

# Can a Middle Ground be Found on Senate Numbers?

Bruce M. Hicks\*

## Introduction

Seven years after Confederation, the House of Commons gave unanimous consent to a motion to consider reforms to the Senate.<sup>1</sup> The proposal included such radical notions as the adoption of a Senate electoral system based on proportional representation, the allotment of six senators for each region, and the fixing of terms to eight years, staggered to ensure the election of only half the Senate at a time.<sup>2</sup>

In 2006, the Conservative government of Stephen Harper introduced a similar agenda of reform. Cognizant of past failures to substantively advance any of these ideas during the intervening 132 years, the Harper approach is to try to achieve incremental changes that either do not require amending the *Constitution Act, 1867*<sup>3</sup> or do not require provincial consent.<sup>4</sup>

One of the principal reasons that substantive Senate reform has failed to get traction since Confederation, despite repeated attempts by governments of different political stripes to secure it, is the issue of numerical representation in the upper chamber. At some point, any proposal to change the Senate inevitably turns to the question of the number of senators to which each province should be entitled. Provinces with a larger proportion of Senate seats tend to be reluctant to alter the status quo, while those provinces with a smaller proportion of seats tend to see a dramatic rebalancing of Senate numbers as essential to their ability to defend provincial and sectional interests.

As former Liberal Senate Leader Royce Frith put it in the context of demands for an equal, ef-

fective, and elected or “Triple E” Senate: “Elect-ed and effective are quite straightforward, but the debate on ‘equal’ could go on forever.”<sup>5</sup> Frith suggested that this problem alone will ensure that genuine and comprehensive Senate reform will never happen, since “[l]arger provinces will simply not agree to equal representation for the smaller ones.”<sup>6</sup>

Substantive Senate reform would seem to require a compromise on the number of senators to which each province is entitled. This is no simple undertaking, as getting proponents of provincial equality and proponents of broader regional equality to compromise on numbers would make those who find the current Senate “laughably incoherent . . . laugh even harder.”<sup>7</sup> In my view, the key is to propose a distribution of seats in the Senate which can be defended on the basis of a principled representation structure. Since it would move beyond a compromise position on Senate numbers, such a middle-ground proposal might appeal to Canadians on its own merits; it might even be politically palatable to elites who have previously endorsed either provincial equality or regional equality in Senate seat distribution.

In the dark days of constitutional negotiations over the adoption of the Meech Lake Accord,<sup>8</sup> when Newfoundland and Labrador had rescinded its approval and Quebec was refusing to reopen the document, I privately advanced a proposal that I believed had the potential to break the impasse and open up negotiations on Senate reform. My motivation was admittedly due less to a desire to contribute to the ratification of the Meech Lake Accord in its then

agreed-to format than it was to a long-held desire to see the upper chamber reformed in a coherent manner; therein, perhaps, lies the strength of this proposal.

The *Hicks Amendment*, as my proposal was later dubbed, has never been published.<sup>9</sup> As Canadians again embark on the path toward Senate reform — a path that will inevitably lead to a discussion about seat numbers — it seems appropriate and timely to present the details of that initiative with respect to numerical representation in the upper chamber. After all, when my proposal was first advanced it was considered meritorious enough to open the door to discussions between Newfoundland Premier Clyde Wells and Quebec Premier Robert Bourassa, two intransigent opponents in the debate over the Constitution and the Senate.<sup>10</sup>

This article will examine the two dominant approaches to representation underpinning debate on Senate seat distribution (which, as will be noted, have also driven debate on constitutional amending formulae advanced during the latter half of the twentieth century), namely, provincial equality and regional equality. Then, this article will present the *Hicks Amendment* with respect to Senate numbers.<sup>11</sup> My hope is that this proposal might provide a mechanism for genuine, principled reform of the upper chamber without relying on a mere compromise between provincial and regional equality.

## The Review Function and Conceptions of Representation in the Senate

A number of scholars have suggested that bicameralism is a theory of legislative institutional design with a rationale applicable equally to federal and unitary states.<sup>12</sup> The theory suggests two distinct roles for an upper chamber: that of *review* and *representation*. The idea of legislative review is well known and has been used to defend both appointed and elected upper chambers. In 1787, Alexander Hamilton suggested that an appointed Senate “will be less apt to be tainted by the spirit of faction, and more out of the reach of those occasional ill

humors, or temporary prejudices and propensities.”<sup>13</sup> His colleague, James Madison, suggested that the inclusion of an upper chamber in the design of the legislature would prevent “a variety of important errors in the exercise of legislative trust.”<sup>14</sup> In 1918, The Bryce Committee in England argued that an upper chamber, even an appointed one, was needed in a democracy for the “interposition of so much delay so the opinion of the nation can be adequately expressed,”<sup>15</sup> and to ensure, in some cases, that controversial legislation would be “submitted to the deliberate judgment of the electorate.”<sup>16</sup> The Supreme Court of Canada echoed these sentiments when it applied to the appointed Canadian Senate the label of chamber of “sober second thought.”<sup>17</sup> While it may be common to justify the presence of an upper legislative chamber by referring to its review function, the question of which approach to representation should underpin the distribution of seats in an upper house is fraught with disagreement.

The Canada of the nineteenth century was marked by duality in language, culture, religion and legal system. As a result, multiple conceptions of the nature of the new country emerged including a view of the Canadian political community as: (i) a compact of provinces, (ii) a partnership between two (or more) peoples or “nations,”<sup>18</sup> and, more recently, (iii) the coming together of individual citizens to create a new country. To the extent that these conceptions of community underlie positions taken on seat distribution in Parliament, the presence of these different conceptions helps to explain the complex representation structures that have developed over time in both the Canadian House of Commons and the Senate.

It is illustrative that the recent debate over the Harper government’s proposals on Commons seat redistribution<sup>19</sup> saw provinces advancing many of the arguments associated with debate over Senate numbers in this article. For example, Quebec argued that it must have 25 percent of Commons seats because it is a nation, while Ontario objected to a seat adjustment which favours B.C. and Alberta, arguing that its own proportion of Commons seats is inadequate. Indeed a general debate ensued over

what constitutes a “fair” balance between considerations of population size and the interests of smaller provinces and the regions.<sup>20</sup>

At the time of Confederation, the Canadian Senate had a seat arrangement which reflected the several conceptions of community held by the Framers of the *Constitution Act, 1867*. The Senate was to be simultaneously regional, provincial, and sectional — a chamber representing founding peoples, founding regions and founding provinces.

Section 22 of the *Constitution Act, 1867* began: “In relation to the Constitution of the Senate Canada shall be deemed to consist of Three Divisions.”<sup>21</sup> The three divisions — the Maritimes, Quebec and Ontario — expanded geographically with a fourth division of the West added by the *Constitution Act, 1915*.<sup>22</sup>

In 1867, the Senate gave an equal number of appointments to each of the existing divisions of Canada, and senators were to represent provinces and be “resident in the province for which he is appointed.”<sup>23</sup> Thus, even at that time, the representation principle for the upper chamber included equally a provincial and a regional dimension, even if the principle was not one of strict provincial equality of seat numbers.

Quebec’s Senate seats were apportioned within the province in a unique manner. Sections 22 and 23 of the *Constitution Act, 1867* specified property requirements for senators from Quebec to ensure they reside in one of the twenty-four separate electoral divisions of the old colony of Lower Canada.<sup>24</sup> This stipulation was added to ensure that the province’s different sectional interests — linguistic, cultural, and religious — would be represented within that province’s one-third of the total of Senate seats.

### Regional Equality

As Table 1 below shows, while every major Senate reform proposal advanced between the late 1970s and constitutional patriation in 1982 advocated some form of government-controlled appointment, each also attempted to rebalance Senate seats to reflect population growth in western Canada.

The reason for the need to address Western under-representation in the Senate is partly historical. At the time of Confederation there were no western provinces. Manitoba became the first in 1870, but it was a small territory in the Red River Valley<sup>25</sup> and was given just two senators. British Columbia was brought in by Order-in-Council in 1871, and Alberta and Saskatchewan were created out of the Northwest Territories in 1905.<sup>26</sup> It was only in 1915 that a “Western region” was given twenty-four senators: six senators were allocated to each of Manitoba, Saskatchewan, Alberta, and British Columbia.<sup>27</sup> In the Maritime division, the number of Senate seats for New Brunswick and Nova Scotia was reduced from twelve to ten to provide Prince Edward Island with four senators when it joined Canada in 1873.<sup>28</sup>

When it comes to the principle of regional equality, the *Constitution Act, 1915* both “giveth and taketh away.” On the one hand it created a new, clearly defined, and equal fourth region of Canada for the purpose of apportioning Senate seats. On the other hand, the Act confirmed and expanded the provision that allowed for Newfoundland to join Confederation without assuming that province was part of the maritime region. As a result, thirty-four years later Newfoundland was given six seats on top of those allotted to the four existing regions, and several generations of Canadian school children have been forced to learn the difference between the Maritimes and the Atlantic provinces.<sup>29</sup>

On 16 June 1971, the provinces and the federal government agreed to a series of constitutional changes known as the Victoria Charter.<sup>30</sup> Although the Quebec government subsequently rejected the Charter and it was not adopted, the amending formula it proposed drew inspiration from Senate divisions in adopting a regionally-based formula; the Senate model remained central to later amendment proposals.<sup>31</sup>

Indeed, a four-region conception of the country was used in amending formulae proposed by most governmental and legislative constitutional advisory bodies including the Molgat-MacGuigan Special Parliamentary Committee in 1972 and the Pepin-Robarts Commission in 1979, and figured prominently

**Table 1**  
**Distribution of Senate Seats: Actual and Proposed (Appointed)**

	Actual (1975-1999) <sup>32</sup>	Bill C-60 (1978)	Pepin- Roberts (1979)	Beige-Paper (1980) <sup>33</sup>	Ontario (1980)	Alberta (1982)
Atlantic	30	32	14	14	30	14
Quebec	24	24	12	20	30	10
Ontario	24	24	12	20	26	10
Prairies	18	26	14	18	26	18
Pacific	6	10	8	9	12	8
North	2	2	0	0	2	0
<b>TOTAL</b>	<b>104</b>	<b>118</b>	<b>60</b>	<b>81</b>	<b>126</b>	<b>60</b>

in virtually all of the federal government's proposals during the decade prior to patriation of the Constitution.<sup>34</sup> The proposal tabled by the federal government in the House of Commons in 1980, when it announced its intention to achieve patriation unilaterally, also contained a variation of the four-region principle.

In the final stages of the patriation negotiations in November 1981, the four-region formula was abandoned by all provinces including Quebec. Given the political dynamic of these negotiations, however, not much should be read into this abandonment other than the fact that the subsequent *Constitution Act, 1982*<sup>35</sup> did not adopt an amending formula based on a four-region formula.<sup>36</sup> Following the defeat of the Meech Lake Accord, and in response to concerns raised by Quebec, the Beaudoin-Edwards Special Parliamentary Committee recommended that the "amending procedure should be changed to adopt the procedure already proposed in the Victoria Charter as a general rule for amendment."<sup>37</sup> Thus the four-region formula was resuscitated.

In 1995, Parliament introduced Bill C-110, *An Act respecting constitutional amendments*.<sup>38</sup> This bill prevents any federal Minister of the Crown from proposing a motion to amend the Constitution unless the amendment has first been consented to by a majority of the provinces in each of the regions. When introduced on 29 November 1995, one month after the Quebec referendum on secession, the bill recognized

four regions — Atlantic, Quebec, Ontario and the West.

As early as the 1970s, British Columbia had called for five regional divisions in the Senate to match that province's sense of its growing importance in the country; thus it should not be surprising that Bill C-110 provoked an outcry from B.C. The federal government of Jean Chrétien quickly amended the Bill on 12 December 1995 to allow for a veto for each of *five* regions: Atlantic, Quebec, Ontario, Prairie, and Pacific.<sup>39</sup>

Chrétien's original assertion of four rather than five Canadian regions may have been a reflection of the Eastern-centric era in which he began public service (particularly his time at the Justice Ministry in the early 1980s). After all, the federal government has since adopted five administrative regions in the civil service, with all major departments having established regional directorates for Atlantic, Quebec, Ontario, Prairie and Pacific regions (something mirrored in ministers' offices and even Chrétien's own Prime Minister's Office).<sup>40</sup>

The use of regional divisions in Bill C-110 as a rationale for regional equality in the Senate was evident recently when Senator Lowell Murray introduced a motion to amend the *Constitution Act, 1867* to change the number of Senate seats. His initiative, introduced on 28 June 2006, to be considered concurrently with the Harper government's Bill S-4 on Senate tenure,



argues for a division of seats loosely based on five regions.<sup>41</sup> Indeed, Murray justifies this configuration purely on the basis that “this status was recognized by the Government of Canada in the mid-nineties”<sup>42</sup> through the constitutional amendment provisions of Bill C-110.

### Provincial Equality

Western Canada has been at the centre of the push for provincial equality in the Senate for the last quarter of the twentieth century. Gordon Robertson explains the origin of this push: “In western eyes there was and is neither provincial nor genuine regional equality to offset the preponderance of population in the industrialized and prosperous centre of Canada.”<sup>43</sup>

There is no disputing that the Canadian federation has *loci* of power. Historically, these can be found not so much in the provinces of Ontario and Quebec as within what David Kilgour calls “Inner Canada”<sup>44</sup>: the urban Montreal — Ottawa — southwestern Ontario nexus. To aggravate matters, this powerful part of Canada is perceived by some in the West to pander to the economically challenged Atlantic provinces and culturally and linguistically threatened Quebec at their expense.

Further, it is not surprising that the Senate is seen as a possible panacea by Western politicians. Before anyone in the West had Senate reform in mind, dozens of high profile royal commissions and parliamentary committees — even the federal government itself — had already offered up the Senate as a way to rebalance the federation.

Proponents of provincial equality in the Senate point to the U.S. and argue that there is a “dual nature of representation that is required in a federal system: the representation of citizens in the national legislative process on the basis of both population and [administrative] region.”<sup>45</sup> Proponents claim that “it is only in Canadian politics that the principle of equal representation for all provinces regardless of population is regarded as radical or unusual.”<sup>46</sup> Although this characterization of equal representation in the bicameral legislatures of other federations is not factually correct, given the proximity of Cana-

da to the U.S. it is not surprising that American political approaches are held in such esteem.

An organization closely associated with the Triple E Senate slogan is the Canada West Foundation (CWF). It goes so far as to argue that Canada, even more so than the U.S., needs provincial equality in Senate representation to mitigate the uneven distribution of Canada’s population. According to the CWF, population distribution among the ten provinces is “more unequal than any other federal country in the western democratic world.”<sup>47</sup>

As Table 2 below illustrates, proposals for an elected Senate appearing on the scene since patriation have tended to call for provincial equality in seat numbers. An Alberta Select Committee of the legislature recommended allotting six senators to each province<sup>50</sup> (as did the CWF), a principle also endorsed by the Government of Newfoundland (the latter with the recommendation of a slightly larger ten senators for each province<sup>51</sup>).

Perhaps reflective of the evolution of growing popular sentiment regarding Senate representation, former Prime Minister Pierre Trudeau, in his testimony before the Joint Parliamentary Committee on the Meech Lake Accord, talked about his preference for the Victoria formula as a fairer reflection of the Canadian social contract while simultaneously suggesting that perhaps there was a need for a move in the direction of equal representation in the Senate. Trudeau added: “that will call for a national spirit which will oblige, for instance, Quebec and Ontario to realize that when they say that all provinces are equal they should mean it.”<sup>52</sup>

I would suggest that neither Trudeau nor the governments of Ontario and Quebec have ever embraced the idea of equality of provinces, nor should they. If a constitution is a social contract then principled demands for a veto over constitutional changes should be driven by the same principles that determine who should be represented and in what proportions with respect to governance at the centre. In other words, the concepts that underlie an amending formula should be the same as those that underlie demands for representation in Parliament.

**Table 2**  
**Distribution of Senate Seats: Actual and Proposed (Elected)**

	Actual (1975-1999)	Alberta Select (1985)	Nfld. Gov. (1989) <sup>48</sup>	Beaudoin-Dobbie <sup>49</sup>			Charlotte- town Accord (1982)
				#1	#2	Lib.	
NF	6	6	10	7	6	8	6
PE	4	6	10	4	4	4	6
NS	10	6	10	10	8	8	6
NB	10	6	10	10	8	8	6
Qc	24	6	10	30	20	18	6
ON	24	6	10	30	20	18	6
MB	6	6	10	12	8	8	6
SK	6	6	10	12	8	8	6
AB	6	6	10	18	12	8	6
BC	6	6	10	18	12	8	6
YK	1	2	2	2	2	1	1
NT	1	2	2	2	2	1	1
TOTAL	104	64	104	154	109	100	62

## Compromise

The Beaudoin-Dobbie Committee offered one of the few proposals for an elected Senate to argue that the equality of provinces is not a fundamental principle of federalism. It correctly noted that no such principle was “asserted in the classical theoretical works on federalism, such as *The Federalist*, or the writings of Alexis de Tocqueville.”<sup>53</sup> More important than provincial equality in Senate seat numbers, according to the Beaudoin-Dobbie Committee, is the building of strong regional blocks which could be accomplished if the smaller provinces were “assigned a sufficiently large number of seats to enable the Senate to perform its role of counterbalancing the principle of representation by population embodied in the Lower House.”<sup>54</sup>

While this point is correct, the Committee failed to take the next step and offer a principled defence of its preferred form of Senate representation. As a result, the numbers put forward by the Beaudoin-Dobbie Committee left no one satisfied, as they were little more than a compromise between those wanting regional equality in the Senate and those preferring provincial equality. Such compromise positions only illus-

trate the futility of suggesting compromises in Senate seat numbers unhinged from an agreed-upon set of principles.

This difficulty was also in evidence during negotiation of the Charlottetown Accord,<sup>55</sup> which proposed an equal number of senators per province while restricting the Senate’s constitutional authority, and creating double majorities, linguistic divisions, and joint sessions to facilitate deviation from provincial equality for various votes in Parliament.<sup>56</sup> This constitutional amendment initiative was rejected by Canadians, including Quebecers, in a country-wide referendum in October 1992. Subsequent research has shown that Charlottetown’s Senate proposals failed to strike a chord with Canadians, even among those who might otherwise have favoured Senate reform.<sup>57</sup>

More recently, discussion of Senator Murray’s motion to increase the number of senators in the West resulted in the characterization of compromise on seat numbers as “a dog’s breakfast of numbers that can only be explained sequentially because they do not make any sense coming in the front door.”<sup>58</sup>

While provincial equality and regional equality may be linked to two distinct visions of the character of the Canadian political community, this situation is complicated by the fact that a number of core beliefs held by elites and by Canadians more generally about the nature of the federation are resistant to compromise. Indeed, competing visions based on duality, a compact of provinces, or popular sovereignty continue (in slightly modified form) to animate positions taken by Alberta, Ontario and Quebec with respect to Senate numbers.

Appearing before the Senate Committee studying Bill S-4 (Senate Tenure), the Minister of Inter-governmental Affairs from Alberta laid out Alberta's position which, not surprisingly, had as its first principle "that representation to the Senate is equal from each province."<sup>59</sup> Two days later, his counterpart from Ontario responded by saying:

If Senate reform is to proceed, the under-representation of Ontario citizens must be addressed. Electing Senators under the existing system would entrench and exacerbate inequities that are acceptable for an appointed body acting as a "chamber of sober second thought," but clearly would not be acceptable in a body that would become a potential democratic competitor to the House of Commons.<sup>60</sup>

Quebec staked out its traditional claim for Canadian duality regarding representation in the upper chamber, citing the words of Ontario's George Brown during the pre-Confederation debates:

The very essence of our compact is that the union shall be federal and not legislative. Our Lower Canada friends have agreed to give us representation by population in the Lower House, on the express condition that they shall have equality in the Upper House. On no other condition could we have advanced a step and, for my part, I accept this in good faith.<sup>61</sup>

In the century since Confederation, additional representational claims have emerged. There is a significant tension between rural and urban populations emergent as a political fault line in Canadian politics. Ethnic and group identities have become the focus of discussion about multiculturalism, group rights, and the need

for substantive, symbolic, and descriptive representation in legislatures.

Recently, as Michael Pal and Sujit Choudhry have illustrated by combining the lower voter-to-MP ratios in the House of Commons evident in rural ridings with the distribution of ethnicity over largely urban ridings, visible minorities in Canada are particularly underrepresented.<sup>62</sup> In 1996, the *Royal Commission on Aboriginal Peoples*<sup>63</sup> pointed out the need to accommodate the Aboriginal population in Parliament; this idea has been largely ignored in Canadian discussions about political representation.<sup>64</sup>

In an increasing number of other democracies, the mechanism used to redress ethnic underrepresentation is to set aside seats in the legislature for ethnic groups.<sup>65</sup> In Canada there appears to be resistance to this solution. To date, debate among elites directed toward the redrawing of electoral boundaries (federal and provincial) or toward Senate reform tends to link representation to territory. Even in the only area where ethnic-political representation has gained some legitimacy in Canada—the dualism of French and English—seats are invariably tied to geography. And recent moves to Aboriginal self-government have increasingly used models of public rather than ethnic government.

Our tendency to link representational concepts with territory ensures that successful proposals to alter the apportionment of Senate seats will fail to accommodate many of Canada's group-representational demands, both historic and current. That does not mean, however, that Senate reform cannot move us towards this goal (and I would argue that one of the strengths of the *Hicks Amendment* is that it moves us in this direction).

Contrary to the assertions of supporters of provincial equality, there is no uniquely appropriate configuration an upper chamber should take in a federal system. There is general agreement that the representation objectives of the lower chamber should involve a commitment to representation by population, although even here there is dramatic variation among democracies. However, any number of different approaches to representation may guide seat dis-

tribution in an upper chamber. The important point for the theory of bicameralism is that the upper chamber be organized on the basis of an approach to representation different from that used in the lower chamber, thus allowing the former to become a chamber where under-represented groups may have their interests advanced in the process of reviewing the activities of the latter.

## The Hicks Amendment as a Principled Middle Ground

There are clearly two types of compromise position regarding representation in Parliament that cannot be ignored, something as true of 1867 as it is of today. The first attempts to resolve divergent claims to representation which are themselves based on different conceptions of Canada as a federal political community. The second is more practical and focuses on the political reality that larger provinces are unlikely to accept a Senate reform proposal in which they are allotted the same or a similar number of Senate seats as smaller provinces. As the constitutional amendment process requires the consent of most if not all provinces, consideration of the demands of smaller provinces are also important.

The strength of the *Hicks Amendment*, when compared to other Senate proposals such as that of the Beaudoin-Dobbie Committee or the Charlottetown Accord, is that it is not a mere compromise between provincial and regional equality. It was advanced specifically to address representational deficiencies in the Canadian federation, and it attempts to do this while not requiring provincial governments to sacrifice their various principled positions on Senate reform.

The CWF was correct in noting that the distribution of Canadians across provinces is the most uneven and unequal of any federal country. Canada is also one of the most ethnically diverse federal states. Nowhere is that truer than in the two largest of the provinces—Ontario and Quebec—where multicultural, urban mega-cities dominate, and where bilingualism is a daily reminder of the duality that was at the

heart of the Canadian community. As a result, there are several approaches to representation currently underlying the seat distribution of both chambers of Parliament. These are evident in the compromises already reached on Senate representation and in the uneven distribution of seats in the Commons.

As noted at the outset, even before Confederation and certainly in the discussions leading to union, the representation demands for the upper chamber included the need to represent smaller provinces, the need to represent Canada's duality, and the need to represent Canada's diversity. Add to that the modern complexities of urban and rural, bilingual, multicultural, federal and multinational communities, and the representational demands seem insurmountable. The challenge is to reconcile all of this complexity in a single upper chamber, leaving the lower chamber free to represent the population more proportionately.

In some ways the answer to this challenge is already evident (i) in the 1867 Senate, (ii) in the Commons (which continues to consider factors other than population when redistributing seats) and (iii) in provincial legislatures (which have been forced, in a unicameral legislature, to find ways to represent diverse populations unevenly distributed across their territories, with particular adjustments for historic groups such as official language minorities and rural communities).<sup>66</sup>

Following this tradition, the *Hicks Amendment* proposes a simple and straightforward representational structure for the Senate. It suggests that: (i) every province but the two (or three) largest be given equal representation; (ii) the largest geographic and populous provinces — Ontario, Quebec and possibly British Columbia — be internally divided for Senate purposes; and (iii) there be separate representation for Canada's North.

**Table 3**  
**The Hicks Amendment (Elected)**

Newfoundland	6
Prince Edward Island	6
Nova Scotia	6
Quebec	



- Northern	6
- Eastern	6
- Western	6
Ontario	
- Northern	6
- Eastern	6
- Southwestern	6
Manitoba	6
Saskatchewan	6
Alberta	6
British Columbia	
- Northern	6
- Southern	6
Northern Canada	6
TOTAL	96

The *Hicks Amendment* is not dissimilar in conception to the original configuration of the Senate, where Quebec was given representation equal to that of Ontario, where Quebec senators were assigned to divisions within the province so that they would represent sectional interests, and where the smaller provinces of Nova Scotia and New Brunswick were given fewer senators but, when combined, had numbers equal to the large provinces.

Table 3 offers a Senate configuration which takes similar considerations into account: Quebec is divided into three regions, with the dominance of Montreal and the Outaouais limited to the eastern region; Ontario is divided into three regions with southwestern Ontario (from Windsor through Toronto) serving as the boundary for most of Inner Canada; and British Columbia is divided into two. In this configuration the North would be one division. Each division would be represented by six senators, giving the Senate a manageable total of ninety-six seats.

There are, of course, other possible configurations. Ontario and Quebec could be divided into four, Quebec could be four and Ontario three, B.C. could remain undivided or be divided into three, and the North could be divided into two or three. The overall number of seats in

the Senate should be based on a balance of competing needs: population, geography, diversity, linguistic duality, and provincial interest. Socio-economic, political, cultural, and historical factors should be the determinants of division boundaries within large provinces.<sup>67</sup>

## Representational Considerations

When we consider the philosophical dimension of representation — the principled claim to representation based on an understanding of the component parts of Canada — then the demands from the various regions of Canada reflect different philosophical conceptions of Canada. For a number of provinces ranging from the geographically small Prince Edward Island to the economically powerful Alberta, the demand at the negotiating table has been and continues to be for stronger provincial representation at the centre to counterbalance Inner Canada's population size and economic influence. Francophones in Quebec hold a conception of Canada based on duality, necessitating a larger number of Senate representatives than other provinces. For many in Ontario, a conception of representation exists based on the matching of that province's proportion of Senate seats to its proportion of Canada's population (in fact, this majoritarian principle has been championed in Ontario since the days of George Brown in the colony of Upper Canada).

In conjunction with Senate reform, the majoritarian principle will be accommodated largely, though not completely, through the redistribution of seats in the Commons. As a result, Ontario may accept a smaller proportion of seats in the Senate than its population would recommend as long as Ontario's seat share in the Commons reflects its proportion of Canada's population. Ontario might even accept fewer seats than Quebec (as seen in Table 1, this was suggested in the proposal of the Ontario Legislature in 1980), though it would not agree to be overwhelmed in the Senate by the smaller provinces.<sup>68</sup> The fact that Ontario and Quebec (and increasingly B.C.) have been and continue to be considered by many Canadians to be separate regions further buttresses their representational demands.

What have been less acceptable historically are the representational demands of the Northern and the Aboriginal populations, both in the Territories and further south. Most Senate proposals make scant mention of the North and, when they do, argue that Senate representation should be linked to provincehood. The North must be considered at least one full region if not three distinct regions by territory (Yukon, Northwest and, since 1999, Nunavut) for the purposes of the Senate, a recognition that would ensure a modicum of Aboriginal representation in the upper chamber.

Currently, northern Quebec is being re-structured as a self-governing majority Inuit territory, to be called Nunavik, to parallel earlier self-government initiatives undertaken jointly by Quebec and Ottawa with respect to the Eeyou (or Cree) of James Bay. Clearly, the division of a province like Quebec for the purposes of the Senate could also lead to increased Aboriginal representation in the Canadian Senate. This would be one argument in favour of the larger geographic territory of Quebec requiring more divisions than Ontario.

Table 4 below compares one possible configuration of the *Hicks Amendment* where Quebec and Ontario are divided into three equal divisions, B.C. into two, and the North and other provinces being one division (i.e. the structure outlined in Table 3), and juxtaposes this to the current population totals and territorial area of these political divisions (as well as to the current division of seats in the House of Commons). What comes immediately to light is that the large province-regions of Ontario, Quebec and, to a lesser extent, B.C. are distinct from the other Canadian provinces and regions (and how underrepresented they are in today's Commons). Quebec and Ontario account for roughly one-quarter and one-third of Canada's total population, respectively, and together represent one-quarter of Canada's landmass (even more if fresh water is included). British Columbia accounts for 13 percent of the population and 10 percent of Canada's territory. Interestingly the North also stands out as distinct, mainly for the reason of its sparse population (smaller than Prince Edward Island), and enormous territory

(three times the size of Quebec, Canada's largest province).

From the perspective of geography and population, any principled or practical negotiation on Senate reform requires that the three large region-provinces be given a larger seat share in the Senate than the other provinces. A similar case could be made on the basis of these provinces' ethnic, linguistic and religious diversity (three of the factors considered by the Framers of the Constitution in organizing the original Senate, and considered central to representational claims in many bicameral systems). Indeed, these three region-provinces are the most ethnically, linguistically and culturally diverse of the provinces.

Both the challenges facing the rural and northern parts of these province-regions and the increasing ethnic presence in Canada's major urban centres offer compelling arguments for the relative strength of the *Hicks Amendment* over a simplistic Senate configuration based on provincial or regional equality. In separating Ontario, Quebec and B.C. into two or three large socio-economic divisions, it is likely that one division in each of these provinces will represent the urban areas surrounding Toronto, Montreal and Vancouver, respectively. In these major urban centres, senators would likely accept responsibility for substantively representing the ever-growing ethnic population of these cities. With a number of large-city issues garnering attention at the federal level, these senators would ensure a sustained focus on urban matters.

Yet it is in these urban areas that the supposed political and economic domination of the House of Commons and the federal government is taking place, while the northern and eastern parts of Ontario and Quebec lack influence in both chambers of Parliament.<sup>69</sup> The same is increasingly true for B.C. outside the Lower Mainland.

Underrepresentation in the House of Commons has not historically been as problematic for non-urban areas, as Commons seat redistribution has tended to favour rural populations (this is true also of provincial legislatures). This

**Table 4**  
**Comparison of Population and Area to Seat Allocation under the Hicks Amendment**

	Current Commons	Population (,000)	The <i>Hicks Amendment</i> (Senate)	Land area (,000 km <sup>2</sup> )
ON	106 (34.4)	12,754 (38.8)	18 (18.8)	918 (10.1)
QC	75 (24.4)	7,687 (23.4)	18 (18.8)	1,365 (15.0)
BC	36 (11.7)	4,353 (13.2)	12 (12.5)	925 (10.2)
AB	28 (9.1)	3,455 (10.5)	6 (6.3)	642 (7.1)
MB	14 (4.5)	1,183 (3.6)	6 (6.3)	554 (6.1)
SK	14 (4.5)	990 (3.0)	6 (6.3)	592 (6.5)
NS	11 (4.5)	932 (2.8)	6 (6.3)	53 (0.6)
NB	10 (3.6)	749 (2.3)	6 (6.3)	71 (0.1)
NF	7 (2.3)	507 (1.5)	6 (6.3)	374 (4.1)
PE	4 (1.3)	139 (0.4)	6 (6.3)	6 (0.0)
North	3 (1.0)	104 (0.3)	6 (6.3)	3,594 (39.5)

Sources: area: Canada's population estimates (2007-06-28), and land and fresh water area, by province and territory (2005-02-01), Statistics Canada.

Notes: provinces are listed in order of declining population size. Percentages are in parenthesis and may not add up to 100 due to rounding.

would likely change following Senate reform as the Commons migrates towards more consistent representation by population. Admittedly, the rural-urban divide is not limited to the three largest cities in Canada; nevertheless, the population size and economic influence of Canada's three mega-cities — not to mention the party/partisan considerations that favour these urban centres — is the cause of much resentment not just in the other provinces but within Ontario, Quebec and B.C. as well.

Strikingly enough, most Senate reform proposals recommending an elected Senate are silent on issues related to the choice of electoral system. Of those that are not silent, the majority propose multiple-member province-wide districts using the plurality (or "first-past-the-post") system currently used in House of Commons and provincial elections. The issue of riding size — an issue important to Canada's rural areas — has been virtually ignored. The one proposal to address the size of constituencies in Senate elections was offered by the Molgat-Cosgrove Committee which endorsed a plurality electoral system with single-member constitu-

encies (on the basis that this system was familiar to most Canadians).<sup>70</sup> Three other proposals recommend some form of proportional representation but again on the basis of large multi-member, province-wide districts.<sup>71</sup>

Were the Senate to adopt a plurality electoral system based on province-wide districts, the accusation of underrepresentation for rural regions in the Senate would likely increase. After all, in the northern regions of Ontario, Quebec and British Columbia, senators would be elected by voters in Toronto, the island of Montreal, and Vancouver, respectively. Even if the Senate were elected on the basis of proportional representation (PR) based on province-wide districts, there would still be no mechanism by which rural Ontario, Quebec and B.C. would be represented in the upper chamber. The same may be true of other provinces, but the geographical size and population diversity of Ontario, Quebec, and B.C., and the concentration of people in urban areas, makes the problem more acute there. The solution, however, is not to divide the Senate into a large number of single member constituencies, as proposed by Molgat-Cosgrove. That

would duplicate the representation logic of the House of Commons and thus undermine the rationale for a second chamber. The adoption of large sub-provincial regions with multi-member constituencies creates an alternative form of representation that lessens the tension between urban and rural in Parliament, and keeps the Senate functionally distinct from the House of Commons.

It is worth noting that sub-province Senate divisions also provide the opportunity to use electoral rules (and even set-aside seats) to address the underrepresentation of women, ethnic groups, and most urgently Aboriginal peoples. The examples of northern Quebec and the territories of the North have already been used in this article to illustrate how the *Hicks Amendment* could be important to the election of First Nations persons to the Senate. However, there is no reason that the electoral rules set by Parliament for the Senate in the future could not be used to encourage representational diversity. Once again, the strength of the *Hicks Amendment* lies in its reconceptualization of representation. While the current appetite in Canada may be for territorial representation, by breaking the three largest provinces down and acknowledging that the North requires separate and significant representation, the possibility exists to address other representational concerns down the road.<sup>72</sup>

### Partisan Considerations

While institutional design should be based on theoretical principles, the reality is that political actors tend to support institutional configurations which they believe will produce outcomes in their interest. So what are the partisan arguments that justify changes to Senate numbers?

The most obvious partisan questions are “what do we get” and “what do we lose” — questions that would be important to both Ontario and Quebec, were they to enter into constitutional negotiations (both provinces are needed to make any change to the *Constitution Act, 1867* given the current general formula as modified by Bill C-110). To answer the partisan question, it is essential to look at both chambers together.

After all, the issue is the overall representation structure of Parliament.

It probably does not need to be pointed out just how woefully inadequate a unicameral system is to defend the interests of such a vast and diverse country like Canada, particularly with the large differences in the size of provinces and territories. Yet Canada has been effectively operating with a unicameral system for some time. Particularly in comparison to upper chambers in other countries, but also in light of its unused constitutional powers, one could argue that Canada’s Senate is ineffectual. Indeed, it has fallen to the Commons to balance representational considerations of geography, linguistic difference, and population density, with the result being a chamber with no obvious representational structure. In its current configuration, small and mid-sized provinces are overrepresented and the larger provinces are underrepresented.

Even if Commons seats were to be distributed more proportionately according to population size, the larger provinces would still be slightly underrepresented because of the nature of provincial and territorial boundaries, and the impact of these boundaries on rounding and on minimum representation levels.<sup>73</sup> A Senate reorganized specifically to facilitate the better representation of regional and sectional interests might, if bicameral systems in other countries serve as a useful guide, encourage a reorientation of Commons seats: (i) permitting numerical representation in that chamber to better reflect actual population distribution across the provinces, and (ii), freeing up Commons’ representatives to orient themselves more toward local matters and, by extension, to become decidedly more majoritarian. Both points would be attractive to the government of Ontario.

The most important issue for Quebec will be its overall proportion of Senate seats. An effective Senate, one in which Quebec has a guarantee of one-fifth to one-quarter of the seats, will ensure that Quebecers always have an effective voice at the centre no matter how Canada’s population is distributed in the future (demographic projections suggest an increasingly westward shift). This level of protection is not assured by a



unicameral legislature, even with all the allowances that have historically been made in Commons seat redistributions.

Quebec's concerns may require that it receive more seats in the Senate than Ontario, but given the linguistic duality of Canada, this is entirely in keeping with the representational role of an upper chamber.<sup>74</sup> Further, it is possible that the allocation of more seats to Quebec would have a symbolic importance for many Québécois, something that in turn would have benefits for Canadian unity.

**Table 5**  
**Parliamentary Seat Share under the Hicks Amendment**

	Commons (Seats)	Senate (Seats)	Parliament (%)
Ontario	124	18	28.0
Quebec	75	24	23.4
Prairies	56	18	17.5
Pacific	42	12	12.4
Atlantic	22	24	15.2
North	3	6	3.4
TOTAL	322	102	100.0

In Table 5, a Senate seat configuration is proposed in which Quebec receives more seats than Ontario. Specifically, the Senate seat distribution is based on Quebec having four regions, Ontario three and B.C. two. In this scenario the Commons seats are distributed to provinces more in keeping with their population size, and on basis of the historic distribution formula without the grandfather clauses and compensatory adjustments necessitated by Canada's lack of an effective upper chamber. Using this redistribution of seats, the regions have been listed in order of decreasing proportion of Commons' seats to illustrate how the *Hicks Amendment* provides a general equilibrium between the regions of Canada, one far superior to a Senate seat distribution based on simple regional equality, and one not even contemplated by any notion of provincial equality.<sup>75</sup>

However, while a Senate thus configured might well produce an equilibrium in regional

representation, it does not favour the politically influential urban centres of the three large region-provinces. For example, the political powerhouse of urban Ontario, which many believe controls the federal government and the House of Commons, would not have more influence than any other province in the Senate (it would be represented directly by only six Senators). Moreover, northern Ontario would have its interests securely represented in the Senate for the first time.

It is hard to argue that the northern regions of Ontario, Quebec, B.C. or Canada, more generally, do not deserve stronger representation in a chamber designed to rebalance the political influence of densely-populated urban Inner Canada, especially when these rural areas together lack the representation that Alberta or Prince Edward Island already enjoy by virtue of their status as provinces.

The same argument applies to Quebec, with the populous western region having significantly different interests than both eastern Quebec and northern Quebec. The differentiation of Quebec into three or four Senate divisions would ensure a strong francophone presence in the Canadian Senate, and ensure that the diversity of Quebec is adequately represented in the upper chamber. This is in the interest of both nationalists and federalists.

Given the recent Quebec provincial election which exhibited clear regional differences in voting preference, and which split the vote almost equally among the Quebec Liberal Party, the Action Démocratique du Québec and the Parti Québécois, one can imagine how a Senate constituted along the lines of the *Hicks Amendment* might result in a greater diversity of voices in the upper chamber. These voices would inevitably come together on linguistic and cultural issues to form a unified front, while offering alternative political and regional perspectives on other policy issues (the sine qua non of an upper chamber).

Under the *Hicks Amendment*, one can imagine senators from eastern or northern Quebec siding with senators from the West or Atlantic Canada on economic issues, but with senators

from Montreal on linguistic and cultural issues. Although voting would be tempered by existing party allegiances, the result would likely be that such coalitions of common interest would increase the influence of the smaller provinces in the Senate.

It is worth noting that the primary argument for a larger proportion of Senate seats for Quebec advanced during the Charlottetown Accord negotiations (which led to the idea of double majorities) was that they were needed to protect francophone language and culture. Yet with senators elected province-wide (as most Senate proposals, whether equal by province or by region suggest), the result would be that bilingual and increasingly immigrant Montreal would tend to determine the winning candidates in an elected Senate. A Quebec premier would be hard pressed to argue that this would be a preferable result to having Quebec divided into east, west and north, with each region given its own seats in the Senate (regardless of the overall size of the upper chamber).

Similarly, an Ontario premier might find it politically difficult to argue that the provision of additional Senate seats to Ontario ought to come at the cost of a subdivision of the province for purposes of allocating Senate seats. A plea for the majoritarian principle of representation by population might permit some flexibility in negotiation but the message to northern Ontario, for example, would surely be that the premier of their province opposes separate Senate representation for their distinct (and relatively economically disadvantaged) region.

So, on the one hand, Ontario and Quebec would be able to find comfort in the provision of additional senators. On the other, the distinctive nature of this representation will permit smaller provinces to temper the will of the most populous provinces. And the resultant changes to the Commons could combine with this Senate format to create a regional equilibrium across Parliament. In short, the *Hicks Amendment* would not require proponents of Senate reform to compromise on principle, even as they compromise on numbers. Those who believe regions need to be protected numerically in Parliament, and those who believe smaller provinces need

a stronger voice at the centre, would both find solace in the proposal.

## Conclusion

Whether or not the cry for reform has grown out of dissatisfaction with the current Senate, the demand to make the Senate more democratic is irresistible and has found resonance across Canada.<sup>76</sup> Like many others, the *Hicks Amendment* is a Senate reform proposal calling for an elected upper chamber. Where it differs from other proposals is in its attempt to situate its structure in both bicameralism theory and the various alternate conceptualizations of the Canadian polity advanced since Confederation. In the process the *Hicks Amendment* makes a plea for an arrangement of Senate seats that accommodates both those who argue that the upper chamber must be organized on the basis of provincial equality and those who argue that it must be regionally based. Indeed, the genius of the *Hicks Amendment* is that neither side has to compromise its political constituency, its representational demands, or its conception of how power would operate in a reconstituted Parliament.

A Senate thus constituted can protect rural and regional interests, probably better than can a Triple E Senate. The *Hicks Amendment* would ensure that the different regions of Ontario and Quebec would receive a separate voice in the upper chamber, something they currently lack at the federal level and at first ministers and intergovernmental conferences. It would ensure a stronger voice for the North. It would secure the francophone minority, based largely in Quebec, a level of representation that it would not be accorded in a Triple E Senate. Finally, it would circumvent the demands of both Ontario and Quebec that they not be overwhelmed numerically by the other provinces in the Senate (without giving additional influence to Inner Canada).

The *Hicks Amendment* leaves it to first ministers to actually negotiate the numbers, yet provides a theoretical basis from which to enter into negotiations over Senate seat distribution. As Royce Frith puts the point, the *Hicks*

*Amendment* “would finesse the most difficult of the Triple-E (equal, elected and effective) propositions for Senate reform.”<sup>77</sup>

## Notes

\* Bruce Hicks is an associate with the Canada Research Chair in Electoral Studies at the Université de Montréal. A longtime parliamentary journalist in both radio (NPR) and print, he has been variously Ottawa bureau chief of United Press International (UPI) and a syndicated columnist (mostly in Thomson Newspapers). It was while Editor-in-Chief of the *Financial Post*’s “Directory of Government” that he first proposed *The Hicks Amendment* to Premier Wells of Newfoundland and Premier Bourassa of Quebec.

1 *House of Commons Debates*, 87 (13 April 1874).

2 Elections would be done by and from the provincial legislature.

3 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [*Constitution Act*, 1867].

4 Bill S-4, *An Act to amend the Constitution Act*, 1867 (Senate Tenure), 1st Sess., 39th Parl., 2006. This bill proposes to limit Senate terms to eight years for new senators; Bill C-43, *An Act to provide for consultations with electors on their preferences for appointments to the Senate*, 1st Sess., 39th Parl., 2006. This bill authorizes Elections Canada to conduct consultative elections on behalf of the Prime Minister to determine public support for nominees to fill Senate vacancies.

5 Royce Frith, *Hoods on the Hill: How Mulroney and His Gang Rammed the GST through Parliament and Down Our Throats* (Toronto: Coach House Press, 1991) at 114 [Frith].

6 *Ibid.*

7 Special Senate Committee on Senate Reform, *Report on the Motion to Amend the Constitution of Canada* (Ottawa: The Senate of Canada, 2006), online: <<http://www.parl.gc.ca/39/1/parlbus/commbus/senate/com-e/refo-e/rep-e/rep-02oct06-e.htm>> [Senate Reform Committee].

8 (3 June 1987), online: The Solon Law Archive <<http://www.solon.org/Constitutions/Canada/English/Proposals/MeechLake.html>>.

9 It was briefly mentioned by the author’s mother during a nomination contest in Nova Scotia, at which time it was given the label the “Hicks Amendment” and received some coverage in the local media (see e.g. *The Daily News and Chronicle Herald*). It also received mention in Frith, *supra* note 5.

10 On 12 February 1990 the idea was broached in

a letter to Newfoundland Premier Clyde Wells and, shortly thereafter, by telephone to Quebec International Affairs Minister John Ciaccia, who took the idea to Premier Robert Bourassa. After agreement in principle was obtained, the author submitted a more detailed proposal which included draft wording for a constitutional amendment (what subsequently became known as the *Hicks Amendment*) on 12 March 1990. Having opened the door to discussions, the federal government entered the fray in late May 1990 and Intergovernmental Affairs Minister Senator Lowell Murray did a tour of provincial capitals. Prime Minister Brian Mulroney then brought each of the premiers to his official residence at 24 Sussex Drive in Ottawa. On 3 June 1990, Mulroney convened a First Ministers’ Meeting which lasted for six days. On 9 June 1990, they released a communiqué, which committed the premiers to seek a final decision on *Meech* prior to 23 June 1990 and then to adopt a companion resolution which would have redistributed seats in the Senate.

11 It will not review, except for what appears in the previous note, the historical context for this proposal or the details of the discussions with the previous governments of Newfoundland and Quebec.

12 H.B. Lees-Smith, *Second Chambers in Theory and Practice* (London: George Allen & Unwin Ltd., 1923); J.A.R. Marriott, *Second Chambers: An Inductive Study in Political Science* (Oxford: Clarendon Press, 1910); Samuel C. Patterson & Anthony Mughan, *Senates: Bicameralism in the Contemporary World* (Columbus: Ohio State University Press, 1999); Harold W. Temperley, *Senates and Upper Chambers* (London: Chapman and Hall Ltd., 1910); and George Tsebelis & Jeannette Money, *Bicameralism* (Cambridge: Cambridge University Press, 1997).

13 Alexander Hamilton, “Federalist No. 27” in Clinton Rossiter, ed., *The Federalist Papers* (New York: Mentor, 1999) at 143.

14 *Ibid.* at 347.

15 “Bryce Conference Report of 1918” in Lees-Smith, *Second Chambers in Theory and Practice*, *supra* note 12 at 33.

16 Marriott, *Second Chambers: An Inductive Study* *supra* note 12 at 86.

17 *Reference re Legislative Authority of Parliament of Canada*, [1980] 1 S.C.R. 54.

18 There are several ways that the uniting of “peoples” has been characterized, including the recent characterization of “nations.” At the time of Confederation, George-Étienne Cartier

spoke of the union of English, French, Irish and Scottish peoples. Henri Bourassa suggested there was a dual compact. More recently, Romney has suggested there was a compact between the conquered French and the English conqueror stemming from the capitulations of Quebec and Montreal; from the *Quebec Act, 1774* (U.K.), 14 George III, c.83; the *Constitutional Act, 1791* (U.K.), 31 Geo. III, c. 31 (which divided the old province of Quebec into Upper and Lower Canada); and finally from the *Constitution Act, 1867*. These authors all point to the same idea that Canada is more than simply a union of provinces or individual Canadians. (For a more detailed discussion see Paul Romney, "Provincial Equality, Special Status and the Compact Theory of Canadian Confederation" (1999) 32 Canadian Journal of Political Science 21; Kenneth McRoberts, *Misconceiving Canada: The Struggle for National Unity* (Don Mills: Oxford University Press, 1997); and Ramsay Cook, *Provincial Autonomy, Minority Rights and the Compact Theory 1867-1921* (Ottawa: Queen's Printer, 1969).

- 19 Bill C-56, *An Act to amend the Constitution Act, 1867 (Democratic representation)*, 1st Sess., 39th Parl., 2007.
- 20 See e.g., Jeffrey Simpson "Harper fiddles with the electoral map while Ontario burns" *The Globe and Mail* (25 May 2007) A25.
- 21 *Constitution Act, 1867, supra* note 3.
- 22 *Constitution Act, 1915*, (U.K.) 5 & 6 Geo. V, c. 45, s. 22. Newfoundland and the Territories were assigned representation outside of the four formal divisions.
- 23 *Constitution Act, 1867, supra* note 3 at s. 23(5).
- 24 *Supra* note 3.
- 25 The colony covered only 36,000 km<sup>2</sup> of the 650,000 km<sup>2</sup> landmass of Manitoba.
- 26 *British Columbia Terms of Union* (formerly *Terms of Order of Her Majesty in Council admitting British Columbia into the Union*), dated the 16th day of May, 1871, online: The Solon Law Archive <http://www.solon.org/Constitutions/Canada/English/bctu.html>; *Alberta Act*, S.C. 1905, c. 3; *Saskatchewan Act*, S.C. 1905, c. 42.
- 27 *Constitution Act, 1915* (U.K.), 5 & 6 Geo. V., c. 45.
- 28 *Prince Edward Island Terms of Union* (formerly *Order of Her Majesty in Council admitting Prince Edward Island into the Union*), dated the 26th day of June, 1873, online: The Solon Law Archive, <<http://www.solon.org?Constitutions/Canada/English/peitu.html>>.
- 29 Even at the time of Confederation it was not expected that Newfoundland would be included in the "Maritime division" and an additional

four Senate seats had been allowed for in section 147 of the *Constitution Act, 1867, supra* note 3. This same section instructed that Prince Edward Island, which, it had been thought, would join the original union of 1867, would be included as part of the "Maritime division."

- 30 Text available online: The Solon Law Archive <[http://www.solon.org?Constitutions/Canada/English/Proposals/Victoria\\_Charter.html](http://www.solon.org?Constitutions/Canada/English/Proposals/Victoria_Charter.html)>.
- 31 Victoria Charter, s.1: "Amendments to the Constitution of Canada may from time to time be made by proclamation issued by the Governor General under the Great Seal of Canada when so authorized by resolutions of the Senate and House of Commons and of the Legislative Assemblies of at least a majority of the Provinces includes: a) every Province that at any time before the issue of such proclamation had, according to any previous general census, a population of at least twenty-five per cent of the population of Canada; b) at least two of the Atlantic Provinces; and c) at least two of the Western Provinces that have, according to the then latest general census, combined populations of at least fifty per cent of the population of all the Western Provinces."
- 32 In 1990, the Senate numbers were temporarily increased by eight through section 26 of the *Constitution Act, 1867, supra* note 3, with two additional Senators being appointed by Brian Mulroney for each of the four regions so as to break a senate deadlock with the House of Commons.
- 33 The Beige Paper makes clear that its numbers are for illustrative purposes only. For the full text of the Beige Paper see: The Constitutional Committee of the Quebec Liberal Party, *A New Canadian Federation* (Montreal : The Quebec Liberal Party, 1980).
- 34 The Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, *Final Report* (Ottawa: Information Canada, 1972) [The Molgat-MacGuigan Report]; Task Force on Canadian Unity, *A Future Together: Observations and Recommendations* (Ottawa, Supply & Services Canada, 1979), online: The Solon Law Archive <<http://www.solon.org/Constitutions/Canada/English/Committees/Pepin-Robarts>>. [The Pepin-Robarts Report].
- 35 Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.
- 36 The general amending formula adopted in the *Constitution Act, 1982* is based on the "Fulton-Favreau Formula" of 1964, originally proposed by E. Davie Fulton (Minister of Justice in 1961) and modified slightly by his successor Guy



- Favreau. This is loosely based on the principle of equality of provinces and requires the consent of Parliament and two-thirds of the legislatures representing at least 50 percent of the population of Canada. The Trudeau government had offered the provinces either the Fulton-Favreau Formula, the Victoria Formula, or some variation that included referenda during the patriation negotiations.
- 37 Canada, Special Joint Committee on the Process for Amending the Constitution of Canada, *The Process for Amending the Constitution of Canada: The Report of the Special Joint Committee* (Ottawa: Supply and Services, 1991), recommendation 1.
- 38 Bill C-110, *An Act respecting constitutional amendments*, 1st Sess., 35th Parl., 1995.
- 39 Bill C-110, *An Act respecting constitutional amendments*, S.C. 1996, c.1
- 40 Bruce M. Hicks, ed., *Directory of Government* (Toronto: The Financial Post Company, 1990).
- 41 Senator Murray's motion would give the region of British Columbia only twelve Senate seats. The other regions would maintain the current twenty-four seats, with the twenty-four in the prairies redistributed to give seven each to Manitoba and Saskatchewan and ten to Alberta.
- 42 Senate Reform Committee, *supra* note 7 at 12.
- 43 Gordon Robertson, *A House Divided: Meech Lake, Senate Reform and the Canadian Union* (Halifax: The Institute for Research on Public Policy, 1989) at 3.
- 44 David Kilgour, *Inside Outer Canada* (Edmonton: Lone Pine Publishing, 1990).
- 45 Peter McCormick, Ernest C. Manning & Gordon Gibson, *Regional Representation: The Canadian Partnership* (Calgary: Canada West Foundation, 1981) at 110 [McCormick *et al.*].
- 46 *Ibid.*
- 47 Peter McCormick, *The 1988 Senate Vote* (Calgary: Canada West Foundation, 1998) at 4.
- 48 *Correspondence Relating to the Meech Lake Accord and the Constitutional Proposal Submitted by the Government of Newfoundland & Labrador* (18 October — 6 November 1989) [unpublished] [Newfoundland and Labrador].
- 49 The Committee offered two alternative sets of numbers as the basis of negotiation. The Liberal Party dissented and proposed its own numbers. Special Joint Committee on a Renewed Canada, *A Renewed Canada* (Task Force Report) (Ottawa: Supply and Services, 1992) at 51 — 52 [Beaudoin-Dobbie Committee].
- 50 Alberta, Special Select Committee on Upper House Reform, *Strengthening Canada: Reform of Canada's Senate* (Edmonton: 1985).
- 51 See Newfoundland and Labrador, *supra* note 48.
- 52 *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on The 1987 Constitutional Accord* (Ottawa: Queen's Printer for Canada, 1987) at 2025.
- 53 Beaudoin-Dobbie Committee, *supra* note 49 at 50.
- 54 *Ibid.*
- 55 Canada, Intergovernmental Affairs, Charlottetown Accord (28 August 1992), online: Government of Canada — Privy Council Office [http://www.pco-bcp.gc.ca/aia/default.asp?Language=E&Page=consfile&doc=charlottetwn\\_e.htm](http://www.pco-bcp.gc.ca/aia/default.asp?Language=E&Page=consfile&doc=charlottetwn_e.htm).
- 56 The Charlottetown Accord also recommended separate Aboriginal people's representation in the Senate over and above provincial and territorial representation, though it left the numbers to be determined by future negotiations.
- 57 See Richard Johnson, André Blais, Elisabeth Gidengil and Neil Nevitte, *The Challenge of Direct Democracy: the 1992 Canadian Referendum* (Montreal: McGill-Queen's University Press, 1996).
- 58 Canada, Special Senate Committee on Senate Reform, *Proceedings of the Special Senate Committee on Senate Reform*, 39th Parl., 1st Sess., No. 4 at 17 (20 September 2006).
- 59 Gary Mar, Marie Bountrogianni & Benoît Pelletier, "Round Table on Senate Reform" (2006) 29 *Canadian Parliamentary Review* 9 at 10.
- 60 *Ibid.* at 12.
- 61 *Ibid.* at 14.
- 62 Michael Pal & Sujit Choudhry, "Is Every Ballot Equal? Visible Minority Vote Dilution in Canada" (2007) 13 *Institute for Research on Public Policy Policy Choices* 1. In another paper released by the IRPP, I use Toronto municipal elections to show that socio-economic factors, including ethnicity, may be resulting in lower voter turnout (Bruce M. Hicks, "Are Marginalized Communities Disenfranchised? Voter Turnout and Representation in Post-Merger Toronto" (Institute for Research on Public Policy Working Paper, November 2006), online: <<http://www.irpp.org/fasttrak/index.htm>>. When these two papers are looked at in tandem, it appears that minorities have specific representational challenges in Canada that may be beyond simple remedies such as fairer redistribution.
- 63 Indian and Northern Affairs Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 2 (Ottawa: Canada Communications Group, 1996) online:

Royal Commission on Aboriginal Peoples ,[http://www.ainc-ianc.gc.ca/ch/rcap/index\\_e.html](http://www.ainc-ianc.gc.ca/ch/rcap/index_e.html)>.

- 64 Some countries have been willing to set aside seats for Aboriginals in their legislatures (countries as varied in history, culture, and political systems as New Zealand, Venezuela, and Taiwan). This has not been a central point of discussion in Canada, though a third chamber for Parliament was proposed by the Royal Commission on Aboriginal Peoples. Instead, official federal government policy is to devolve authority to individual Aboriginal nations for self-government on a one-on-one basis.
- 65 Mala Htun, "Is Gender like Ethnicity? The Political Representation of Identity Groups" (2004) 2 *Perspectives on Politics* 439.
- 66 The adjustment of ridings in the New Brunswick legislature to accommodate the minority Franco-phone population in the north of the province is a typical example of this Canadian approach to addressing linguistic/cultural duality.
- 67 For example, a case also could be made for dividing Alberta. While two-thirds of the province is now urban, it would seem that a rural-urban divide would not provide the most appropriate representation in a federal Parliament. The political and socio-cultural divide between North and South (the north centred around Edmonton and the south around Calgary) seems a more appropriate division to ensure diversity of representation in a second chamber given the powers of the federal government.
- 68 The idea of limiting the Senate's powers is often advanced as a way of satisfying Ontario's apprehension over insufficient representation in the Senate. This can dramatically undermine the review function and negatively affect the representational balance envisioned by bicameralism. See Tsebelis & Money, *supra* note 12 for a modeling of how bicameral chambers interact.
- 69 Even in the case of Quebec, where senators are required, pursuant to s. 23(6) of the *Constitution Act, 1867*, *supra* note 3, to hold property in twenty-four specific "electoral divisions" so as to ensure that various regional and sectional interests in the province were represented in the Senate, the majority of these districts are located in southern Quebec.
- 70 Special Joint Committee on Senate Reform, *Report of the Special Joint Committee of the Senate and of the House of Commons on Senate Reform* (Ottawa: Queen's Printer, 1984) at 24 [Molgot-Cosgrove Committee].
- 71 The Canada West Foundation proposed using a single transferable vote system, which clearly has

informed the Harper Government's proposals. See McCormick *et al.*, *supra* note 45. The other two proposals suggested proportional representation using party lists. See the Royal Commission on the Economic Union and Development Prospects for Canada, *Report* (Ottawa: Queen's Printer, 1985); and Beaudoin-Dobbie Committee, *supra* note 49.

- 72 This is possible by using, on the one hand, multimember districts and, on the other, by not restricting these districts to provincial and territorial boundaries but rather drawing them along community lines so as to ensure diversity in representation.
- 73 The redistribution of seats in the Commons, it is assumed, would be based on a more simplified version of the formula adopted at Confederation and modified since then, without the numerous grandfather clauses and exemptions that have since come into play. In this model, Quebec is given 75 seats and the allocation of Commons seats to other provinces is then done proportionally to Quebec's (current population levels, this would mean approximately one representative for every 102,000 persons), with no province or territory receiving fewer than one seat. This is the formula used in Table 5 for the redistributed Commons and the natural distortions it creates where the largest provinces come in slightly under-represented can be seen here.
- 74 In addition, there are the representational issues of the Aboriginal governments in northern Quebec and of the English and Allophone populations of Montreal.
- 75 The percentage of Parliament is arrived at by averaging the share of seats in each of the two chambers, though this obviously does not tell the whole story. For example, British Columbia would appear to have less of a share of Parliament than Atlantic Canada and yet it has double the percentage of MPs (a number that will consistently increase given population trends).
- 76 This is reflected in public opinion polls taken throughout the constitutional negotiations, which increasingly moved toward support for an elected Senate as follows:

Year	Appointed	Elected	Abolish	Don't Know
1990	9%	51%	22%	18%
1989	14%	51%	19%	16%
1987	15%	44%	21%	21%
1985	15%	41%	26%	18%
1961	18%	46%	17%	19%

1954	25%	31%	21%	23%
1944	18%	31%	36%	15%

Source: Gallup Canada, Inc.

77 Frith, *supra* note 5 at 114.