



When it comes to the Constitution, it comes to the Supreme Court. What would it say on parliamentary reform? *Policy* photo

# Electoral Reform and the Constitution

Sébastien Grammond

*In the wake of the 2014 Supreme Court decisions on Senate reform and judicial appointments, it has been argued that electoral reform is impossible unless the Constitution is amended. University of Ottawa constitutional expert Sébastien Grammond has examined this claim and finds it unwarranted, with the exception of the principle of proportional representation of the provinces, which requires that MPs be elected to represent a specific province.*

**T**he Constitution is Canada's supreme law. This means that a certain set of statutes, called the Constitution Acts, cannot be amended without following a rigid procedure that requires the participation of Parliament and at least seven provinces representing at least half of the country's population, the 7/50 general amending formula. Parliament, or so it was thought, could still enact or amend 'ordinary' legislation concerning the

structure of our political institutions, provided that it did not amend the Constitution. However, in two decisions rendered in 2014, the Supreme Court of Canada prevented Parliament from adopting legislation that would have changed certain essential features of the Senate or the Supreme Court, even if it purported to do so without altering the text of the Constitution. Even though the text was left untouched, reasoned the Court, Parliament's unilateral action would have affected the 'architecture of the Constitution,' which includes the fact that Senators are appointed and not elected.

This raises the question: is the first-past-the-post electoral system a part of Canada's constitutional architecture? Can it be changed by Parliament acting alone, or must any reform go through the process of constitutional amendment, involving the provinces? Are there other features of our political system that form part of the architecture of the Constitution, so that they are now beyond Parliament's reach?

Canada has been through something similar before. In 1998, the Supreme Court of Canada handed down its opinion in the *Quebec Secession Reference*. It based its judgment on four 'underlying principles' of the Constitution. In the following years, imaginative lawyers invoked those principles to support an impressive variety of arguments, challenging anything ranging from municipal mergers to special legislation governing tobacco litigation. Most of those claims were rejected, and the Supreme Court had to remind everyone that underlying principles could not be used to limit the powers of legislatures in ways not contemplated in the constitutional text.

The recent decisions concerning Senate reform and Supreme Court appointments were greeted with similar enthusiasm. Several commentators have read them as saying that the Constitution is now composed of the Constitution Acts plus the consti-

“ *Is the first-past-the-post electoral system a part of Canada's constitutional architecture? Can it be changed by Parliament acting alone, or must any reform go through the process of constitutional amendment, involving the provinces? Are there other features of our political system that form part of the architecture of the Constitution, so that they are now beyond Parliament's reach?* ”

tutional architecture. In effect, they are suggesting that an indeterminate number of political principles or current features of our political system have become entrenched. Some have suggested 'tests' to ascertain the scope of this new part of our Constitution. Others have blamed the Supreme Court for making the Constitution uncertain and boundless. However, a better reading of those cases is that the court, far from adding new components to the Constitution, concluded that its amending formula has a protective function, namely that it restricts Parliament's power to change the essential characteristics of some of our institutions. This protective function relates to institutions that were the subject of intense discussions among politicians in the two decades before patriation of the Constitution. During those discussions, federal and provincial politicians reached consensus over the fact that important features of those institutions could not be changed except through a constitutional amendment. The Senate was the main institution concerned. The Supreme Court was added in 1981, when it became clear that the constitutional package about to be adopted would not include a reform of the court. Thus, in its two recent decisions, the Supreme Court essentially gave effect to the politicians' intention that major reforms regarding certain specific subjects would require a large degree of provincial consent.

So, what does the Constitution say about the House of Commons? A few provisions refer

to its elected character. For example, Section 3 of the Canadian Charter of Rights and Freedoms protects the right to vote in elections for the House of Commons. Other provisions relate to the distribution of seats among the provinces. But the Constitution does not mention first-past-the-post (FPTP) or any other electoral system. The manner of counting votes is found in ordinary legislation, like the franchise, the delineation of ridings, spending rules and other important features of our electoral system.

Then, what does the amending formula protect? The framers of the Constitution Act, 1982 included two very specific elements that cannot be changed except through constitutional amendment: "the principle of proportionate representation of the provinces" ('rep by pop') and a guarantee, known as the 'Senate floor,' according to which smaller provinces would never have fewer MPs than the number of senators they had in 1982.

The amending formula's focus on the Senate, rather than the House of Commons, is no accident. In federal systems, upper chambers are usually meant to ensure the participation of constituent units in the federal legislative process. That was one of the roles assigned to the Senate in 1867, and whether or not it has been successful in discharging that function, most reform proposals have been aimed at designing a Senate better equipped to perform that role. This justifies the provinces' interest in Senate reform and the Supreme Court's conclusion that major changes to the

Senate may be made only through a constitutional amendment.

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In contrast, the role of the House of Commons is to represent the population in its entirety. Beyond ‘rep by pop,’ it does not have a regional or provincial dimension that would justify a specific provincial interest. Except for ‘rep by pop’ and the ‘Senate floor,’ provincial politicians have never thought it useful to claim a specific voice in the process leading to changes to the House of Commons, including the electoral process. Subject to those two exceptions, the Con-

stitution’s amending formula does not have a protective function with respect to the House of Commons.

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Yet, one should not underestimate the constraints flowing from the constitutional status of the principle of ‘rep by pop’. To say that provinces must be proportionally represented in the House of Commons assumes that MPs are representing a particular province. Logically, this would require that MPs be elected by the voters of the province they are representing, not by voters in other provinces. Electoral systems that have a proportional component typically rely on lists of candidates drawn up by political parties. The number of candidates on each list who are elected depends on the percentage of votes obtained by each political party. In order to comply with the Constitution, this kind of mechanism would have to be implemented on a province-by-province basis, to ensure that MPs are gen-

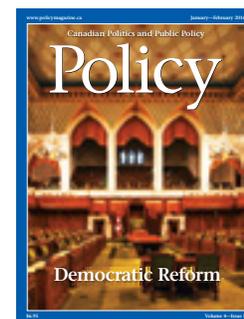
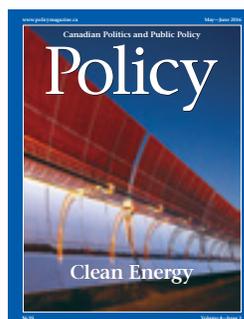
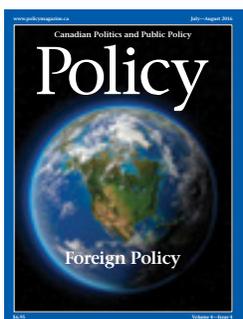
uinely linked to a specific province. In other words, political parties will have to draw lists of candidates for each province. The number of candidates elected from each party’s list in a particular province must depend on the proportion of votes obtained by each party in that province, not votes obtained in other provinces.

Subject to this constraint, the principles established by the Supreme Court in its 2014 decisions concerning Senate reform and the appointment of Justice Nadon do not mandate a departure from what it said in 2003 in a case dealing with the right to vote: “The Constitution of Canada does not require a particular kind of democratic electoral system, whether it is one that emphasizes proportionality and the individual aspects of participation or one that places more emphasis on centrism and aggregation, to be frozen in place.” **P**

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