While many Canadians were outraged by the passage of the GST, they should not doubt the constitutionality of stacking the upper house.

by David Schneiderman

POLITICAL PUNDIT LARRY Zolf has described the Senate as the “crown jewels of Canadian political patronage.” Despite its tarnished reputation, the Senate often has performed the role of chamber of sober second thought with admirable resolve. As political scientist Alan Cairns has observed, the Senate’s “most astonishing feat has been to survive and perform various useful functions in a society embarrassed by its continued existence.” Calls for the Senate’s reform or abolition have continued unabated, and for some, the need has become particularly clear after the events of the fall of 1990. The Liberal-dominated Senate, with a slim but united majority having made clear their intention to defeat the Mulroney government’s Goods and Services Tax legislation, successfully rallied the allegiance of the Canadian public, according to opinion polls, overwhelmingly opposed to the new tax. The only expedient method of unblocking passage of the tax in the upper house available to the government was to invoke the antiquated leverage available under the Constitution.

The events leading up to the appointment of the eight extra senators is by now well-known. As early as May 1990, there were grumblings reported in the press that if the Meech Lake Accord failed, the prime minister would quickly move to appoint extra senators under a long-forgotten provision of the Constitution Act, 1867. Once the Accord failed, and in the face of consolidated Liberal opposition in the Senate to the passage of the GST, the prime minister carried through with that threat in September 1990.

Section 26 of the Constitution Act, 1867 provides:

If at any time on the recommendation of the Governor General the Queen thinks fit to direct that Four or Eight Members be added to the Senate, the Governor General may by Summons to Four or Eight qualified persons (as the case may be), representing equally the Four Divisions of Canada, add to the Senate accordingly.

The Canadians had come to Britain in 1867 with an elaborate scheme for the representation of the regions in an unelected upper house, but without a mechanism to break a deadlock between that house and the elected House of Commons. Section 26 was included in 1867 at the behest of the Imperial Parliament. The deadlock formula respected the divisional breakdown between the four (then three) regions, the Maritimes, Quebec, Ontario, and the West, but could prove of no effect if the appointment of extra senators (four or eight) could not tip the scales in the Senate in favor of the government of the day. By virtue of section 27, the deadlock mechanism could not be triggered again until the number of senators in each division had returned, by attrition, to their ordinary totals. It should not be surprising to learn that this mechanism was hardly ever used.

The dearth of such occasions does not suggest that, if a more effective mechanism was available, it would not have been attempted to be used.

The pre-Second World War Senate had a long tradition of blocking Commons legislation. Prior to 1943, 141 government bills had been vetoed, including money bills (the Senate is precluded, by section 53, from initiating such bills), Old Age Pension legislation, designed to supplement modestly the income of those over 70 years of age, was vetoed in 1927. The repeal of the notorious section 98 of the Criminal Code, passed on the heels of the Winnipeg Strike and which outlawed “unlawful” associations, was blocked four times between 1926 and 1930 before the Senate succumbed to the will of the Commons on the fifth try. These were some of the reasons that the League for Social Reconstruction, in its classic 1935 text, Social Planning for Canada, called the Canadian Senate “[in] its composition and in its activity . . . one of the most reactionary chambers among all the free governments in the western world.”

The modern-day Senate has been loathe to block or reject money bills, but, well-stocked by decades of Liberal appointments, it has actively thwarted the Conservative government’s legislative agenda by delaying refugee and drug patent legislation for close to one year, and copyright, free trade, and unemployment insurance legislation for a slightly shorter period of time. It was in light of this precedent, and the avowed intention of the Senate majority to block GST, that Prime Minister Mulroney chose to play his constitutional hand.

Immediately after the appointment, questionable constitutional arguments were raised by both sides to the debate. Federal Liberals, the Social Credit government in British Columbia, and Ontario lawyer Sher Singh argued that because the provision had not been used formally for over 100 years it was no longer in effect, but lapsed because of disuse. This interpretation conflicted with the express words of the section (“If at any time”) and flew in the face of the Supreme Court of Canada’s decision in the 1981 Patriation Reference which had ruled that “conventions,” such as the one requiring the consent of the provinces to amend the Constitution prior to 1982, were not enforceable in the courts.

Even as recently as June 1990, the federal and provincial governments had contemplated the potential use of the section. In the First Minister’s Final
Communique issued after the marathon week-long session to salvage the Meech Lake Accord, a draft amendment to section 26 was included to reflect the proposed redistribution of Senate seats should comprehensive Senate reform not have been achieved within five years.

Shortly thereafter, the New Democratic Party raised the constitutional stakes. The NDP alerted the government that section 51A of the 1867 Act had application as New Brunswick, after the appointment, now had more senators (11) than members of the House of Commons (10). The section read:

Notwithstanding anything in this Act a province shall always be entitled to a number of members in the House of Commons not less than the number of senators representing such province.

The government’s reply, which appeared to be designed after the fact, was that they were “divisional” senators and not provincial ones: that is, they each represented one of the four regions, not one of the 10 provinces. The reply flew in the face of the express words of that section: “Notwithstanding anything in this Act a province shall always . . . .” It also contradicted most other sections in the Constitution regarding the appointment and qualifications of senators. Generally, a senator is required to be “resident in the Province for which he is appointed” and to be possessed of real property “within the Province for which he is appointed.”

Arguments on this issue were heard by courts in both Ontario and in New Brunswick. Judge McRae of the Ontario High Court of Justice, in a decision released in mid-October 1990, held that the extra senators did not count for the purposes of section 51A. He qualified the section to read that a province would be entitled to a number of members in the House of Commons not less than the number of senators ordinarily representing the province. In any event, ruled Judge McRae, the section only “entitled” the province to an extra seat, it was not a condition precedent to the appointment of extra senators, nor did it in the meanwhile nullify any acts done in the Commons or Senate.

Justice Ronald Stevenson of the New Brunswick Court of Queen’s Bench, in a judgment released one month later, agreed only in part, ruling that the section “entitled” New Brunswick to an extra seat, but that this did not affect the validity of laws passed in either House. This decision is now under appeal. Any further argument on this front may have been pre-empted by the recent death of Senator Richard Hatfield, a Senate appointee from New Brunswick.

The Ontario Court further ruled on other arguments in a decision released in December 1990. Judge McRae held that section 26 remained a viable constitutional instrument in view of its amendment in 1915 and its inclusion in the Canada Act, 1982, passed by the U.K. Parliament as part of the patriation process. Nor would the Court interfere with the invocation of the section because this was a “political question” which was not appropriate for legal determination and, in any event, the facts showed “an actual collision of opinion” which justified its use. In his words, this was a situation of “incipient deadlock.” Nor would the Judge rule on the application to declare former Nova Scotia Premier John Buchanan unqualified to sit as a senator, this being a question which section 33 of the Constitution requires to “be heard and determined by the Senate.”

The judiciary continued to register the Senate stacking as the issue proceeded before Courts of Appeal. In February 1991 the British Columbia Court of Appeal replied to constitutional questions regarding the Senate appointments referred to it by the government of British Columbia. The major line of argument was that it was the original intention of the drafters of section 26 that the Queen act as a neutral arbiter of such requests, requiring her to act on the advice of her British ministers in London and not on the advice of any Canadian politician. As Canadian constitutional development would not now permit the exercise of such independent discretion by the Queen, the section would cease to be operative as a matter of law, not just convention. Referring to earlier drafts of section 26, the Court of Appeal found that the very limitation argued to exist was expressly included and then dropped from earlier drafts. No such limitation fettered the section’s operation, concluded the Court.

The Ontario Court of Appeal, on appeal from the judgment of McRae J., in a judgment released in May 1991, agreed with the British Columbia Court of Appeal on this point. With respect to the section 51A argument, that one too many senators had been appointed from New Brunswick, the Court held that the section did not apply to the temporary appointment of senators under section 26 and that, in any event, Justice McRae was correct that section 51A did not bar the appointment of extra senators.

While many Canadians were outraged by the passage of the GST, they should not doubt the constitutionality of stacking the Senate in this case. The circumstances in 1990 lent themselves to the pre-conditions outlined by the Imperial government in 1873. There was actual collision of opinion between the Houses in regard to a major tax initiative, and the appointment of extra senators would provide an adequate remedy. Some argue that the prime minister could not invoke the section until after the Senate had voted down the bill. But, after having read the bill twice in the Senate, after conducting a summer’s worth of public hearings, and after producing the Senate Standing Committee’s report, the Senate had done virtually everything that it usefully could have done.

The dismal history of Senate intrusions which prevented or delayed the passage of progressive law reform in the pre-Second World War period, is a reminder of the price democratic politics is bound to pay for this type of intervention. While the Liberal senators and their political supporters were likely right about the numbers in opposition to the new tax, they were not right to reject outright on the basis of opinion polls an important piece of fiscal legislation half-way through the Conservative mandate.

If successful, they would have usurped the democratic process and the opportunity Canadians would have had to make the Conservatives account for their tax in the next election.

As the memory of kazoo-playing senators recedes and we begin to think again about Senate reform, it is worth reminding ourselves of two things. First, the reported cost of running the Senate is over $32 million per year. Second, previous proposals on Senate reform, in particular that of the Alberta Special Select Committee on Upper House Reform, have proposed denying a reformed Senate the power to block money bills emanating from the House of Commons. A reformed Senate along those lines would not have been able to block the GST and would, in this way, have been less effective than the one that is presently constituted.

David Schneiderman is Executive Director of the Centre for Constitutional Studies at the University of Alberta in Edmonton.

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