The Canadian Senate is both the most written about and the least studied of Canadian political institutions. It is the most written about because reformers look to a reformed Senate to resolve problems of federalism (e.g., Burns 1977; Cody 1995; Crommelin 1989; Galligan 1985–86; Janda 1992; Lusztig 1995; McConnell 1988; McCormick 1991; Sharman 1987; Stillborn 1992; and White 1990). It is the least studied because academics have been satisfied with the accepted image of the Senate as a dusty, obscure Arcadia filled with aged and retired political war horses—once characterized by former prime minister Mulroney as “has-beens and never-weres”—whose main concern, apart from enjoying a good, comfortable,
life, is to preserve private wealth and the interests of big business, the "lobby from within" (Campbell 1978; Zolf 1984). In fact, Canada has two Senates. One is the real, working, but little understood Senate as it actually exists; the second is the imaginary Senate reformers propose. There is no relationship or resemblance of the one to the other. There has been no major study conducted of what the Senate actually does for nearly twenty years, even though between 1984 and 1997 the Senate was more active and influential in Canadian politics than at any other time in its history. This renewed activism was highly partisan, and the feisty opposition majority in the Senate much of the time saw itself as the true opposition to the government in the Commons, which it alleged had been emasculated and rendered ineffective by government control (Frith 1990).

This recent Senate activism raises important questions about Canadian democracy: What did the Senate really do after 1984; was it only a minor change, or did it in fact become more aggressive and influential? Should an appointed upper chamber try to become the "real" opposition and defy and obstruct a government supported by a majority in the lower house? What has gone wrong with the House of Commons to allow the Senate to claim this role? What does this tell us about the legislative process in Canada and the state of Canadian democracy? In the first part of this chapter I will relate the little known story of what the Senate has actually done since 1984 and examine these broader issues. The second and shorter part will examine the issue of Senate reform, this most written about aspect of Canadian parliamentary government.

The Canadian Senate

At the time of confederation in 1867, the Canadian Senate had 72 seats. Ontario and Quebec had 24 members each, and 24 were equally apportioned between New Brunswick and Nova Scotia. Prince Edward Island got 4 seats when it joined the confederation in 1873, and the western provinces were given seats as they joined Canada, becoming a third region of 24 seats divided equally among the four western provinces in 1915. Newfoundland was given 6 seats when it joined, and the northern territories later were assigned 1 each. This gives the present total of 104. The greatest disparities between population and Senate seats are in the west, where two provinces, British Columbia and Alberta, each now have more citizens
than the four Atlantic provinces combined. Prince Edward Island, with under 150,000 people, still has four senators. Senators are appointed by the Governor in Council, in effect the prime minister, and unless they resign, they retain their seats until the compulsory retirement age of seventy-five.

In these two factors, regional representation and method of appointment, lie most of the sources of criticism of the Senate. The western provinces in particular complain that they are drastically underrepresented in the upper chamber, as indeed they are. As a remedy, Alberta in particular proposes a Senate in which all provinces would have equal representation. However, because of the huge variations between provinces, this would create even more severe imbalances in representation than exist at present. Under equality, for example, each citizen of Prince Edward Island would have roughly one hundred times the representation in the Senate as citizens of Ontario, the largest province. Canada, more so than most other western democracies, has been ruled by long-lived governments and government parties. Prime ministers have been equally long-lived in power, and the effect of this on the Senate has been a preponderance of senators from the government side—the Liberal Party for most of this century—and frequent accusations (often valid) that the prime reason for a senatorial appointment is the senator’s support of the party in power, or friendship with the prime minister. The method of appointment of senators and the imbalance in party representation were recurring issues during the post-1984 period of Senate activism.

In legislation, the Canadian Senate has coequal powers with the House of Commons, with the exception that bills for appropriating public revenues, or for imposing any tax (commonly referred to as “money bills”) must originate in the Commons. The Senate has the constitutional right to amend, but not to increase, money bills sent up from the House of Commons. Any other legislation, public or private, government or private member’s, may be introduced first in the Senate, or, if introduced first in the Commons as most major bills are, may be amended by the Senate as it sees fit, though these amendments must subsequently be agreed to by the Commons. The Senate can also reject legislation. These powers are greater than those of the British House of Lords, whose only sanction is now a suspensive or delaying veto.

Despite these formal constitutional powers, the Senate’s role traditionally was, at the most, to make minor amendments to legislation passed by the House. Often it would pass bills grudgingly but unchanged in the last
days of a session, when a rush of bills from the Commons gave the upper chamber more than it could examine. An unwritten, self-denying convention kept the Senate from interfering with legislation passed by the Commons (Heard 1991, 87-100). As Senator Keith Davey observed, “Although we are not elected, we can block any and all legislation passed by the duly elected House of Commons. Not that we would ever use our powerful veto, given our unelected status. If we did, it would immediately be taken away from us; and so it should be” (Davey 1986, 306). There was, most of the time, little difference between the Senate’s activities on bills whether the majority in it was from the government side or not (Heard 1991).

There were some notable exceptions to this habitual docility. In 1875, in its first major legislative confrontation with the Commons, the Senate rejected a bill for the construction of a railway from Esquimalt to Nanaimo in British Columbia. In 1913 the Senate defeated the Naval Assistance Bill, arguing that it could not give its assent until the country had given its judgment in an election. These and other public confrontations were the exception, however, and for the most part the Senate either approved bills passed by the Commons with little discussion or made minor amendments.

In his pioneering 1947 book on Canadian government, MacGregor Dawson observed that “Canada is slowly developing some institutions of government which, if they cannot yet be placed in the vestigial class, are in danger of attaining that questionable distinction.” The Senate was one of these: “It would be idle to deny that the Senate has not fulfilled the hopes of its founders; and it is well to remember that the hopes of its founders were not excessively high” (Dawson 1970, 282). The Senate, according to Dawson, had “become so sluggish and inert that it seemed capable of performing only the most nominal functions” (279). Its end as an effective component of Parliament seemed imminent. Senate committees performed useful work in revising ill-drafted legislation coming to it from the House of Commons and in making investigations, but these could not justify the costs of the institution (Kunz 1965; MacKay 1963; Franks 1987; O’Neal 1994).

A few observers suggest that the real Senate was something quite different. “Of course one of the clichés is that the Senate is just a bulwark for the rich and their interests,” Senator Eugene Forsey complained. “But the journalists, with few honourable exceptions, possess convictions that are above and beyond being shaken by anything so trivial as mere evidence.
Perhaps the saddest thing about it all is that many of those who simply reel off the ancient clichés are on other subjects well informed—clear, logical, and sensible. Is this a case of what the Roman Church calls invincible ignorance?” (Forsey 1990, 168–69). But a more recent study of the Senate's role in defense policy supported the critics. It found that, even including committee work, “Canada's ‘upper house' is more of a constitutional anachronism than a legislative assembly” (Sokolsky 1989, 15). Whatever the validity of these received truisms, all was to change after the general election of 1984.

Not Dead Yet: The Senate as Opposition

By the time of the general election of 4 September 1984, the Senate was composed largely of appointees of the Liberal governments which had been in power virtually without interruption since 1963. Of its 99 members, 73 were Liberals, 25 were Conservatives, and 4 were independents. At the same time, the new House of Commons reflected the public's strong rejection of the previous Liberal government: Prime Minister Brian Mulroney's Progressive Conservative government held 211 seats, the largest majority a Canadian government has ever enjoyed, while the Liberals were reduced to 40, with the New Democratic Party at 30, and 1 other.

The conjunction of a Senate dominated by one party and a Commons dominated by another had occurred before in Canadian history, but never so overwhelmingly. This time there was also another crucial difference. John Turner, leader of the opposition in the Commons, announced on October 10 that Allan MacEachen would become opposition leader in the Senate. MacEachen, formerly a very senior Liberal cabinet minister with a reputation as a cunning political tactician, lost neither his cunning nor his ardent partisanship on his elevation to the Senate and to his new role. His appointment as Senate opposition leader began a series of confrontations between the two Houses the like of which had never been seen before, and which continued until 1997.

The Borrowing and Drug Patent Bills

Under a practice that, though it had begun earlier, became much more widespread after 1971, when it was used to handle extremely complex tax
legislation, the Senate engaged in “prestudy” of legislation introduced in the Commons by referring the subject matter of legislation to committee before it had been formally passed by the Commons. Previously, the Senate had often been faced with a rush of legislation toward the end of a session and “had almost always dutifully swallowed their pride and passed legislation no matter how late it was received, while complaining of the indignity of being taken for granted” (Dobell 1988). Prestudy had been introduced when the Senate and Commons were dominated by the same party.

Critics of the Senate often ignored prestudy and overlooked the low-key and serious work done in Senate committees before bills had passed the Commons. MacEachen dropped the practice of prestudy, giving the Senate both more prominence and stronger tools for resistance to the Commons. In MacEachen’s opinion the Senate is a legislative body, not an advisory one, and should act consecutively with the Commons, not in conjunction with it. To replace prestudy MacEachen proposed reviving the use of joint conferences between representatives of the two chambers to resolve disputes. The Mulroney government rejected this proposal, presumably because they did not wish to encourage the exercise of independent Senate power. This set the stage for serious, prolonged, and continuing disputes between the two chambers.

The first skirmish in the subsequent long-running battle occurred in January 1985, when the upper chamber delayed passage of Bill C-11, a $19.3 billion borrowing bill that had been passed unanimously by the House of Commons. Twelve billion dollars of the total was for the 1985–86 fiscal year, and Liberal senators objected to this “because the government had failed to tell how the money would be spent. It was like a request for a post-dated blank cheque!” (Davey 1986, 315). Bill C-11 was finally passed by the Senate after the tabling of the 1985–86 estimates, and was given royal assent on February 27, 1985, but not before the press had strongly criticized the Senate’s actions (Franks 1987, 193). The defense that the Senate was constitutionally entitled to act independently on legislation, even money bills, was given less weight than the argument that the government’s finances were properly the business of the Commons, and the Senate’s action was seen as mischievous partisan meddling. Heard views the Senate’s actions on Bill C-11 sympathetically, noting that it was roundly criticized for delaying the bill because it quite properly “said that Parliament should not approve funds for which the government had not presented any spending plans” (Heard 1991, 93).
Prime Minister Brian Mulroney reacted strongly. On February 28 he let it be known that the federal government was shaping legislation intended to curb some of the powers of the Liberal-controlled Senate. Discussions were already under way with the provinces for a constitutional amendment that would remove the Senate’s right to veto money bills adopted by the House. Mulroney said that he had decided to act on Senate reform because a “bunch of Liberal rejects” in the nonelected Senate delayed passage of the borrowing bill for a month after it had been passed without opposition by the House. The Senate, the government claimed, had cost the taxpayers many additional millions because of its obstruction. The government introduced its constitutional resolution to amend the Senate’s powers into the Commons in May. It was debated briefly and then allowed to die. The governments of Manitoba and Quebec refused to support this Mulroney proposal, Manitoba because it wanted the Senate abolished, Quebec because it did not recognize the 1982 constitution. Senate reform did not die in the minds of the government, however, and was a recurring theme during the Mulroney years. But because discussions of Senate reform inevitably raise questions of the imaginary Senate as well as the real one, these efforts became part of later cumbersome and disastrously unsuccessful efforts at broader constitutional reform.

Parliament was recalled from its summer adjournment in July 1986 to pass legislation aimed at keeping dangerous offenders behind bars longer. This bill too had been an issue of contention between the two Houses, with the Senate refusing to be a rubber stamp, and making amendments to which the government objected. This minor skirmish was, however, simply a preliminary to a massive battle between Senate and Commons later that year.

In November 1986 Consumer Affairs Minister Harvie Andre introduced legislation in the Commons, Bill C-22, to amend the Drug Patent Act. The amendments were to give the patent holders of brand-name drugs ten years of freedom from competition for most of the products they brought to market in the years to come. The Patent Act, a policy of the previous Liberal government, had encouraged competition by producers of generic or no-name drugs, which could make inexpensive copies of brand-name drugs upon payment of nominal fees to the patent holders. Critics argued that, because the prices of patent drugs would rise, the bill would be more damaging to consumers than the government
was prepared to admit. The minister, on the other hand, argued that benefits would include increased spending on research in Canada by the drug companies. The drug companies on this legislation lobbied universities, doctors, provincial governments, and, of course, the various actors in the federal government, often in a lavish manner new to Canada (Robinson 1996).

Bill C-22 had been debated in the House of Commons for nearly ninety hours. It had been studied by a Commons committee that heard hundreds of witnesses in twenty-two separate sessions. Nevertheless, the Senate decided to hold its own hearings on it, and established a committee of five Liberal and three Conservative senators. After three months of intensive work, the committee submitted reports introducing significant amendments to the legislation, including reducing the period of exclusivity from ten to four years, eliminating a proposed Patented Drug Prices Review Board, and increasing the royalty fee from 4 to 14 percent to finance research and development in the Canadian pharmaceutical industry. In its deliberations, the Senate committee divided along party lines, with Conservative senators defending the government and Liberals supporting the proposed amendments.

The government-controlled Commons rejected most of these amendments, and the bill was returned to the upper chamber, where Senate Government Leader Lowell Murray declared, "The moment of truth has arrived for the Senate. It is up to the Senate now to decide whether to exercise its undoubted constitutional right, which has been exercised rarely, if ever, in modern times, to insist on its amendments, or whether the Senate will bow to the will of the elected House" (Debates, 2 September 1987, p. 1776). Conservative senators argued that the Senate had reached the limits to its political legitimacy, and that once the Commons had made its voice heard it was time to yield to the will of the lower house. Liberal senators argued that the reasons given by the Commons for not accepting the Senate's amendments deserved further investigation. They were not stonewalling the bill, they claimed. They were encouraged by public demonstrations and protests against the bill, by the lobbying efforts of the generic drug industry, and by provincial departments of health.

The Senate sent the bill to the Standing Committee on Banking, Trade, and Commerce, which was to answer the question of whether there was a possibility of compromise with the Commons and Harvie Andre, the
minister responsible. Two months later, on October 21, the committee reported back that Mr. Andre was not willing to compromise or alter any of the fundamental principles of the bill. "I think after the House of Commons has had five votes on [the bill] we've got a little more than a mandate to negotiate," the minister observed, in claiming that the Prices Review Board and the ten-year period of exclusivity were essential and rejecting further changes (Globe and Mail, September 3, 1987, A4). In his presentation of the Senate Banking Committee's report, the chairman, Liberal senator Ian Sinclair, quoted Sir John A. Macdonald to the effect that the Senate should never set itself against the deliberate and understood wishes of the people. The wishes of the people on this bill were easy to determine, according to Sinclair. They were apparent in the opinions and evidence presented by various witnesses and briefs and in the reports of the two Senate committees, each of which had concluded that there was no public mandate to pass the bill (Debates, 29 October 1987, p. 2095). And they were also evident in the number of public demonstrations and protests held on Parliament Hill.

Conservative senator Jacques Flynn complained that "in this case the Senate, or rather the Liberal majority in the Senate, has tried to use its powers in a spirit of confrontation ... and partisanship. The background of Bill C-22 illustrates the longest filibuster I have ever seen in my 30 years in Parliament ... it is a record of time spent to actively debate a bill in this house" (Debates, 29 October 1987, p. 2096). The bill bounced back and forth between the two houses until November 19, 1987, when the Liberal senators retreated and allowed it to become law. Most Liberal senators followed the advice of John Turner that the will of the Commons must prevail "at the end of the day" and let the Conservative minority pass the bill in the Senate by a vote of 27 to 3, with 32 Liberals abstaining (Maclean's, August 24, 1987, 18–19; November 30, 1987, 19).

The Drug Patent Bill, though the most important of the Senate's acts of opposition to the decisions of the lower house, was far from being the only one during this period. In August 1987 Parliament was again recalled to deal with the Drug Patent Bill and two bills deregulating the transportation industry that Senate committees were considering over the summer. In 1988 a copyright bill and two controversial immigration bills were disputed, on quite reasonable grounds, by the Senate. After a prolonged struggle, the Senate dropped its demands for amendments to the
copyright bill, and the immigration bills were passed after the government acceded to amendments demanded by the Senate. The Progressive Conservative government, with its huge majority, could, and did, force legislation through the Commons by using closure and timetabling instruments (Sealey 1995), but the Liberal-dominated Senate had become a much more difficult and contrary obstacle. Prime Minister Mulroney continued persistent but unsuccessful efforts to reach agreement with the provinces on Senate reform.

The Senate and Free Trade

The Senate achieved its greatest importance in history in 1988, when it refused to pass legislation for a free trade deal with the United States. This time Liberal Opposition Leader John Turner reversed the position he had taken on the drug patent bill and asked the Senate to stall the free trade bill until Canadians could vote on the issue. “Call an election and let the people decide,” Turner told the prime minister as the Commons passed the legislation under strict closure and timetabling. For his part, Prime Minister Mulroney brushed aside calls for an immediate election and accused the Senate of “hijacking the fundamental rights of the House of Commons” by refusing to pass the legislation. He attacked Turner for abandoning his leadership and handing it over to the unelected Senate. But Turner rejected the suggestion that the Senate and not free trade could become the issue in the next election. “I am the issue,” Turner told a press conference. “I have asked the Senators to do this and I will take the responsibility.” Senate Liberal Leader Allan MacEachen said he supported the position of Mr. Turner, “and we’re working on how to carry through that position.” Here, the Senate was following in the tradition of 1913, when it had refused to approve the controversial naval aid bill until the government had won support in a general election. The government at the time was in the fourth year of its mandate, and an election was drawing near in any case.

Trade with the United States has been a perennial issue in Canadian politics. Traditionally the Progressive Conservative Party had opposed free trade, while the Liberals supported it. This time around, the first major proposal for free trade came during the previous Trudeau Liberal government from a Senate committee chaired by Liberal senator George
Van Roggen. A royal commission on the economy and federation established by Liberal prime minister Trudeau also supported free trade. But in the topsy-turvy world of Canadian parties and platforms, the Liberals were now opposed, and the Conservatives were in favor. Turner’s first disappointment in this battle came when Senator Van Roggen broke ranks and resigned his chairmanship of the Senate’s Foreign Affairs Committee, saying that he supported free trade.

Editorial coverage of Turner’s move was mixed, with western newspapers by-and-large being critical and eastern ones laudatory. The Winnipeg Free Press called Turner’s move “a final gasp by a ruined politician,” while the Calgary Herald observed that “the man who stayed just long enough for a cup of coffee as prime minister had finally demonstrated his total contempt for the parliamentary tradition of government of the people by the elected representatives of the people.” On the other side, the Toronto Star said that with “this risky but bold move, Turner has not only shown great personal courage, but also the integrity to insist that this fundamental issue be resolved by Canadians.”

On September 15, the Senate gave approval in principle to the free trade bill in a 19 to 0 vote, but only because Liberals unanimously abstained to avoid killing it and to show their support for Turner. The legislation moved to the Senate Foreign Affairs Committee, where it languished until the federal election was called. In the 1988 general election the Mulroney government was returned, though with a much-reduced majority, becoming the first Canadian government to win back-to-back majorities since the Liberals under Prime Minister St. Laurent in 1953. The Liberals stood by their commitment to allow the free trade legislation through if the country supported it in a general election, and free trade became law on December 24, 1988, just in time for Parliament to recess for Christmas and for free trade to come into effect at the beginning of the new year.

Randall White accurately describes the mixed reactions to the Senate’s role in the free trade issue: “When Brian Mulroney’s new Progressive Conservative government came to office, it complained, with at least some justice, of harassment by the continuing Liberal majority in the Senate. . . . On the other hand, there are Canadians who still believe that the unreformed Senate, with its unelected Liberal majority, did indeed live up to its highest responsibilities as a body of sober second thought in 1988, when it helped precipitate a federal election over the Canada-U.S. Free Trade Agreement” (White 1990, 220).
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The GST Battle and Others

A $33 billion supply bill became the first subject of contention between the two houses in 1989. The Senate proposed an amendment which implied that the cabinet had acted illegally by passing a governor general's special warrant to spend $6.2 billion on April 1, before Parliament had reconvened.1 Treasury Board President Robert De Cotret expressed alarm: unless the bill was passed by midnight May 15, the government would have no cash to pay immediate expenses such as Royal Canadian Mounted Police wages, government suppliers, and veterans' pensions. But Liberal senators countered by criticizing the use of special warrants and claiming that they were defending the right of Parliament to approve government spending. They complained that the use of special warrants (the Conservative government had used three in 1989) was a step toward presidential government. On May 17, the Senate backed down and passed the supply bill unamended. It immediately received royal assent.

Senate activism did not go unnoticed, however. In December a spokesman for the National Pensioners and Senior Citizens' Federation, representing 500,000 seniors across the country, urged the still Liberal-dominated Senate to block a bill that would allow the federal government to tax back (claw back) old-age pensions from well-off seniors. The Conservative majority in the Commons had limited final debate on this contentious bill to two days and rejected amendments.

The year 1990 was more contentious. The problems began in December 1989, when the Senate established a special committee to consider amendments to the Unemployment Insurance Act, Bill C-21. These amendments were designed to curtail expenditures on unemployment insurance through several provisions affecting the eligibility of seasonal workers, training programs, and the shifting financing of the program toward employers and employees. The government had forced the bill through the Commons. Senator MacEachen, not entirely innocently, alerted his colleagues to the possibility that, if senators were properly to complete their examination of the bill, it would take longer than the government hoped. He said he wanted to avoid a situation of crisis or confrontation that might arise if the Commons suspected that the Senate was using delay as an instrument to block, slow, or frustrate the bill. The Senate committee asked for permission to meet during sittings of the Senate because pressure was coming from government members, and it did not
want to be accused of delaying the legislation. Prime Minister Mulroney was having none of these professions of good faith, and denounced the Liberal majority in the Senate (Stewart 1989). The Senate committee heard from groups that had been denied the opportunity to testify before the Commons committee. Senator MacEachen, stating a principle to which the Senate had only paid lip service during much of its history, argued the need for a thorough and independent review of the legislation: “If we were to accept the work of the House of Commons, if we were to take the view that we have received the bill now from the House of Commons, that they have done the work, then it would question very seriously the validity of the Senate. We are supposed to do our own work when the bill comes here, and if we cannot do that then we should not put up the pretence—if it is a pretence—that we are a chamber of sober second thought” (Debates, 19 December 1989, p. 938). Since many of the changes being urged on the Senate involved increasing appropriations, the Senate’s power to make amendments was limited. Conservative senators expressed frustration that the bill was being delayed, while an “angry” prime minister urged the committee to speed passage of the bill (Toulin 1989).

The battle over unemployment insurance took many curious twists, including the passage by the Senate of a bill inspired by MacEachen, S-12 (the S indicates that it was first introduced in the Senate rather than the Commons, where it would have been designated by a C), in which money provisions were “red-lettered,” an arcane and archaic procedure which involved leaving money clauses in red ink, and not as part of the provisions actually passed. The Senate special committee reported that it agreed:

with the great majority of witnesses before it who condemned the changes to the entrance requirement and benefit structure. The motivation behind these changes appears to be not simply to divert funds to new training programs, but to promote what one witness euphemistically described as, the ‘adhesion’ of workers to their jobs. The government would seem to believe that many of the unemployed are in a position of their own making, and that, with proper ‘incentives,’ they would find work or remain in their jobs longer. This, of course, fails to recognize that what is needed is jobs, not incentives to find jobs, or training for jobs that simply do not exist. (Third Report, Debates, 14 February 1990, pp. 1146-47)
Regardless of its other merits, this report was a thinly disguised commentary on Mulroney’s earlier election promise of “jobs, jobs, jobs.” The committee’s recommendations were criticized by Conservative senators for containing money provisions, and the government continued this criticism in the Commons. “We’re not going to have this unelected coterie of Trudeauites decide what the policy of Canada is to be in 1990,” declared John Crosbie, a senior minister in the Mulroney government (Delacourt 1990). The government house leader in the Commons, Doug Lewis, accused the Senate of “harassment.”

Senator MacEachen defended the committee’s report by expressing concern about the attitude of the government. He was “somewhat worried that the Minister [Employment Minister Barbara McDougall], by this bill, has taken a somewhat—maybe bureaucratic, maybe mechanical approach to peoples’ problems, namely unemployment and unemployment insurance. . . . We attempted to understand the problems of the Government, and, as well, those of the unemployed. It is in that spirit that we have made the amendments” (Debates, 20 February 1996, p. 1224).

Unquestionably, ideological differences between senators appointed by the Trudeau Liberal government and the Mulroney Conservatives underlay much of this battle over unemployment insurance. At the same time, the Mulroney government was trying to come to terms with both a massive deficit in current spending and the burgeoning public debt; the Liberal Chrétien government, which succeeded it, had to deal with the same problems and was, if anything, harsher in its reductions to spending on social programs. But these ideological concerns were mixed with a strong dose of partisanship, and subsequently the Liberals in the Senate under Jean Chrétien’s Liberal government have shown no comparable zeal for disputing the government’s cuts to welfare, unemployment insurance, and other social programs. The Senate’s opportunities to dispute cuts, like those of the Commons, were somewhat limited, because the cuts came to Parliament in the form of appropriations in Supply, which Parliament cannot unilaterally increase, rather than in the form of legislation, as the cuts of the Mulroney government had done. This contributed to the lack of parliamentary discussion of these very important changes.

Meanwhile, two other important items of business from the Commons were occupying the Senate. In May 1990 legislation requiring women to obtain the consent of a single doctor for abortion, and retaining other abortions as crimes within the criminal code, narrowly passed
the Commons in one of its rare "free votes," 140 to 131. This abortion bill was a compromise. After the Supreme Court had declared the then-existing legislation unconstitutional, the government had proposed five choices to the Commons, ranging from virtually free access to abortion at one end to strict limitation and control at the other. In free votes, the Commons had rejected each of the options. Opinions on abortion were too polarized to allow the compromises and coalitions necessary for a majority to form (Flanagan 1997). Ardent anti-abortionists in the Liberal and Conservative ranks, as well as pro-choicers led by the New Democrats, had campaigned vigorously against the government's bill and hoped to form an alliance to scuttle it. But cabinet ministers solidly supported the legislation and managed to hold the loyalty of enough Conservative backbenchers to push it through the Commons. As it passed from Commons to Senate, lobby groups on both sides of the issue said they would turn their attention to the upper chamber.

Even as the Senate was battling the government on unemployment insurance, and the contentious abortion issue went to the upper chamber, a third issue, far more central to the government's economic and fiscal policies, had been the major issue facing the Commons. This was the Goods and Services Tax (GST)—a measure designed to replace outdated taxes on manufacturing with a tax of the sort economists like but taxpayers detest, in effect a general sales tax, or tax on consumption. On April 10, 1990, the Conservative government, after nine months of rancorous debate and committee hearings, forced the GST bill through the Commons. It too went to the Senate, where Liberal senator Sidney Buckwold, chairman of the Senate Banking Committee, said they would probably hold cross-country hearings on it. On June 27 Parliament adjourned for the summer. Three major bills—the 7 percent GST, abortion, and unemployment insurance—were left in the Liberal-dominated Senate with no hope of becoming law before the fall. When Parliament reconvened, the battles recommenced. On September 25 the Senate Banking Committee, still Liberal dominated, recommended that the GST be scrapped, and despite a Conservative filibuster the committee's report was tabled the following day.

Prime Minister Mulroney took drastic and unprecedented action. On September 27, unfazed by rising public furor against the new tax, he enlarged the Senate by eight members, claiming that the Liberal senators were undermining the principle of responsible government by blocking the GST and other bills. The move raised the number of senators to 112,
giving the Conservatives a majority which would eventually get the stalled GST and other bills moving. He had already added fifteen Tory senators to fill vacancies since August. And over the years since his government was first elected in 1984, time, retirement, and attrition had reduced the Liberal majority in the upper chamber to the point where the appointment of eight new Conservative senators would tilt the balance.

In stacking the Senate, Mulroney took advantage of a never before used article in the 1867 Constitution Act, section 26: “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.” No new senators could be appointed until the Senate returned to its membership quota of twenty-four for the relevant region. Only once before, in 1873, had a Canadian government attempted to use this provision, and then the British Colonial Secretary, observing that the Senate had not yet defeated Commons business, refused to advise Queen Victoria to approve the additional appointments. This time Queen Elizabeth granted approval.

Mulroney’s decision to “swamp” the Senate drew angry responses from opposition leaders and most of the provinces. British Columbia and Alberta challenged it in the courts. But “it seems clear that the original intent of section 26 was to provide a ‘deadlock’ mechanism in the event of an irreconcilable clash of wills between the two Chambers,” a study by the Library of Parliament had observed the previous month, and “the fact that no such clash occurred in the first 120 years after Confederation invalidates neither the purpose nor the use of section 26 in the appropriate circumstances” (Dunsmuir 1990). This time there was a serious deadlock between the two houses, and the Mulroney government’s claim that these were “appropriate circumstances” was upheld by the courts. The Conservatives now, for the first time since they had come into power, enjoyed the support of a majority in the Senate.

The battle over the GST was not yet over, however. Liberal senators, taking advantage of procedural rules much less stringent than those in the Commons, began a filibuster, which at times degenerated into rowdy name calling and whistle blowing. There were renewed calls for Senate reform in the press. Mulroney accused the Liberal senators of “legislative terrorism.” By October 24 the Liberal Party had sunk below the New Democrats, the perennial third party, in the polls, and Liberal Leader Jean
Chrétien admitted that the hijinks of Liberal senators in fighting the GST may have contributed to the Party's drop in support. An apparent truce negotiated between Liberals and Conservatives in the Senate to timetable the GST and other bills began to unravel, but on October 25 the GST cleared a major hurdle when the Conservatives, aided by three independents, defeated the Senate committee report calling for the bill to be killed.

A *Globe and Mail*-CBC poll found that 75 percent of Canadians remained opposed to the GST, and this massive rejection was matched by opposition to Mulroney's stacking the Senate to get it passed. Still, representatives of seventeen business groups called on the Liberal senators to stop their opposition so that the GST could be implemented as planned by January 1. The Senate finally passed the bill on December 13, and it was given royal assent the following Monday, the Liberals having succeeded in one last delay by adjourning for the weekend before assent could be given the Friday before. The Senate sat over the Christmas break to catch up on the backlog of work, including the unemployment insurance bill, which had accumulated during the prolonged battle over the GST.

In June 1991 the Conservative majority in the Senate ensured passage of a package of new rules that gave the government more control over the Senate agenda and reduced the opportunities for filibustering and other delaying tactics (Robertson 1991). The Liberal senators had boycotted the committee that drafted the rules. These were the first real changes to Senate procedure since 1906. Until the post-1984 confrontations, the Senate had traditionally operated on a "gentlemanly" basis; its procedural rules had not been "adhered to with any degree of rigidity and a considerable portion of the Senate’s business [was] in fact conducted under suspended rules" (Kuntz 1965). To Liberal senator Royce Frith, "The emasculating surgery was completed. The House of Commons had already been taken care of by further amendments to its rules. No worry about effective opposition there. Now the Senate, having shown what was possible under its rules by its fight against the GST had [been] taken care of. The only effective opposition left to the government is the media, and perhaps academia, but neither of them seems to have noticed. Or if they have, they don't care" (Frith 1990, 109–10).

But that was not the end of the Conservative government's difficulties with the upper chamber. On January 31, 1991, the controversial abortion bill came to a vote. The result was an unusual tie, 43 to 43. Cheers went up on both sides of the chamber when the acting speaker explained that
the tie meant defeat of the bill. It had been a free vote, but most Conservatives had voted for it, most Liberals against. Key to the government's defeat was the defection of Senator Pat Carney, a former Conservative cabinet minister who had been expected to support the government. Government Senate Leader Lowell Murray said that it would be some time before the government tried again to fill the void left three years earlier when the Supreme Court of Canada had thrown out the earlier law, and this was echoed by Justice Minister Campbell's observation that this was the government's best shot at achieving an acceptable compromise that could pass the constitutional test, and they would be hard pressed to find an alternative.

Defections from the government side caused the defeat of another item of Conservative legislation in 1993. This was an act to implement provisions of the budget that proposed reducing the number of government agencies by eliminating some, amalgamating others. Contention focused on the proposal to amalgamate the Canada Council, which nurtures cultural and artistic activities, with the Social Sciences and Humanities Research Council (SSHRC), a grant-giving agency that administers funds for research and scholarship, and the international programs of the Department of External Affairs. Both the arts groups and the academic community objected to the amalgamation. The two granting agencies had been separated in 1978 because of their different concerns and needs. Discussion in the Senate was acrimonious, as often happened after the trauma of the GST battle. Some senators opposed to the bill pointed out that it was a cosmetic change that would generate no savings, while others argued that it was flawed in substance and political in purpose. Senator Frith proposed that the bill be divided into two, so that the noncontentious issues could be passed while the Canada Council–SSHRC merger was examined more closely, but the Conservative majority defeated this motion.

The chairman of the Senate Committee on National Finance, Liberal senator H. A. Olson, reported on May 27 that his committee had heard from over thirty groups of witnesses, many of whom had been refused appearance before the Commons committee. Most testimony was critical of the merger. Witnesses argued that the distinct voices of the arts and social sciences and humanities research communities would be lost. Conservative senator Finlay MacDonald agreed with these concerns: "The opposition to this legislation is heartfelt, intelligent and of a very
non-partisan stripe. This is by no means frivolous or ideological opposition. The appeals to the Government have been extremely reasonable, patient, and circumspect. That kind of democratic intervention should be recognized and applauded, not ignored" (Debates, 31 May 1993, p. 3315).

He offered a spirited defense of the Senate's traditional role:

There is a sufficient amount of confusion, incredulity, and opposition to justify the government to say, 'Okay, we will pause. We will have a second look.' In that way, they would win public confidence, and that is the way to win an election. If ever there was an opportunity, a duty, or a responsibility for the Senate of Canada to make a small contribution to political stability by acting as a counterweight to the House of Commons, today is one day we should reflect upon the reason for our existence. There would be no use for a Senate, if it did not exercise, when it thought proper, the right of opposing or amending or postponing the legislation of the House of Commons. We would be of no value at all, if we were a mere chamber for registering the decrees of the lower house. (Debates, 3 June 1993, p. 3368)

The government refused to accept Senator MacDonald's amendment to remove the merger from the bill. But to its surprise, the vote in the Senate on June 10 was a tie, resulting in defeat of the entire bill. While Senator MacDonald had worked quietly to gain the support of four other Tory senators in voting against it, and others in abstaining, the government whip had not done his homework. He had underestimated the strength of the revolt, and as a result the entire omnibus bill was lost. A reporter claimed that many other senators would have voted against the bill except that it would have angered Prime Minister Mulroney, "who values loyalty more than independence. . . . As many as a dozen other Tory senators wanted to vote against C-93, but refused to because they would have angered Mulroney" (Cohen 1993).

This important event showed once again that senators are less vulnerable to pressure from party whips than are members of the House of Commons, and senators have correspondingly greater freedom to dissent from party positions. Several senators on the government side asserted their independence, and because the sanctions that the government can impose on them are much weaker than those to which MPs are liable, they could act on the basis of their studies and beliefs and defeat their
own government's legislation. The period of Conservative rule was drawing to a close. Prime Minister Mulroney resigned to be replaced by Kim Campbell, who called a national election for October 25. The Progressive Conservative government received the most resounding defeat of any government in Canadian history in this election, with all its sitting members but one being defeated, and this member, Jean Charest, being joined by only one other new member. The Liberals now formed a massive majority with 172 seats, while the New Democratic Party, reduced to 9 members, like the Conservatives lost their status as a recognized party in Parliament.

This sweeping public rejection of the Progressive Conservative government proves that they must have done a lot of things wrong. The GST was one of these, and Liberal Leader Jean Chrétien made an election promise, which he later found he could not honor, to get rid of it. Without doubt the Senate's obstruction, public hearings, airing of differing viewpoints, and constant questioning of government policies contributed to the defeat. But how much, it is impossible to say. The Senate, far from being "so sluggish and inert that it seemed capable of performing only the most nominal functions," as Dawson had described it, was lively and influential during the Mulroney years. And contrary to Senator Davey's views, the unelected Senate had used its powerful veto more than once. Senate obstruction had led Prime Minister Mulroney to demand not once but many times that the Senate be reformed. But Senate reform got lost in the broader and unsuccessful efforts at constitutional amendment.

For much of this period, the Senate was the more interesting house, though the lack of media coverage obscured this from the general public. Parliamentary government, particularly when the party lines and discipline over the private member are as rigid as they are in Canada, requires checks on the government through a vigorous opposition. The rules of the House of Commons had changed enough by 1998 that the capacity of the opposition to delay, to expose faults, and to instigate public discussion on contentious issues had been drastically curtailed. The time spent on debate of each item of legislation in the chamber itself was reduced (Sealey 1995), and committee investigation became more virulent, partisan, and superficial than before (Franks 1997).

In this 1984–93 period the Senate was, in many ways, the real focus of opposition to the government. On many crucial issues, both debate and committee investigation in the upper chamber were freer, more extensive,
and more interesting than in the lower house. The Senate fulfilled its role as a chamber of sober second thought. On the other hand, much (though certainly not all) of the motivation for its scrutiny of government proposals came from partisan considerations, and the Senate found itself in the position of receiving more criticism for its partisanship and the method of appointing senators than it did praise for its investigations and arguments on principle. The practice of exclusive prime ministerial control over appointment to the Senate, and the perceived public image of the Senate as a refuge for superannuated party workhorses and has-beens, prevented its very good work from receiving the attention and support it deserved.

The Senate under Prime Minister Chrétien

Like Brian Mulroney before him, Prime Minister Jean Chrétien was faced with a Senate whose majority was from the opposition, though this time the Senate majority party was backed by only two members in the Commons. But there was an important difference between 1993 and 1984. The MacEachen Liberal senators had been part of the expansion of government, especially of social programs, during the sixties and seventies. They had been ideologically on the opposite side of the fence from the Mulroney Conservative government, and their battles with the Commons had always mixed in with partisanship a measure of fundamental disagreement over the role of government and the vision of the good society. The new Chrétien Liberal government placed a much higher emphasis on reducing government expenditures than had even the Mulroney Conservatives. Because many of the reductions had to come from the biggest items of expenditure, the social programs, the Chrétien government was, on this score, in practice at least as “conservative” as the Mulroney government, and arguably more so. Consequently, on the key issue of reductions to major social programs, the Conservative majority in the Senate was in sympathy with the actual, if not professed, policies of the Chrétien government. Further, financial constraints meant less major legislation reached the Senate from the Commons.

The opposition in the House of Commons was vastly different from previous parliaments. The Bloc Québécois, a separatist party exclusively
drawn from Quebec, became Her Majesty's Loyal Opposition with 52 seats, while the Reform Party, western-based and more to the right politically than the Progressive Conservatives, nearly matched them in size. In the sessions that followed, the Bloc proved a perceptive and intelligent critic of the Chrétien government's cuts to social and cultural programs. Unfortunately, the fact that they spoke almost entirely in French, and retained an aura of being anti-Canada, meant that the English media largely ignored them. Canadians outside Quebec mistrusted them, even when the Bloc attempted to speak on behalf of a broad spectrum of Canadians. All the members but one of the Reform caucus were new to Parliament, and the party had come to Parliament with a program deeply critical of how government and Parliament operated. The Reform Party did not have much success in making its mark on Parliament or winning public support. With the Bloc and Reform parties laboring under these handicaps, the Commons after 1993 did not have an effective opposition.

John Lynch-Staunton, the Conservatives' new Senate leader, at first proposed a much less ambitious role for the Senate than the MacEachen Liberals, saying that the Conservative senators would not use the upper chamber as a government-in-exile to defeat legislation, but would do what they could to change bills they felt to be flawed. Jean Charest, the interim Tory Leader, and the only sitting member of his party to be returned to the House, agreed that there were limits to how far the party could push its agenda in the upper house: "The bottom line is that the House of Commons makes decisions." Nevertheless, some Conservative senators, observing the weakness of the opposition in the Commons, concluded they had to become the real opposition.

The distribution of seats in the House of Commons, and the revision of the boundaries of electoral districts, have always been thorny issues in Canadian politics, not only because governments, and for that matter sitting members in general, tend to want to ensure that both are carried out so that their chances of reelection are preserved if not improved, but also because Canada, as a growing country, experiences large demographic changes that affect the size of ridings. The process of redistribution following the 1991 national census was well under way by 1994, with commissions in each province, established by the Mulroney government, managing the process. Partly under pressure from the substantial number of Liberal members who were apprehensive over the possible outcomes,
the Liberal government introduced a bill to suspend and amend the process. This delay would have meant that redistribution would likely be delayed until after the next election, due in 1997 or 1998.

In April 1994 the Conservative Senate majority said they would challenge the Liberal government's bill. After a long and vigorous fight in the Senate, the objections of senators forced the government to abandon its legislation. Redistribution then proceeded under the old act. Many members of Parliament had concerns about the proposed changes to their districts. The Commons's committee on procedure held hearings at which these and other concerns were expressed, and in the end, some modifications were made to boundaries proposed by the various provincial commissions. The new boundaries were in place before the general election of June 1997, allowing the distribution of seats and the electoral map to reflect demographic changes recorded in the 1991 census. A majority of members were satisfied with the new district boundaries, with complaints largely centered in Ontario, where the demographic changes and consequent readjustments had been greatest, and in New Brunswick, where the redistribution commission appeared to be somewhat sympathetic to Conservative concerns. The unelected Senate in this instance found itself in the curious position of opposing both the government and the House of Commons in defending the principles of political equality of citizens.

Receiving more notoriety was the issue of privatization of Toronto's Pearson International Airport, the largest and busiest airport in Canada. The Conservative government had approved a contract to privatize Pearson Airport in its last months, just before the 1993 election. By this time, the Mulroney government had become so tainted with allegations of patronage that, regardless of whether this contract made good business sense and had been awarded in a fair manner, suspicions of patronage were strong. The airport deal had become a symbol of the partisanship and influence of lobbyists that voters connected with the Mulroney regime, and Jean Chrétien had made an election promise to scrap it. On July 7, 1994, Conservative senators started a showdown with the new Liberal government by blocking a bill passed by the Commons that would have killed the privatization deal. The Tories used their majority in the Senate to delete clauses of the bill which stripped the Pearson Development Corporation, the winners of the contract, of the right to go to court to sue the government for more compensation than the $30 million
provided by the bill. Tory senators argued that the bill violated the corporation's constitutional rights. The Liberals claimed that the Tories were trying to protect their friends who had signed the contract.

In September, Transport Minister Doug Young escalated this confrontation between the houses. “Tory Senators don’t want us to settle for out-of-pocket and reasonable expenses,” he told the House Commons (Debates, 28 September 1994, p. 6268), declaring that the bill would go back to the Senate as it was. He charged that the Pearson Development consortium wanted to sting the Canadian public for over $400 million. A spokesman for the consortium claimed that they were actually only claiming $173 million in compensation. In December the Liberal government accepted some of the changes demanded by the Senate, and increased the compensation they were willing to pay to $80 million, but still included the prohibition against suit for lost profits. Conservative senators were not satisfied, however, and in May 1995 the Liberal government reluctantly agreed to allow the Senate to hold an inquiry into the Pearson Airport deal. When the session prorogued in February 1996, the Senate and Commons remained deadlocked over the bill.

Early in the new session the Liberal government introduced a bill identical to the one that had died at prorogation. But on June 19, the Senate defeated this bill. The Liberals at the time held one more Senate seat than the Conservatives, but illness and absence, and the key defection of one Liberal senator to the Tory side created a tie vote, 48 to 48, the Senate’s third tie on important legislation in five years, and caused the defeat. Transport Minister David Anderson said that he was determined to protect taxpayers from footing the bill for “millions of dollars of unearned and undeserved profits in an unacceptable deal,” and would not rule out any options, including stacking the Senate with more government supporters, as Mulroney had to get the GST passed. Within a few weeks the government and the Pearson Development Corporation settled on compensation far lower than the many hundreds of millions that had been rumored, though allegations persisted of hidden benefits.

This Pearson Airport bill was unusual, not only in that it was introduced by the government to honor an election commitment but also in that it was highly controversial and based on dubious legal and commercial principles. In the end it was defeated by the defection of senators from the government’s own side.
These were by no means the only bills that the Senate delayed. A major revamping of unemployment insurance and a new transportation act died in the Senate at the 1996 prorogation. The Senate also was accused of dragging its feet on a constitutional amendment on secularizing schools in Newfoundland, on amendments to the copyright act, on a child support bill, and on a sales tax law designed to replace the GST in three maritime provinces. Many of the Senate's concerns over these bills were reasonable and deserved consideration on their own merits. But these merits got drowned in the flood of criticism of an unelected Senate thwarting the will of the elected House of Commons. In April 1997 Prime Minister Chrétien appointed two women to the Senate, both strong Liberal supporters, giving the government a clear majority in the upper chamber. However, the era of Tory obstruction was not entirely at an end.

When Parliament was dissolved for the June election, many bills passed by the Commons remained unpassed by the Senate. A deal between Conservative senators and the government allowed some bills, including antigang legislation, a ban on the gasoline additive MMT, changes to the Income Tax Act, the Canada-Chile free trade agreement, an anti-tobacco advertising law, and two budget bills, to pass and receive royal assent. Left unpassed by the House of Commons were many other important bills dealing with endangered species, an Environmental Protection Act, amendments to the Canada Labour Code, and a bill to hive off Canadian ports and "commercialize" the St. Lawrence Seaway, amendments to the Competition Act, and many other issues. Almost all of this backlog was caused by the government's haste in calling the election. But it was the Senate, not the government, that was blamed by the media for failing to pass these bills.

The Senate and the Legislative Process

The least that can be said about the Senate since 1984 is that it transformed its role from what was previously accepted understanding, and defied most of the previous norms and unwritten rules governing its behavior. It became an intensely partisan chamber, and in many ways was a more effective opposition to the government than the House of Commons was. The Senate precipitated an election by refusing to pass the free trade bill,
and though the Senate had done this before, in 1913, it was nevertheless a striking deviation from its behavior in the seven decades between then and 1984. It rejected many government bills. It protracted arguments with the Commons over others. It obstructed the important GST legislation to the point that the prime minister had to resort to a previously unused clause of the 1867 British North America Act of the British Parliament (Canada's founding statute) to create a Senate majority of supporters.

Senator Keith Davey's view that the Senate would not use its "powerful veto, given our unelected status," seemed by 1993 like a remark from another age, about a quite different Canadian Senate. The Senate left far behind its image as a sleepy pasture for retired party workhorses. Nor was it the lobby within protecting the rights of privilege and wealth. For the nine-year period of the Mulroney government the Senate was a voice in favor of social programs and active government redistribution of wealth. Only in the Pearson Airport affair, in the succeeding Chrétien administration, could it be argued that the Senate, now dominated by Conservative Mulroney appointees, acted as the lobby within. But even on this issue there were questions of fairness and legality that were at least as important as business lobby concerns.

Since 1993, and even more so since the Liberals regained their majority in the Senate in 1997, the period of Senate activism seems to be over, and the Senate for the most part has reverted to its traditional less visible and less overtly partisan form of behavior. However, this period of Senate activism after 1984 poses important and disturbing questions about the legislative process and responsible parliamentary democracy in Canada. In particular, it highlights the problems of and the legitimacy of a powerful Senate appointed exclusively by the prime minister. Two factors have masked this incompatibility for most of Canada's history. First, the Senate has normally not been as visibly activist and confrontational as it was under Senator MacEachen. Second, for most of its history Canada has been governed by long-serving government parties—in the nineteenth century the Conservatives, in this century the Liberals—and as a result, most of the time the party with a majority in the House of Commons has also had a majority in the Senate. The reasons for the post-1984 confrontations lie in the 1984 election of a Conservative government with a massive majority, after virtually uninterrupted Liberal rule since 1963. If Canada were to have more frequent changes of government in the future,
the likelihood of more confrontations between the two houses, like those seen in the 1984–97 period, would increase. This in itself suggests that some sort of Senate reform is necessary.

In the Canadian system of responsible parliamentary government, the crucial control over the use of power is that the government must enjoy the support of a majority in the elected House of Commons. In practice this support is ensured by government control of the majority party in the Commons. The key agent in making accountability and responsibility to Parliament work is not the individual members of Parliament, for almost without exception they vote according to their party's wishes, but Her Majesty's Loyal Opposition, to whom falls the task of criticizing and debating the government's proposals, and of presenting themselves as a credible alternative to the government, so that they in turn will win an election and replace the governing party in power, as happened in the general elections of 1984 and 1993.

Effective parliamentary democracy demands both an opposition that can present itself as a credible alternative to the government, and parliamentary processes that enable the opposition to criticize government policies effectively and hold the government accountable for its stewardship. These core activities are highly partisan in nature, and their legitimacy derives from their support through the democratic election of members to the Commons. The Senate is appointed, not elected. For most of its history it has been largely non-partisan in its approach to government business and at best peripheral to the core democratic processes. After 1984 it acted in such a way that it appears to have a new and more influential position as both a legitimate opposition and as a voice of the people.

The bulk of the battles between Senate and government, though not all, pitched a majority of one party in the Senate against a majority of the other party in the Commons. Partisanship was a huge motivating factor. Liberal senator Jacques Hebert, a strong supporter of the Trudeau government's social programs, during the contest over the Mulroney government's unemployment insurance reforms, remonstrated over claims of partisanship: "I was disappointed that in her speech in the House of Commons the minister accused us of political theatrics and of playing games. She said that because of our political games it was difficult to believe that our amendments were a sincere attempt to improve this bill."
I hope that we can convince the minister that, indeed, we are serious and sincere in our attempts to improve the bill, and that we do not want simply to defeat it, as we have been requested to on many occasions" (Debates, May 16, 1990, p. 1639). No doubt Senator Hebert and many of his colleagues, like many other Canadians, felt that the bill needed improvement, and that the improvements they would like to see were either complete rejection of the bill or a drastic reversal of its fundamental policies and intent. Hebert's own sincerely felt ideological convictions would have led him to this conclusion. But the traditional role of the Senate has not been to alter the main thrust of legislation. Rather it has been what is termed "technical amendments," improving the clarity and wording of bills without affecting policies.

What the MacEachen-inspired Senate Liberal leadership did was replace the technical with an ideological thrust. Liberal senators no doubt were sincere, but they were also, despite what Hebert and others claimed, highly partisan. So also was the Conservative-dominated Senate's opposition to the Chrétien government's legislation restricting compensation for cancellation of the Pearson International Airport development contract. On the GST issue, the partisan motivation dominated. Some sort of tax like that was necessary, as the Chrétien government later found when it discovered that it could not abolish the tax. The quiescence of the Liberal senators when faced with cuts to social programs by the Chrétien government reinforces the conclusion of partisanship.

The House of Commons is supposed to be the battleground between the parties. Was the Senate reinforcing its allies in the Commons, or did it see itself as replacing the Commons? Both views have some validity. When John Turner explicitly requested Liberal senators to obstruct the free trade legislation until a general election could be called, he was asking Liberal senators to be the allies of the Liberal Party in the Commons in its contest with the Mulroney Conservative government. But much of the time, although the battles the Senate fought repeated arguments heard in the Commons, senators like Hebert emphasized the "justice" of their arguments rather than their partisan content. The senators often claimed to be acting independently of the Commons. Sometimes they argued that they had to do this because the Commons itself lacked an effective opposition or because opposition was muzzled in the Commons.

Senator Frith defended the Senate's activist role by arguing that govern-
government control over the Commons had reached the point where the lower House was ineffective:

In Canada democracy has become an illusion. In reality Canadians are ruled by one person. The Parliament of Canada has become nothing more than a vehicle for the election of a new despotic government in cycles of four or five years. . . . The resulting totalitarian system has evolved in a most remarkable manner: no armed revolution or military coup was required. It has sneaked up on us because Parliament has been doing nothing to stop it from doing so. Indeed, Parliament has been encouraging its own evolution into impotency by quietly lying down and holding still for a slow and painful emasculation process, a process masquerading as the 'streamlining' of the parliamentary system. The objective of all streamlining is to increase speed by eliminating resistance. When applied to the parliamentary process it means changing the rules so as to reduce Parliament's resistance and thus increase the government's speed in having its own way. And in our system the word government now means Prime Minister. . . .

So successive governments have found Parliament, and the need to listen to parliamentarians, a damned nuisance. And governments have been able to persuade the media and electorate that that is just what Parliament is—a damned nuisance. Especially when parliamentarians went 'too far' in partisan resistance to 'efficient' government. (Frith 1990, 7, 10)

There is more than a little truth to Frith's contention. By 1990 the Mulroney government had used closure and timetabling in advance more times than all previous Canadian governments (Sealey 1995). They limited debate, even on major bills, to twenty hours. The opposition was no longer able to delay and argue to the point that a headstrong government could be slowed down and forced to listen to criticism.

Parliamentary government is as much about accommodating minorities as allowing majorities to have their way. The Commons was no longer working in a way that allowed these slow processes of vision and revision to work. In the last analysis, this heavy-handed domination of Commons business did not help the Mulroney government. No other Canadian government has by the measure of electoral outcomes failed so drastically to mobilize consent for its programs. A close connection exists between the Mulroney government's excessive limiting of Commons debate and its
failure to win support for its policies from the general public. Good government needs a strong opposition. This the Canadian parliamentary system has not always provided, whether because of government domination, as in the Mulroney period, or electoral fortunes, as in the Chrétien. But an appointed Senate is an unlikely and unconvincing remedy for this deficiency.

Much of the time, senators defended their activism by saying that they were responding to public opinion as expressed by witnesses before committees, in letters and phone calls, or in public opinion polls. The government, they claimed, was at fault in not heeding these voices. This argument must be rejected. Governance involves making unpleasant as well as pleasant decisions, and the only true test of public opinion is its expression in a general election on the aggregated performance of the government during its tenure in office since the previous election. Senator MacEachen had it right when, as the final vote on the drug patent bill approached, he told the Senate, "Defeating the bill would relieve the government of its commitments, which it steadfastly refused to put into legislation, to provide additional jobs, investment in research, and to safeguard the population from the harm arising from future increases in drug prices. These are the burdens of government. The defeat of the bill today could become a victory for the government. . . . It is much more appropriate that the government take the responsibility for the impact of the legislation rather than that the Senate should do so" (Debates, November 19, 1987, p. 2224). In the last analysis the elected government, not the appointed Senate, must be responsible. Only a government responsible to the House of Commons can be held accountable by the electorate. In 1988 the electorate disagreed with the Senate on free trade; in 1993 the electorate supported the Senate on the GST. The Senate was not, and could not be—despite the claims of some senators—a voice of the people confronting an autocratic government. Only the people or their elected representatives can do this.

The activism of the Senate since 1984 offers a cautionary lesson to would-be Senate reformers. Much of the argument for a "Triple-E" Senate—Elected, Effective, and Equal—lies in the claim that it will be nonpartisan and will represent the interests of provinces rather than parties. But if an appointed Senate not accountable to the voters can act in as partisan a manner as the present Senate, then there is not much hope that an elected Senate will be any less partisan. The party organizations will be
needed to recruit Senate candidates and whip up voter support. Senators will be identified by their party labels, especially if they are elected proportionately from lists. Quite likely, an elected Senate will be as partisan as the Commons. That certainly has been the experience of the Australian Triple-E Senate, which, when its majority differs from that of the lower house, has been more than willing to carry on its share of the party battles and confront the government. The Australian Senate is more the voice of party than of region (Sharman 1987). A Triple-E Senate in Canada is not likely to be different on this score from the Australian.

Concerns over the legitimacy and appropriateness of the appointed Senate in Canada ob structing and defying an elected House of Commons could be alleviated if its powers were to be limited to a suspensive veto of, say, six months. After that time had elapsed, passage of a bill once again by the Commons would be deemed as passage by the Senate as well. This sort of procedure would give the government an opportunity to rethink contentious legislation, muster its forces for a new attempt to win over public opinion, or withdraw gracefully if that path proves advisable. The Senate as well would benefit because it would have more freedom to disagree with the Commons, as would individual senators when they want to diverge from party lines, without these actions causing calamitous results. Less formal power would likely, in the long run, produce a more influential and valuable Senate.

Should It Be Resurrected? Reforming the Canadian Senate

The British magazine of the rural upper classes, *Country Life*, in a recent discussion of the British House of Lords, observed that reform of this venerable institution should not stop at merely abolishing hereditary peerages, for that "would leave an Upper House filled entirely by appointment by prime ministers—the worst of all worlds. There is no other democracy on the planet whose second chamber is filled only by this means" (January 9, 1997). Obviously *Country Life* has never heard of the Canadian Senate, which since its creation in 1867 has lived in this worst of all possible worlds, with all appointments at the discretion of the prime minister.

There have been innumerable proposals for reform of appointment procedures, and at least as many about the functions and powers of the Senate. Senate reform proposes a whole new upper chamber, which bears
little if any relationship to the existing Senate. The main concerns of reformers have been, first, to broaden and improve the base for appointment and, second, to identify a useful role for the Senate and give it powers appropriate to this role. The Canadian Senate was originally conceived, somewhat like the American, to be a forum for the representation of regional interests in federal politics. But from early on, regional and provincial interests were more powerfully represented in the Canadian cabinet than the Senate. Since the Second World War, with the growth of government and the extension of the social safety net, which involve the two levels of government in both policy formation and execution, executive federalism, in effect negotiations between the provincial and federal governments, has become a major national policy-making forum. Executive federalism bypasses both the House of Commons and the Senate, leaving a problem in integrating the federal Parliament with the increasingly important federal-provincial relations (Olson and Franks 1993; Franks 1998; Smiley 1978; Watts 1988). This lacuna, the absence of a role or forum for Parliament in executive federalism, has been the focus of most recent proposals to alter the role and functions of the Senate.

Senate reform has also become a more acute issue in recent decades because of the pressures that threaten to pull Canada apart. The most powerful of these, the Quebec separatist movement, has little interest in Senate reform. But western alienation, the sense in the western provinces that they are left out of government and that central Canadian interests take advantage of the west, finds a strong expression in proposing a reformed Senate that would give the provinces a greater voice in national policy making, and in particular would prevent the federal Parliament from unilaterally legislating on revenues from the rich resources of western provinces.

A concrete expression of these concerns in terms of Senate reform can be found in the wide-ranging provisions for constitutional amendment in the Consensus Report on the Constitution (or Charlottetown Agreement), which was agreed to by the provincial premiers and the federal government in August 1992 (Canada 1992). Though this comprehensive proposal for constitutional reform was later rejected in a nationwide referendum, its proposals for the Senate embody all recent major streams of criticism and reform, and provide a useful pathway for identifying the streams of thought on why and how the Senate should be reformed.

Sections VII to XV of the Charlottetown document deal with the
Senate. Article VII proposes changing the method of appointment from prime ministerial prerogative to election, though with many twists and turns:

VII. The Constitution should be amended to provide that Senators are elected, either by the population of the provinces and territories of Canada or by the members of their provincial or territorial legislative assemblies.

Federal legislation should govern Senate elections, subject to constitutional provisions requiring that elections take place at the same time as elections to the House of Commons and provisions respecting eligibility and mandate of Senators. Federal legislation would be sufficiently flexible to allow provinces and territories to provide for gender equality in the composition of the Senate.

Three strands of Senate reform coexist in these proposed methods of appointment. First is an Elected Senate. This is one of the three E's of the Triple-E Senate reform proposals of the Alberta government, the western province most concerned with Senate reform because of its perceptions of injustice and discrimination against it by the federal government (Lusztig 1995; McConnell 1988; McCormick 1991; White 1990). The other two E's—Equal provincial representation and an Effective Senate in protecting provincial rights—are addressed later in the Charlottetown document.

This proposal for popular election is qualified, however, by allowing provincial or territorial assemblies to elect senators. This provision was put in at the insistence of the government of Quebec. Because of the domination of elected legislatures by premiers (prime ministers) and cabinets in Canada, election by provincial legislatures would mean, in effect, ratification by the legislature of nominations by the premiers. In other words, instead of powers of senatorial appointment residing in the federal prime minister, they would reside in the premier of whichever provinces chose to exercise this option, in particular the key province of Quebec. This would not, in any real sense, be popular election of senators.

Appointment by provincial governments harkens back to a pre-Triple-E strand for Senate reform based on the German Bundesrat (Burns 1977; Janda 1992), which proposed that the upper chamber should provide direct representation for provincial governments in the federal legislature. In the Bundesrat version of reform, the Senate would become an extension of, or even a focus for, federal-provincial relations and executive
federalism, and would be a key part of policy making in the Canadian amalgam of parliamentary and federal institutions.

The third strand, gender equality, was put in at the insistence of the premier of Ontario, Bob Rae, who then headed the first NDP (social democratic) government of Ontario. The Rae government, which was soundly defeated in the Ontario election of 1994, had a strong concern with equity and minority representation. In Senate reform, this was to be translated into two lists of candidates, one male, one female, from which equal numbers would be elected.

The combined result of these different strands would have meant that senators from Quebec and Ontario, the two largest provinces, containing well over half the country’s population, would have been selected under different rules from the rest of the country. The divergence from the norm of Quebec would have been the most severe, leaving the French-speaking province in this, as in many other areas, a “province not like the others.”

Articles VIII and IX dealt with composition and equality. Article VIII dictated that “The Senate should initially total 62 Senators and should be composed of six Senators from each province and one Senator from each territory,” while Article IX proposed that Canada’s aboriginal peoples should be guaranteed Senate representation. Equality of the provinces in Senate representation was thus to be enshrined in the constitution. The model here was the United States and, to a lesser extent, Australia. At least one provincial premier, Clyde Wells of Newfoundland, a strong proponent of the Triple-E Senate, believed that upper chambers throughout the world were based upon equal representation of the second level of government. The examples of countries like India or Germany, where the number of members of the upper house varies with the population of the state or province, were ignored by Wells and other proponents of equality. The vast differences between Canadian provinces and the American states were also ignored. Canada has only ten provinces, giving each one much more prominence than any of the fifty American states. The smallest province, Prince Edward Island, has roughly 1 percent of the population of the largest, Ontario. Article IX would have given each citizen of Prince Edward Island one hundred times the influence of citizens of Ontario in the revitalized Senate.

Quebec also presented particular problems in terms of equality. Quebec is clearly different from the other provinces, with its majority French-speaking population and its strong nationalist and separatist movements.
Equal representation of the provinces ignores the uniqueness of Quebec, and in particular its strongly held view that Canada was built by two founding peoples, the French and English, who should be represented through dualism rather than equality of ten provinces. The Charlottetown document proposed to resolve the special position of Quebec partly through guaranteeing it, in Article XXI, 25 percent of the seats in the Commons, regardless of demographic changes—since 1867 Quebec's proportion of the Canadian population has steadily decreased, and continues to do so as the west in particular grows. The combination of Articles IX and XXI elevated provincial equality in representation in the Senate to a higher status than equality of the citizens in representation in the House of Commons. No argument was presented in the document or by its drafters to explain or justify this dubious deviation from fundamental democratic principles.

Articles X to XV dealt with the powers of the Senate. To eliminate the problems faced by the Mulroney government with a Senate dominated by the opposition party, the Senate would have to dispose of legislation other than revenue and expenditure bills within thirty sitting days of the House of Commons (Article XII). Revenue and expenditure bills would be subject to a thirty calendar day suspensive veto; if such a bill were defeated by the Senate within this period it could be repassed by a majority vote in the Commons. Bills affecting French language and culture would require the approval of a majority of senators, and a second majority of Francophone senators. The Commons could not override the defeat of such a bill. Senate defeat of bills involving tax changes relating to natural resources also could not be overridden by the Commons. Defeat or amendment of ordinary legislation by the Senate would trigger a joint sitting process with the House of Commons, in which a simple majority vote would determine the outcome. Article XV gave the Senate, like its American counterpart, the power to ratify key appointments, including the Governor of the Bank of Canada, the heads of national cultural institutions, and the heads of federal regulatory boards and agencies.

These proposals would have reduced the powers of the Senate over ordinary legislation by giving it a relatively short period to consider bills and permitting the decision of a joint sitting to override Senate defeat. Powers over natural resource legislation were increased, a concession to the western provinces, as were Senate powers over legislation dealing with language and culture, a recognition of Quebec's concerns.
With the defeat of the Charlottetown proposals in the nationwide referendum, this particular phase of Senate reform came to a halt. The proposals for Senate reform had not satisfied the ardent believers in a Triple-E Senate, nor had the reforms won much support elsewhere. Comprehensive constitutional reform in Canada faces such enormous problems in, first, getting agreement of premiers and federal government to a reform package, and, second, in winning assent through referendum in all provinces, and there are such harmful consequences to failure in terms of damaged expectations and frustrated hopes, that Canadian governments are unlikely to be eager to engage in the process again in the near future (Russell 1993; Franks 1995).

However, two of the E's of the Triple-E Senate, election of senators and a definition of the Senate's powers of the sort proposed in the Charlottetown document (Effective), could be made through ordinary legislation of the Parliament of Canada because they do not require constitutional amendment. Changing the composition of the Senate to achieve provincial equality or some other goal, on the other hand, would require constitutional amendment. Whether a government will undertake Senate reform, either with or without constitutional amendment, depends on the political pressures of the times. So far, the present federal government has shown no eagerness to engage in the comprehensive sort of reforms embodied in the Charlottetown document or in less ambitious incremental reforms that might not involve so much political capital and so many daunting obstacles and penalties.

Meanwhile, the Canadian Senate remains as it has for 131 years, an anomaly, a peripheral institution of government, sometimes a nuisance, occasionally of value, and, if Country Life is to be believed, the worst of all possible worlds. It is worth cautioning that even a Senate reformed along the lines of the Charlottetown document would not likely alter to any great extent the practices of federal-provincial relations in Canada. Because of the dominance of the executive, executive federalism seems to be an inescapable part of the amalgam of parliamentary and federal institutions (Watts 1988). Experience with the Australian Senate (Sharman 1987), and that of the post-1984 Canadian Senate, indicates that the Senate proposed at Charlottetown would have remained highly partisan, and that its main concern would be to support party, not region or province. The variety of bases for representation might have produced complex and conflicting purposes within the Senate that would have detracted from the
priority of provincial representation. In any case, these proposals are now lost in the sands of time, and the Canadian Senate remains much as it always has been, awaiting, unreformed, the proposals of a new generation of reformers and reforms.

The three key issues in Senate reform are, first, how senators are appointed; second, what the powers of the Senate should be; and third, what balance in the representation of provinces or regions it should have (Franks 1998). On the first, it is clear that appointment by the prime minister from among party supporters has by now reduced the legitimacy of the Senate to the point where it harms not only the Senate but also Parliament as a whole and even the government. It is not good for the country to have the bulk of news stories and other coverage of one of the chambers of the national legislature to be primarily criticism of appointments for having no merit other than service to the party in power or, worse, to the prime minister personally. Either the Senate could be elected, or a portion of appointments chosen by the opposition in Parliament or by provincial legislatures or governments.

An elected Senate would have more legitimacy than the present one, but at a cost of potential tensions within parliamentary institutions that would be unacceptable without drastically reducing the powers of the Senate from what they now are. The same problem exists for most other reforms that would give the Senate more legitimacy, leaving the inescapable conclusion that reduction in the Senate’s powers is a necessary part of any reform package.

Equality of provincial representation is less important, and probably more potentially damaging, than its proponents believe. Canada is marked by formidable inequalities between the provinces, ranging from the tiny size of Prince Edward Island, and the poverty of most of the maritimes, to the unique character of Quebec’s language and culture, the large population and wealth of Ontario, the enormous government revenues from oil and gas in Alberta, and British Columbia’s immense resources and potential as part of the Pacific rim. Provincial equality would give the smallest six provinces, which together contain only about 10 percent of Canada’s population, a majority in the Senate. Some form of redistribution is desirable, but not provincial equality.

Whatever the proposals for reform, the Canadian Senate remains an anachronism, and an anomaly. For the most part, its work is better than is appreciated, but lack of legitimacy damages both itself and Canadian
parliamentary institutions generally. At present, proposals for reform are mired in the seemingly intractable problem that they must be part of a broader constitutional reform package. Recent efforts (Meech Lake, the Charlottetown Accord) have been unsuccessful and extremely damaging to Canadian unity. The method of selecting senators can be altered by Parliament itself through statute—by binding the prime minister to appoint senators nominated through some new process—and similarly a self-limiting statute could restrict the Senate’s powers. These very real possibilities for Senate reform exist as yet untried within the present constitution.

Notes

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1. Governor general’s warrants allow the government to spend money without appropriations having been voted by Parliament. In some years in the 1960s the entire expenditure of the Canadian government was made under governor general’s warrants because opposition obstruction and elections had prevented Parliament from voting supply. The rules of the House of Commons were subsequently amended to ensure passage of supply. The Senate, however, remained “unreformed” and immune to these Commons rules.

References


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