amendement constitutionnel pour appliquer les dispositions du projet de loi S-224? Quel est l'argument?

M. Van Loan : Je ne suis pas plus d'accord avec le fait que vous deviez invoquer cette formule pour le projet de loi C-19 ou le projet de loi C-20, parce qu'aucun de ces textes ne modifie la représentation des provinces ou la composition fondamentale du Sénat.

Le sénateur Murray : Tout cela tient à la méthode de sélection car, comme vous le savez d'après le renvoi sur le Sénat, il y a déjà longtemps, la question est de savoir si un changement de durée du mandat vient modifier l'une des caractéristiques essentielles du Sénat. Ce que les provinces nous disent, c'est qu'il faut invoquer la formule générale d'amendement dans le cas du projet de loi C-20. Vous dites que, si tel est le cas, il faut faire la même chose pour le projet de loi S-224. Je ne vous suis pas du tout dans cet argument.

Nous contraignons ou cherchons à contraindre le premier ministre dans sa prérogative relative aux élections partielles à la Chambre des communes et au Sénat. Ces questions relèvent évidemment de notre compétence unilatérale, comme vous avez vous-même contraint la prérogative du premier ministre quand vous avez adopté le projet de loi C-16 qui prévoit des élections à dates fixes. Je ne vous suis donc pas dans votre argumentation.

M. Van Loan : J'estime qu'aucun de ces trois projets de loi, pour les mêmes raisons, ne font pas problème à cet égard. Pour ce qui est de la méthode de sélection, les éléments juridiques fondamentaux dont dispose le premier ministre pour recommander une nomination au gouverneur général ou à la Reine ne sont pas modifiés quant à la dimension discrétionnaire.

occur within a particular time touches upon the selection process. That requirement is part of affecting the process by which they are selected. I do not agree with that basis, but if that is the basis on which you constitutionally argue that Bill C-20 requires a constitutional amendment, the same process occurs. That is what this bill is about. It is all about process. You are affecting, altering, compelling and putting in place limits in that process. You are setting up a legal framework for that process. Therefore, if the issue is process, then they are all on the same footing. Yes, it is different aspects of the process, indisputably, but it is a process consideration and a question of process absolutely. I think those bills are all legitimate and do not require a constitutional amendment. You cannot argue on the other side for two but not for the third.

Senator Murray: With regard to Senator Joyal's suggestion, and mine and others that Bill C-20 ought to be referred to the Supreme Court of Canada — and I think it was Senator Merchant's observation about the three provinces — those three provinces have indicated if the bill receives Royal Assent they will challenge it. You seem to think that this challenge could be dealt with swiftly. You would know more about this than I would, but three cases going through three separate appeal courts and making their way up to the Supreme Court of Canada is time consuming. It seems to me that if you wanted to cut the whole thing off at the pass, you would go directly to the Supreme Court of Canada with a reference now.

Mr. Van Loan: You can make that argument for any electoral reform or electoral change laws that pass. I do not think it should be a prerequisite for any change to the Canada Elections Act that it go to the Supreme Court first on a reference because it will affect subsequent election that will occur. Anyone may object to it.

Senator Murray: Three provinces, minister, have made their intentions clear. We went through all this in 1980, and the Trudeau government finally saw the wisdom of going directly to the Supreme Court of Canada.

Mr. Van Loan: I think you would find that, in any case like that, one would face an effort for injunctive relief to prevent something from happening, and it would be up to the courts to determine whether to grant such injunctive relief in the circumstances.

Senator Murray: You will have to spell out this point for us.

Mr. Van Loan: They would deal with it on that basis, that if the situation was urgent because of an upcoming election, they would deal with it on that basis. Even if it did not go all the way to the Supreme Court, the court at the appropriate level would make its determination, and it would have that impact. I am not concerned.

Senator Murray: In that province.

Aucun des trois projets de loi ne modifie cela. Le fait d'exiger qu'une nomination intervienne dans un délai particulier touche au processus de sélection. C'est en partie cette exigence qui modifie le processus de sélection. Je ne suis pas d'accord avec ce fondement, mais si c'est celui à partir duquel vous soutenez qu'il faut apporter un amendement constitutionnel au projet de loi C-20, c'est alors la même chose. Il n'est question de rien d'autre dans ce projet de loi que de processus. Avec ce texte, vous vous trouvez à modifier, à imposer et à limiter le processus. Vous établissez un cadre juridique pour ce processus. Dès lors, si le problème réside dans le processus, les trois projets de loi sont sur un même pied. Indéniablement, il s'agit d'aspects différents d'un même processus, mais il est bien question de processus. J'estime que ces projets de loi sont tous légitimes et qu'ils n'exigent pas d'amendements constitutionnels. Vous ne pouvez pas soutenir qu'il convient d'apporter un amendement pour deux de ces textes et pas pour le troisième.

Le sénateur Murray : Pour en revenir à la suggestion faite par le sénateur Joyal, par moi-même et par d'autres, à savoir que le projet de loi C-20 devrait être renvoyé à la Cour suprême du Canada — je pense que c'est le sénateur Merchant qui vous a parlé de trois provinces — il se trouve que trois provinces ont indiqué que si ce projet de loi recevait la sanction royale, elles contesteraient devant les tribunaux. Vous semblez penser que cette contestation serait rapidement réglée. Vous en savez sans doute davantage que moi à ce sujet, mais il est certain qu'il faudra beaucoup de temps pour que trois causes, entendues par trois cours d'appel différentes, aboutissent devant la Cour suprême. J'estime que si vous voulez vraiment gagner du temps, vous devriez vous adresser directement à la Cour suprême du Canada en lui adressant un renvoi.

M. Van Loan : Vous pouvez toujours soutenir cela dans le cas de lois sur la réforme électorale ou sur le changement de processus électoral, mais je ne pense pas qu'il soit nécessaire de commencer par un renvoi à la Cour suprême en vue de modifier la Loi électorale du Canada, parce que le changement aura un effet sur les élections suivantes. N'importe qui pourra s'y objecter.

Le sénateur Murray : Monsieur le ministre, trois provinces ont clairement énoncé leur intention. Nous avons connu ce genre de situation en 1980, quand le gouvernement Trudeau a finalement eu la bonne idée de s'adresser directement à la Cour suprême du Canada.

M. Van Loan : Dans toute situation de ce genre, il faut s'attendre à ce que certains aient recours à des mesures injonctives et il appartient alors aux tribunaux de déterminer s'il convient de faire droit à de telles mesures injonctives eu égard aux circonstances.

Le sénateur Murray : Il va falloir que vous nous précisiez cela.

M. Van Loan : Si la situation était urgente à cause de la proximité d'élections, les tribunaux traiteraient de la chose en urgence. Même si la cause n'aboutissait pas devant la Cour suprême, les tribunaux de ressort compétent rendraient une décision qui aurait ce genre d'impact. Cela ne m'inquiète pas.

Le sénateur Murray : Dans la province concernée.

Mr. Van Loan: Well, no. You talk about provinces and the views of provinces. In reality, they must all be regarded to a larger extent as political positions, which reflect the interests of those provinces.

Senator Murray: And yours is not political; you rise above it.

Mr. Van Loan: One of the provinces you indicate, the same province, when its government changed, changed its opinion. Therefore, I think that is the clearest evidence that what we are dealing with are political positions. We are satisfied with the legal advice we have obtained, legal advice that your committee has heard from the most distinguished scholars that the process being followed is appropriate; that Bill C-20 would be constitutional; that Bill C-19 would be constitutional; and, by the same token, Bill S-224 now before you would probably pass the test too.

The Chair: We have time for one quick question from Senator Banks.

Senator Banks: I want you to comment on the distinction that I see. The Constitution refers to fundamental change in the nature of selection. The present bill determines when but not whether the convention of a prime minister making a recommendation to the Governor General will happen. It does not say the Prime Minister cannot. The other two bills constrain the Prime Minister's freedom of action by requiring the Prime Minister, at least by inference, to appoint whomever is selected, whatever that process would be, unless you agree that the Prime Minister could, in that event, ignore the selection and appoint someone else.

Mr. Van Loan: Legally, the Prime Minister could ignore that. That discretion is not affected by Bill C-20. I believe there would be political pressure, the same as there would be in this bill. What is the consequence in this bill? For failure to adhere to the law, one pays a political price. The same would be the case of a prime minister who failed to make an appointment of someone who was democratically elected. They would pay a political price.

This question is raised about constitutionality, this question of compelling the Prime Minister and whether the organization can exist. If there is a requirement that those spots be filled, if it is, as the chair has indicated, that they must be appointed when, again any one of you could take up that question with the courts. You could seek injunctive relief, a mandamus that the Prime Minister fill those appointments. If none of you are keen to try that approach, then I expect —

Senator Murray: Are you giving us legal advice?

Mr. Van Loan: I am saying the fact that this has not happened, that no one has done that, tells me that probably there is no requirement for that to occur.

The Chair: As the Court Challenges Program no longer exists, the question of finance might arise.

M. Van Loan : Non. Vous avez parlé des provinces et de leurs points de vue. En réalité, il faut considérer que chacune constitue une position politique qui traduit leurs intérêts.

Le sénateur Murray : Quant à vos intérêts à vous, ils ne sont pas politiques, vous vous élevez au-dessus de ça.

M. Van Loan : L'une des provinces dont vous avez parlé est celle-là même qui a changé d'avis quand son gouvernement a changé. Cela prouve bien que nous avons à faire à des positions politiques. Nous sommes satisfaits de l'opinion juridique que nous avons obtenue, opinion que vous avez vous-même recueillie par la voix d'éminents juristes qui vous ont dit que le processus appliqué convient, que le projet de loi C-20 serait constitutionnel, que le projet de loi C-19 serait constitutionnel et, par le fait même, que le projet de loi S-224 dont vous êtes saisi le serait également.

La présidente : Il reste assez de temps pour une brève question du sénateur Banks.

Le sénateur Banks : Je vois une différence et j'aimerais que vous me disiez ce que vous en pensez. La Constitution parle d'un changement fondamental dans la nature du processus de sélection. L'actuel projet de loi établit quand le premier ministre doit faire une recommandation au gouverneur général, mais pas s'il y est obligé. Il n'empêche pas le premier ministre de le faire. Les deux autres projets de loi contraignent la liberté d'action du premier ministre parce qu'elle exige de celui-ci, du moins par déduction, qu'il nomme toute personne sélectionnée, peu importe le processus appliqué, à moins que vous ne nous disiez que le premier ministre peut, dans tous les cas, faire fi de la sélection et nommer quelqu'un d'autre.

M. Van Loan : Légalement, le premier ministre pourrait faire fi de la sélection. Ce pouvoir discrétionnaire n'est pas modifié par le projet de loi C-20. Je crois qu'il y aurait des pressions politiques comme dans le cas de ce projet de loi. Quelle est la conséquence de ce projet de loi? Celui qui ne respecte pas la loi, on finit par en payer le prix politique. Il en irait de même d'un premier ministre qui ne nommerait pas une personne ayant été démocratiquement élue. Il en paierait le prix politique.

La question qui se pose sur le plan de la constitutionnalité est celle de la contrainte imposée au premier ministre et de l'existence de l'organisation. S'il faut que les sièges soient comblés et si cela, comme la présidente l'a indiqué, doit se faire par le biais de nominations, n'importe lequel de vous pourrait se pourvoir en justice avec cette question. Vous pourriez demander l'application d'une mesure injonctive, d'un mandamus, afin que le premier ministre comble les sièges vacants. Si aucun de vous n'est prêt à suivre cette démarche, alors je m'attends...

Le sénateur Murray : Êtes-vous en train de nous donner une opinion juridique?

M. Van Loan : Ce que je vous dis, c'est que tel n'est pas le cas et que si personne ne l'a fait, c'est ce que ce n'est pas nécessaire.

La présidente : Comme le programme de contestation judiciaire n'existe plus, il risque d'y avoir un problème de financement.

Mr. Van Loan: To finance the poor impoverished senators.

Senator Milne: You are the Minister for Democratic Reform. Do you stand by your government's decision to leave the citizens of Toronto Centre without an elected representative for over eight months? How is that democratic reform?

Mr. Van Loan: There are all kinds of reasons why by-elections might not be called at a particular time. I do not have a serious problem with what you have in the bill although I am not sure the bill addresses the situation you speak of. I am not sure it would prevent a situation like that one from having occurred. Lots of situations like that have occurred, and there are reasons; we might want to wait to have a series of by-elections in a common area together at the same time.

There are reasons why we might not want to have by-elections conflicting or overlapping with potential provincial elections, municipal elections and issues like that. I know those issues have been taken into consideration. In general, I do not think I have a problem with the element that is proposed here relating to elections.

Senator Milne: I am amazed that you can defend those eight months with a straight face, minister.

Mr. Van Loan: There have been situations like that over time. I do not have a problem with what you propose in this bill.

The Chair: Honourable senators, that brings us to our commitment to liberate the minister at five o'clock. I believe it is now five o'clock. This committee is now about to go in camera.

The officials were not invited to stay. However, before you leave, gentlemen, are there senators who would like to put questions to the officials, if they can stay?

Senator Joyal: I have one simple question. I read the brief that was presented. You do not have to concur with it. It is a political statement. I was left with a hungry taste because I thought there would be a legal or constitutional argument made relating to the nature of this bill and the exercise of the prerogative. We have heard witnesses, who have raised constitutional issues in relation to the framing of the prerogative. I am sure you have read the minutes of this committee. I was expecting that, in the two pages we received today, there would have been at least one paragraph answering those points.

I do not need you to comment on this point, but unfortunately the brief is a political speech. That is fine. The minister comes here, he is a political minister and he makes a political statement. I have no quarrel with that situation. However, the brief does not enlighten us much in trying to understand the legal

M. Van Loan : De financement pour les malheureux sénateurs appauvris.

Le sénateur Milne : Vous êtes ministre de la Réforme démocratique. Vous en tenez-vous à la décision de votre gouvernement d'avoir laissé les citoyens de Toronto-Centre sans représentant élu pendant plus de huit mois? C'est ça, la réforme démocratique?

M. Van Loan : Il y a toutes sortes de raisons pour lesquelles on peut ne pas pouvoir déclencher une élection partielle avant un certain temps. Je ne vois pas de gros problème avec ce que dit le projet loi, bien que je ne sois pas certain que celui-ci concerne la situation dont vous parlez. Je ne suis pas certain que celui-ci permettrait d'éviter le genre de situation que vous avez évoquée. Celle-ci n'a rien d'exceptionnel et elle s'explique. On peut vouloir attendre de tenir une série d'élections partielles en même temps dans une grande région.

On peut ne pas vouloir tenir d'élections partielles pour éviter d'entrer en conflit avec des élections provinciales, des élections municipales et autres considérations du genre. Je sais que l'on a tenu compte de tout cela. Je ne pense pas qu'en règle générale les dispositions concernant les élections fassent problème.

Le sénateur Milne : Je suis surpris que vous puissiez défendre une période de latence de huit mois sans sourciller, monsieur le ministre.

M. Van Loan : Ce n'est pas la première fois que ça se produit. Je n'ai rien contre ce que vous proposez dans le projet de loi.

La présidente : Honorables sénateurs, nous en sommes au point où nous allons devoir tenir parole envers le ministre et le libérer à 17 heures. Je pense qu'il est 17 heures. Notre comité est sur le point de passer à huis clos.

Nous n'avions pas invité les fonctionnaires à rester sur place, mais avant que vous ne partiez, messieurs, j'aimerais savoir si des sénateurs désirent vous poser des questions. À condition qu'on vous permette de rester.

Le sénateur Joyal : J'ai une simple question à poser. Je viens de lire le mémoire qui nous a été présenté et je ne suis pas d'accord avec ce qui y est dit. C'est une déclaration politique. Je suis resté sur ma faim, parce que je m'attendais à lire une argumentation juridique ou constitutionnelle sur la nature de ce projet de loi et sur l'exercice de la prérogative du premier ministre. Nous avons entendu des témoins à ce sujet qui nous ont parlé des problèmes que la question de la prérogative soulève sous l'angle de la Constitution. Je suis certain que vous avez lu les délibérations de notre comité. Je m'attendais à ce que les deux pages que nous avons reçues aujourd'hui contiennent au moins un paragraphe répondant à ces questions-là.

Je me passerai de vos commentaires à ce sujet, mais il se trouve malheureusement que ce mémoire est un discours politique. C'est bien. Le ministre vient nous rencontrer, il a un point de vue politique et il fait des déclarations politiques. Je n'ai rien contre cela. Cependant, ce mémoire ne nous éclaire pas beaucoup dans

implication of this bill in reference to the use of the prerogative or the framing of the prerogative of the Prime Minister to recommend an appointment to the Governor General.

I want to express to you that when the department comes with the minister, I do not want to prevent the minister from making a political speech, as is his privilege. On the other hand, you understand that this committee must study the bill on its merits and the basis of its constitutional implications. We do not have that information in this brief.

I do not know if you can provide us with additional comments, whether written or however you want to give them to us, but I express to you my dissatisfaction that those aspects of the bill have not been addressed by the minister or you on the basis of what we have in front of us today.

Dan McDougall, Director, Strategic Analysis and Planning, Democratic Reform, Privy Council Office: Perhaps I can make two points, if I may. I think, senator, in part, the issue of constitutionality was addressed in the minister's comments. I agree it was not in his opening statement per se, but the minister indicated that it is his view and the view of the government that there is not a constitutional issue with respect to the bill, and that what the bill proposes is constitutionally valid.

With respect to other elements of the prerogative, if you will, a point of order was raised during debate on this bill with regard to Royal Consent, and I believe you received a ruling from the Speaker indicating that Royal Consent in this instance was not required. That ruling was indeed touching on the prerogative. You, as a committee, have a ruling from your Speaker on that aspect.

Senator Joyal: Are you satisfied that this bill is constitutional as is?

Mr. McDougall: Yes.

Senator Moore: Are you the legal advisers to the minister?

Mr. McDougall: We are not legal advisers. We are policy advisers to the minister.

Senator Moore: Did you help prepare his remarks today?

Mr. McDougall: Those remarks, no.

Senator Moore: I listened to the minister saying that the provinces should not stand as a barrier to change, but yet the minister has no problem ignoring the provinces' rights as they exist today. All this talk about democracy and democratic reform, all of that, any democracy hinges on the rule of law. We have a Constitution that I guess the minister implies that he does not need to observe. I want to know —

The Chair: He is about to put his question, Senator Andreychuk. He said, "I want to know."

notre tentative visant à comprendre les répercussions juridiques de ce projet de loi en ce qui a trait à l'application de la prérogative ou à l'encadrement de la prérogative du premier ministre en matière de recommandation des nominations au gouverneur général.

Je tiens à vous dire que, quand les fonctionnaires viennent nous voir en compagnie de leur ministre, je ne cherche pas à empêcher le ministre de faire des déclarations politiques, parce que c'est son droit. D'un autre côté, vous comprendrez que notre comité doit étudier ce projet de loi sur le fond et en fonction de ses répercussions constitutionnelles. Or, ce document ne nous dit rien sur ces plans-là.

Je ne sais pas si vous pourrez nous en dire davantage, par écrit ou autrement, mais je peux vous dire que je suis mécontent que ces aspects du projet de loi n'aient pas été abordés par le ministre ni par les fonctionnaires, à partir du texte dont nous sommes saisis.

Dan McDougall, directeur, Analyse et planification stratégique, Réforme démocratique, Bureau du Conseil privé : Je pourrai peut-être vous dire deux choses. Sénateur, je pense que le ministre a en partie traité de la question de la constitutionnalité dans ses remarques. Je suis d'accord avec vous qu'il ne l'a pas fait dans sa déclaration d'ouverture, mais il vous a fait part de son point de vue et du point de vue du gouvernement qui estime que le projet de loi ne soulève pas de problème sous l'angle constitutionnel et que ce qu'il propose est constitutionnellement valable.

S'agissant des autres éléments de la prérogative, un sénateur a fait un rappel au Règlement lors du débat sur ce projet de loi au sujet de la sanction royale et je crois savoir que le président a rendu une décision indiquant que la sanction royale dans ce cas n'était pas nécessaire. Cette décision touchait évidemment à la prérogative. Votre comité dispose donc d'une décision du président du Sénat à cet égard.

Le sénateur Joyal : Vous êtes donc convaincu que ce projet de loi est constitutionnel?

M. McDougall : Oui.

Le sénateur Moore : Êtes-vous les conseillers juridiques du ministre?

M. McDougall : Nous ne sommes pas ses conseillers juridiques, nous sommes ses conseillers politiques.

Le sénateur Moore : L'avez-vous aidé à préparer son intervention?

M. McDougall : Pas celle-ci, non.

Le sénateur Moore : Le ministre nous a dit que les provinces ne devraient pas faire obstacle au changement, mais il ne voit rien de mal à passer outre les droits actuels des provinces. Tout le débat sur la démocratie et la réforme démocratique s'articule autour de la primauté du droit. Nous avons une Constitution que le ministre ne semble pas juger nécessaire de respecter. Je veux savoir...

La présidente : Il est sur le point de poser sa question, sénateur Andreychuk. Il vient de dire « Je veux savoir ».

Senator Moore: I want to know what you feel about the rule of law and whether the Constitution of Canada, as it currently exists, should be and must be followed until it is changed.

Mr. McDougall: I agree with you fully, senator.

The Chair: Gentlemen, thank you very much indeed. In particular, since you were not warned that we would hang on to you, we appreciate the fact that you let us hang.

Honourable senators, this committee will now go into an in camera session to consider a draft report and future business of the committee.

Senator Andreychuk: Madam Chair, you have sent out a notice saying we are going to clause-by-clause consideration.

The Chair: That is one of the things we will discuss in our in camera session.

The committee continued in camera.

OTTAWA, Thursday, May 8, 2008

The Standing Senate Committee on Legal and Constitutional Affairs, to which was referred Bill S-224, An Act to amend the Parliament of Canada Act (vacancies), met this day at 10:50 a.m. to give clause-by-clause consideration to the bill.

Senator Joan Fraser (*Chair*) in the chair.

[*English*]

The Chair: Honourable senators, welcome to this meeting of the Standing Senate Committee on Legal and Constitutional Affairs. On the agenda today is one item, which is the clause-by-clause consideration of Bill S-224, An Act to amend the Parliament of Canada Act (vacancies).

Is it agreed, senators, that we move to clause-by-clause consideration of Bill S-224?

Hon. Senators: Agreed.

Senator Di Nino: On division.

The Chair: Carried, on division.

Shall the title stand postponed?

Hon. Senators: Agreed.

The Chair: Carried.

Shall clause 1 carry?

Some Hon. Senators: Agreed.

Senator Di Nino: On division.

The Chair: Carried, on division.

Shall clause 2 carry?

Some Hon. Senators: Agreed.

Le sénateur Moore : Je veux savoir ce que vous pensez de la primauté du droit et si, selon vous, la Constitution du Canada, dans son état actuel, devrait et doit être appliquée comme telle jusqu'à ce qu'elle soit modifiée.

M. McDougall : Je suis tout à fait d'accord avec vous, sénateur.

La présidente : Messieurs, je vous remercie beaucoup, d'autant que nous vous avons retenus tandis que nous ne vous en avions pas prévenus. Nous apprécions de nous avoir permis de le faire.

Honorables sénateurs, nous allons maintenant passer à huis clos pour étudier une ébauche de rapport de même que les travaux futurs du comité.

Le sénateur Andreychuk : Madame la présidente, vous nous avez fait parvenir un avis indiquant que nous allions passer à une étude article par article.

La présidente : C'est une des choses dont nous allons parler à huis clos.

Le comité poursuit ses travaux à huis clos.

OTTAWA, le jeudi 8 mai 2008

Le Comité sénatorial permanent des affaires juridiques et constitutionnelles, auquel a été renvoyé le projet de loi S-224, Loi modifiant la Loi sur le Parlement du Canada (sièges vacants), se réunit aujourd'hui, à 10 h 50, pour procéder à l'étude article par article du projet de loi.

Le sénateur Joan Fraser (*présidente*) occupe le fauteuil.

[*Traduction*]

La présidente : Honorables sénateurs, je vous souhaite la bienvenue à cette séance du Comité sénatorial permanent des affaires juridiques et constitutionnelles. Le seul point à l'ordre du jour aujourd'hui est l'étude article par article du projet de loi S-224, Loi modifiant la Loi sur le Parlement du Canada (sièges vacants).

Êtes-vous d'accord, sénateurs, pour que nous entreprenions l'étude article par article du projet de loi S-224?

Des voix : Oui.

Le sénateur Di Nino : Avec dissidence.

La présidente : Adopté avec dissidence.

L'étude du titre est-elle reportée?

Des voix : D'accord.

La présidente : Adopté.

L'article 1 est-il adopté?

Des voix : D'accord.

Le sénateur Di Nino : Avec dissidence.

La présidente : Adopté avec dissidence.

L'article 2 est-il adopté?

Des voix : D'accord.

Senator Di Nino: On division.

The Chair: Carried, on division.

Shall the title carry?

Some Hon. Senators: Agreed.

Senator Di Nino: On division.

The Chair: Carried, on division.

Is it agreed that this bill be adopted without amendment?

Some Hon. Senators: Agreed.

Senator Di Nino: On division.

The Chair: Carried, on division.

Does the committee wish to consider appending observations to the report?

Hon. Senators: No.

The Chair: Is it agreed that I report this bill to the Senate?

Some Hon. Senators: Agreed.

Senator Di Nino: On division.

The Chair: Carried, on division. I shall do that this afternoon.

Does any senator wish to raise an item of other business?

An Hon. Senator: I move the adjournment.

The Chair: All in favour?

Hon. Senators: Agreed.

The committee adjourned.

Le sénateur Di Nino : Avec dissidence.

La présidente : Adopté avec dissidence.

Le titre est-il adopté?

Des voix : D'accord.

Le sénateur Di Nino : Avec dissidence.

La présidente : Adopté avec dissidence.

Le projet de loi est-il adopté sans amendement?

Des voix : D'accord.

Le sénateur Di Nino : Avec dissidence.

La présidente : Adopté avec dissidence.

Le comité souhaite-t-il annexer des observations au rapport?

Des voix : Non.

La présidente : Puis-je faire rapport de ce projet de loi au Sénat?

Des voix : D'accord.

Le sénateur Di Nino : Avec dissidence.

La présidente : Adopté avec dissidence. Je devrais le faire cet après-midi.

Voulez-vous discuter d'autre chose?

Des voix : Je propose de lever la séance.

La présidente : Tous ceux qui sont pour?

Des voix : D'accord.

La séance est levée.