

Native Rights

CONFIDENTIAL

January 16, 1981

MEMORANDUM FOR THE PRIME MINISTER

The Role of the Senate  
in the Amending Procedure

The Problem

Under the terms of the current Resolution, the Senate will exercise an absolute veto over any amendment under section 42 (referendum procedure). However, the Senate would only have a delaying power of 180 days over amendments under section 41 as modified by section 44. Senators have expressed concern about amendments respecting the Upper House of Parliament that could be made under section 41 as modified by section 44 without Senate approval.

Options

1. Hang firm

If this aspect of the Resolution is not changed, it is possible that the Resolution will pass in the Senate if the government is very stern and exercises political control over the Liberal caucus in the Senate; but the margin of the majority may be narrow. A hard core of six to eight Liberal Senators will probably vote against any Resolution that does not provide an absolute veto for the Senate over any proposed amendment respecting the Senate. If the current proposal is not altered, a number of other Liberal Senators may also vote against the Resolution. There are 94 Senators at present: 64 Liberals, 1 independent Liberal (Cameron: Alberta), 2 independents (Molson: Quebec; Lawson: British Columbia) and 26 Conservatives. It is likely that the 26 Conservative Senators and Senator Manning will vote against any Resolution.

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2. "Pack" the Existing Senate

There are ten vacancies in the Senate at present: 1 in Ontario, 4 in Quebec, 2 in New Brunswick, 2 in Nova Scotia and 1 in Saskatchewan. The government could fill these vacancies with the appointment of ten new Senators who would be high-minded Canadians committed to the national interest.

3. An absolute veto for the Senate over a range of matters save the numbers by which a province is entitled to be represented in the Senate.

A proposal along these lines was circulated to a few key Liberal Senators and the reaction was mixed: a majority would support it, but there would probably be at least six or eight Liberals opposed.

Attached please find a copy of the proposal in which amended sections 44 and 50 are put forward that would give an absolute veto to the Senate over all of the matters referred to in section 50, with the exception of amendments respecting the numbers by which provinces are entitled to be represented in the Senate.

The amended sections 44 and 50 would allow the current Senate to play a more definitive role in the amending procedure (e.g., a veto over amendments to the Charter). However, the Senate would only have a suspensive veto over amendments respecting the number of Senators to which a province is entitled to be represented in the Senate. This would allow Parliament and the legislative assemblies of at least six provinces distributed among four regions to "stack" the Senate, if need be, in order to achieve Senate reform notwithstanding the opposition of incumbent Senators.

The NDP would not be favourably inclined towards such a proposal but as long as Parliament (i.e., the House of Commons) and six provincial legislatures could override the Senate through the control of numbers, the NDP should be able to swallow it.

4. Give the Senate an absolute veto over its own existence

This could be done by exempting from the application of section 44 (override by the Commons) any amendment to the matters referred to in section 50 (including the numbers by which a province is entitled to be represented in the Senate) or exempting from the application of section 44 only those amendments respecting the Senate (including numbers).

While this might ensure the total or near total support of Liberal Senators, Conservative Senators would still probably vote against the Resolution for reasons related to the process of seeking patriation. Such an amendment would cause serious problems for the NDP. Some Senators might be embarrassed by such an amendment (especially the second variant): it would expose in a blatant fashion the self-interest of incumbent Senators.

5. Removing section 44 from the Resolution

Another option would be to remove section 44 from the Constitution Act, 1980 and to provide no override at all by the Commons. This would be particularly objectionable to the NDP.

#### Assessment

Of the five options above, the first three would appear to be the most defensible in democratic terms. Providing an appointed body with an absolute veto over its own existence would be hard to justify to the people of Canada in the event that the Commons and six legislative assemblies distributed over four regions were of the view that it were desirable to proceed to reform the Upper Chamber.

The choice of the option to be pursued by the government represents a delicate political decision and would involve, among other things, a headcount of Liberal Senators to find out where they stand and the number who would be likely to vote

for the Resolution (whether amended or not). I would suggest that, on the basis of the options raised above, Jim Coutts perform a head-count at a Senate caucus to be held during the week of January 19th and make a political recommendation.

*Mike*  
Michael Kirby

J.R.Hurley/jl

January 15, 1981

A Veto for the Senate  
over Constitutional Amendments

The Senate will exercise an absolute veto over any amendment under section 42 (referendum procedure). However, the Senate would only have a delaying power over amendments under section 41 as modified by section 44.

Senators have expressed concern about amendments respecting the Upper House of Parliament that could be made under section 41 as modified by section 44 without Senate approval. This concern could be accommodated in part by amending sections 44 and 50 to provide for an absolute Senate veto over a number of amendments, including those respecting the powers of the Senate. However, any absolute veto exercised by the Senate should not make it impossible for Parliament and the requisite number of provincial assemblies to reform the Senate, notwithstanding the opposition of Senators. Hence, as a last resort, Parliament and at least six legislative assemblies distributed among four regions should have the power to alter the number by which a province is entitled to be represented in the Senate notwithstanding the opposition of incumbent Senators.

The amended sections 44 and 50 below would achieve the purpose of giving greater security to the Senate while, at the same time, giving ultimate authority to Parliament and the requisite number of legislative assemblies to proceed to reform the Senate should that be considered desirable course of action. A note explaining the operation of the amended sections 44 and 50 is attached.

Amendments  
without  
Senate  
resolution

44. (1) An amendment to the Constitution of Canada, other than an amendment in relation to a matter referred to in subsection 50(1), may be made by proclamation under subsection 41(1) or section 43, as appropriate, without a resolution of the Senate authorizing the issue of the proclamation if, within one hundred and eighty days after the passage by the House of Commons of a resolution authorizing its issue, the Senate has not passed such a resolution and if, at any time after the expiration of those one hundred and eighty days, the House of Commons again passes the resolution.

Computation  
of period

(2) Any period when Parliament is prorogued or dissolved shall not be counted in computing the one hundred and eighty day period referred to in subsection (1).

Matters  
requiring  
amendment  
under  
general  
amendment  
procedure

50. (1) An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with a procedure prescribed by section 41 or 42:

- (a) the office of the Queen, the Governor General and the Lieutenant Governor of a province;
- (b) the *Canadian Charter of Rights and Freedoms*;
- (c) the commitments relating to equalization and regional disparities set out in section 31;
- (d) the powers of the Senate;
- (e) the method of selecting Senators and the residence qualifications of Senators;
- (f) the right of a province to a number of members in the House of Commons not less than the number of Senators representing the province; and
- (g) the principles of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada.

Idem

(2) An amendment to the Constitution of Canada in relation to the number of members by which a province is entitled to be represented in the Senate may be made only in accordance with the procedure prescribed by section 41, as modified by section 44, or by section 42.

January 15, 1981

The proposal would:

1. Provide for an absolute Senate veto over an amendment in relation to the following matters:
  - a) the office of the Queen, the Governor General, and the Lieutenant Governor of a province,
  - b) the Canadian Charter of Rights and Freedoms set out in the proposed Resolution,
  - c) the commitments relating to equalization and regional disparities set out in the proposed Resolution,
  - d) the powers of the Senate,
  - e) the method of selecting Senators,
  - f) the resident qualifications of Senators,
  - g) the right of a province to a number of members in the House of Commons not less than the number of Senators representing the province, and
  - h) the principle of proportionate representation of provinces in the House of Commons;
2. Provide that the Senate would have a suspensive veto for 180 days in relation to all other amendments of the Constitution to which the general amending formula applies, including an amendment in relation to the number of members by which a province is entitled to be represented in the Senate.

Thus, the Senate would have an absolute veto over the vast majority of amendments relating to the Senate, and its powers.

The only exception would be in respect of an amendment in relation to the number of members of the Senate. Such an amendment could be adopted without the Senate's consent only subject to a 180 day veto by the Senate and if approved by the House of Commons and by the legislatures of Ontario, Quebec, two Atlantic provinces and two western provinces with the two western provinces having 50% of the population of the western region.