

The Dangers of the Proposed Elected Senate

ROUSING THE RABBLES



by
Nick Ouellette

It's about time that Senate reform got back on the agenda. Prime Minister Stephen Harper's latest tweaks to the stuffy red chamber hit the presses last week. Not only has the government come up with a new plan for effecting these changes to the Senate, it has also come up with more changes than the last time.

Right now, Senators hold office until the age of 75, but eight-year term limits languished in the current Senate and died when Parliament prorogued its last session earlier this year. This time around, it's in the House of Commons first, apparently in an effort to lend the plan more credibility if it passes the elected chamber.

Now, in addition to limiting Senate terms, the government plans for the

Prime Minister to "consult with electors" – essentially, to hold an election. These consultations would happen at the same time as federal elections and would produce Senators-in-waiting whom the Prime Minister would appoint when a vacancy occurs in the upper house. It's kind of like what Alberta has been doing on its own for some time now, even though the federal government ignored those elections until Harper came to office. Even though Senators would be indirectly elected through voter consultations, as long as the Prime Minister follows the "advice" of the electorate, we'll have an elected Senate.

Great. I'm all for an elected Senate. I know there are many arguments against it. Some people see no problem with our current system, which sees the Prime Minister essentially make patronage appointments to the Senate. After all, the British House of Lords is full of appointees from the upper classes, so why shouldn't our Senate be?

To me, an appointed Senate strikes the core of our notion of democracy. The Senate isn't meant to be a place where political appointees come to toe their respective parties' lines. The reason Parliament has two houses is to offset disparities between the population bases in each province. Although the number of people living in each province dictates

how many Members of Parliament it elects, each region of the country has a set number of Senate seats. This is supposed to provide a more equitable representation for the provinces.

Appointed Senators ultimately hold allegiances to the political masters who appointed them, and more than once, this has created problems in passing important legislation when government changes hands between the major parties. This can happen even when those votes are not in a particular region's interests. Electing Senators can remove this political disposition and more effectively represent the will of Canadians.

However, as much as I am in favour of electing Senators, I think we should pause to consider the implications of Harper's chosen method for Senate reform. In theory, this should require a constitutional amendment to which all the provinces agree, but that kind of consensus is not likely. Instead of attempting such a process, Harper has chosen not to change the process surrounding the actual appointment of a Senator – it will still happen at the hands of the Governor General on the advice of the government. The legislation introduced last week simply sets out a process that the Prime Minister will use in determining whom to appoint. This creative solution does not need a constitutional amendment, so

the provinces do not need to agree. Suddenly, we can have an elected Senate, albeit indirectly, without the hassle of having to enter into a new round of constitutional negotiations.

Here's the problem. The federal government, through a number of mechanisms, appoints people in many different positions, including judges. This doesn't include only judges on the different federal courts and the Supreme Court. The federal government also chooses the judges for a number of provincial courts.

If Parliament passes legislation that allows the Prime Minister to hold consultations with voters to see whom to appoint to the Senate, what is stopping a bill that sets out a similar process for consulting with voters to see whom to appoint as judges?

Not a whole lot. It's true that there are conventions surrounding the appointment of judges that the government currently follows, but Harper's voter consultation bill sets a precedent for allowing the government to ask voters who it appoints to any of the many offices it fills by appointment. It remains to be seen whether the existing conventions surrounding judicial appointments can successfully prevent an argument that voters should elect judges just as they elect Senators. In fact, Harper has already modified the

process slightly by creating a committee to review the most recent appointee to the Supreme Court. The committee did not have the authority to reject the nominee, but without legislation, let alone a constitutional amendment, the government changed one aspect of the appointment process notwithstanding the established practice.

The conventions might not stand, and in theory no constitutional amendment would be needed for an elected judiciary. No consensus would be needed amongst the provinces, any of which might reasonably oppose such a move. With the current party line system in Parliament, such a bill could easily pass during a majority government intent on reforming the process. This is a problem.

I might support an elected Senate, but there is no way I can support an elected judiciary. Judges are meant to be impartial, but can we say that a system where judges campaign for election is truly impartial? It at least opens the door to a situation in which the appointment process for courts inherently impedes upon impartiality.

I, for one, do not want even the risk of such a politicized judiciary. The impartiality of our courts is essential to a free and democratic society. It instills confidence in our system, and we must protect that confidence in order to

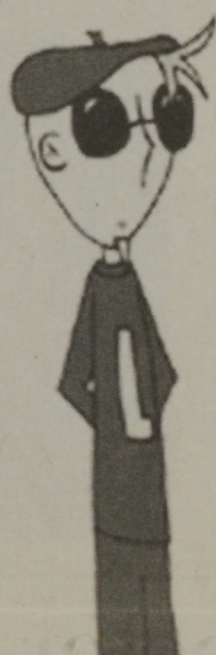
ensure that the authority of the courts is well respected. Judgeships are not based on popularity contests. Even though they may be fully capable and qualified jurists, candidates for the judiciary might take positions on a number of matters during the course of their campaigns that call into question that impartiality.

So even though Harper's legislation achieves the good of an elected Senate, we should at least consider whether or not it is the best way of going about this. A process that makes such changes while avoiding an amendment to the constitution sets a precedent that calls into question the safety of the process itself.

I'm not saying that electing the Senate the way Harper has proposed will open a floodgate of elected judges that destroy the respect for our courts, but the implication should at least make us pause and think about whether avoiding a new round of constitutional debates is worth risking the chance that we might politicize our courts. I'm not convinced that it is.

Nick Ouellette, a UNB law student, has served on the UNB Student Union Council and the UNB Board of Governors, and now serves on the UNB Fredericton Senate and as an Assistant Don in UNB's Residence Community.

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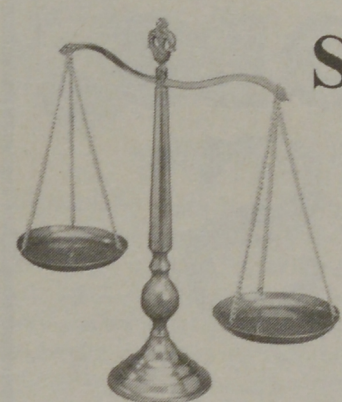


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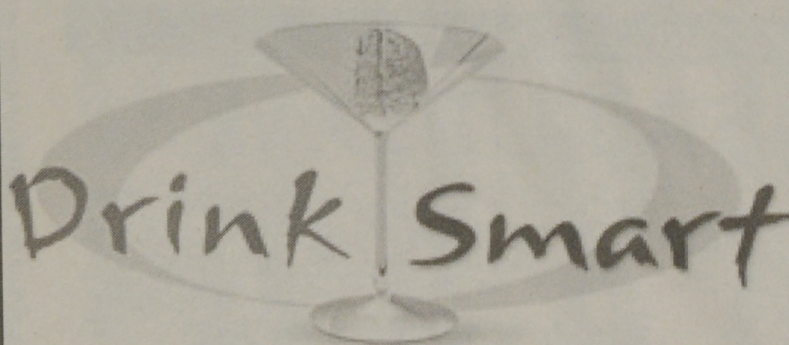


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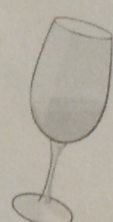
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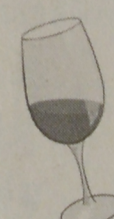


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