

## **Citizens' Assemblies and Parliamentary Reform in Canada**

[notes and references to be added]

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Canada, like Australia, is a federation and, like Australia, has a system of government based on British-derived parliamentary and monarchical traditions. But Canada's structure of government differs in two important respects; it has no history of strong, elected upper houses in its state and federal parliaments and, since 1982, it has had a constitutionally entrenched Charter of Rights and Freedoms. Some Australians—though fewer than in the past—would like Australia to become even more like Canada by reducing the influence of upper houses on the parliamentary process in state and national politics. And some commentators—particularly those with legal backgrounds—have argued that Australia should follow Canada and adopt a constitutionally entrenched bill of rights to limit the scope of parliamentary governments.

But there is another difference between the two countries which few Australians would wish to remove. There is evidence that many Canadians are unhappy with their parliamentary institutions to an extent that is not mirrored in Australia. While Australians may grumble about their politicians, there is no widespread public debate about electoral reform or the need to transform parliamentary politics. Australians know that their governmental system is not perfect, but there is no general feeling that state and federal parliaments are somehow unable to deliver the kind of government that citizens expect. In contrast, five of the ten Canadian provinces, as well as the national government in Ottawa, have been prompted to commission studies into ways of making parliamentary government more responsive to community preferences.

In this talk, I will take a look at the most adventurous of these inquiries, the British Columbia Citizens' Assembly on Electoral Reform. I will be concerned with how it was set up, what it recommended, why it has generated wide interest in Canada and beyond, and why it raises important questions about the design of parliamentary institutions.

### *Politics in British Columbia*

Of all Canada's ten provinces—the Canadian equivalent of the Australian states—British Columbia's politics is most like Australia's. For the last fifty years, control of the unicameral provincial parliament, has been a contest between two major parties, one centre left with support from a well organized trade union movement, the other centre right with support from business interests. This characterization of the party system in British Columbia is over simplified; there have been several major party realignments, and there is an important populist component in BC politics. But the point is that elections since the 1950s have been predominantly two horse contests.

This pattern has been reinforced by the use of a first past the post electoral system which has been employed for all but two of British Columbia's elections since it gained self-government in 1871. Such a system over-represents the largest parties and penalizes small parties unless their support is regionally concentrated. This makes for single party majority governments even though the winning party has fewer than half the votes, and means that minor parties are unlikely to secure representation in parliament.

Why should anyone complain about such an arrangement? Isn't that exactly what a British derived parliamentary system is supposed to produce? Single party majority governments can get things done and there is no question of who is responsible at election time for government policies which have gone wrong. And if the governing party really makes a mess of things, the first past the post electoral system punishes governments by magnifying electoral swings against them.

This is all true, but there are a number of costs to single party majority governments based on first a past the post electoral system, and particularly so if parliamentary parties are strongly disciplined. Such a system greatly reduces the ability of the parliament to check the actions of premiers and their ministers and to force them to answer awkward questions. The system, by excluding the representatives of smaller parties, not only produces a distorted picture of the

range of views in the community and fosters an adversarial style of parliamentary and electoral politics, but makes the operation of parliament dependent on the will of the governing party.

These costs may not be an issue for most of the time, but when a government starts to behave arrogantly, ignores issues which many in the community feel are important, is reckless with its treatment of public funds, and attempts to hide its policy failures, public dissatisfaction with the operation of parliament will start to grow. Such situations developed in all Australian states during the 1980s and 1990s and led to major inquiries into the operation of parliamentary government, most notably in Queensland and Western Australia.

A similar situation arose in British Columbia in the 1990s. At the 1996 provincial election, the governing party, the New Democratic Party, was returned to office with a majority of seats even though it won fewer votes than the opposition party, the Liberals. The government had a five year term and, what was a slightly unpopular government at the beginning of its term, ended in complete disarray with allegations of corruption, the resignation of two premiers, and a series of policy failures. At the following election in 2001, the Liberals won 77 of the 79 seats in the legislature, leaving the New Democrats with only two.

The incoming Liberal premier, Gordon Campbell, had campaigned on a platform which had included a strong commitment to restoring public trust in the institutions of government. These commitments included the introduction of fixed four year terms for the provincial parliament—similar to the system now operating in South Australia—and making some cabinet meetings open to the press. But the most adventurous commitment was the promise to set up a randomly selected citizens' assembly to inquire into the electoral system and make recommendations for change if the assembly thought this was warranted. This commitment was the idea of the Liberal leader and was regarded with misgivings by many in his caucus.

#### *The structure of the Citizens' Assembly*

The final design of what became the British Columbia Citizens' Assembly on Electoral Reform was not settled until early in 2003 after a consultant's report and a great deal of discussion in the Liberal Party cabinet and caucus. In its final form, the Citizens' Assembly had 160 members, one man and one woman from each of British Columbia's 79 electoral districts, and 2 first nations' members. The members were chosen by a process which

involved several steps. First, invitations were sent to a randomly selected, age stratified, panel of electors from the electoral role in each district inviting them to attend a meeting in that district. At the meeting, there was a presentation by Citizens' Assembly staff explaining that members of the Assembly would have to be willing to spend 12 weekends in the coming year (2004) and travel to Vancouver for each meeting (expenses would be paid by the Assembly). At the end of the meeting, those who were willing to make such a commitment had their names put in a hat, and one man and one woman were selected. This process was repeated for all 79 electoral districts in the province.

All the members had been chosen by the end of 2003 and the Assembly began its work in January 2004. There were three phases: six weekends in the first three months of the year were spent learning about electoral systems and the political process; during the period over spring and summer, each member attended several public hearings around the province and considered submissions made to the Assembly; and six weekends in the last three months of 2004 were spent deliberating on whether BC needed a new electoral system and, if so, what system should be adopted.

The random selection process produced a Citizens' Assembly with a range of ages and occupations which closely mirrored the composition of the province, and the equal numbers of men and women members gave the Assembly a special claim to represent the community. The element of self-selection—the willingness to attend a selection meeting and accept the commitment of spending 12 weekends during the year discussing electoral systems—meant that a large majority of the selected members had an enthusiastic acceptance of their task. Almost all members had little knowledge of or interest in electoral systems when they were selected but, when it was explained to them, they felt the task was important and proved willing to devote an extraordinary amount of time and effort to the Assembly's work.

The news media were initially sceptical about the ability of 'ordinary people' to become familiar with the complexities of electoral rules and their parliamentary consequences but, as the Assembly's meetings progressed, the tone of media reporting moved from mild condescension to admiration both for the substance and the tone of the Assembly's discussions. The faith in 'ordinary people' being able to make decisions on complex political issues had been overwhelmingly endorsed. The public goodwill towards the Citizens' Assembly process was perhaps its most important achievement.

The way in which the members of the Citizens' Assembly had been selected was only one of the unusual features of the Assembly. Another was its independence from government influence. Apart from formal accounting requirements and some general specifications about the timing and format of the Assembly's recommendations, the Liberal government went out of its way to leave the Assembly to do its work in the way of its own choosing. But perhaps the most unusual feature was the Assembly's ability to decide on the wording of a referendum question if the Assembly decided that a change of electoral system for the province was needed. This reinforced the unusual independence of the Assembly and confirmed the intention of the government to withdraw from the process; the choice of electoral system was to be left to the Assembly and the public.

But what about the apprehensions of the Liberal caucus? The electoral system controls access to parliament and sets the parameters for a parliamentary career. Why would members of parliament be willing to cede control over this critical issue to a bunch of ordinary people and a public referendum? The answer can be found in the conditions that were put on the timing of a possible change and the rules for the success of the referendum. The Citizens' Assembly was to complete its work by the end of 2004; if it recommended a referendum on electoral change, this referendum would be held with the scheduled provincial general election in May 2005. Even if the referendum passed, no change to the electoral system would take place until the general election to be held in May 2009.

Of greater significance, a referendum on electoral change would be successful only if it gained the support of 60 percent of the voters, and majorities in 60 percent of the 79 electoral districts in the province. This was the price the Liberal caucus extracted from Premier Campbell for the endorsement of his proposal for a Citizens' Assembly on Electoral Reform. The bar for electoral change was set high, perhaps so high that change was unlikely.

#### *The Assembly's consideration of electoral change*

The debate in the Citizens' Assembly over electoral change was driven by a fundamental concern with the style of politics the Assembly members favoured. The chair of the Assembly had been a university principal and had been chosen by the government for his skill as a facilitator and as a person who believed in consensus building. He was keen that the Assembly members decide early on what were the most important values for an electoral system to reflect. These turned out to be an electoral system which maximized electoral

choice, produced a proportional outcome (a close fit between the share of votes gained by a party and the seats won), and retained an elector's access to an identifiable local member.

Missing from this list, was the creation of majority governments. The members were not persuaded of the benefits of single party majority governments as one of the values to be promoted by an electoral system. If a clear majority of voters supported a single party, that was one thing, but they did not support the idea that the virtues of a single party majority government were sufficient to justify an electoral system which turned a plurality of votes into a majority of seats. This view was coupled with a mild suspicion of parties. Parties might be necessary to structure electoral choice and to organize the legislature, but parties were associated in the minds of most members with the distortion of the representative process and the perpetuation of confrontational politics in both parliament and the electorate.

This view of the political process was at odds with the parliamentary tradition of British Columbia and led the members of the Citizens' Assembly inexorably towards a recommendation for change to the electoral system. A desire for proportionality meant that any system based solely on single member districts was precluded, including what Australians call preferential voting (and the rest of the world calls the alternative vote, except the United States which calls it instant runoff voting). The list system of proportional voting used in parts of Europe was not acceptable because it enhanced the power of parties over members of parliament.

Much to the surprise of most commentators and perhaps to some Assembly members, the Assembly did not endorse a mixed member proportional (MMP) system of the kind used by Germany and adopted by New Zealand. Before the Assembly had begun its deliberations, it had been assumed by commentators that, if the Assembly recommended change, the MMP system would be its choice. Other inquiries into electoral reform in Canada had recommended MMP systems of various kinds. The attraction of MMP is that it appears to combine the best of both worlds. The voter has the choice of a local member by the familiar single member, first past the post system, coupled with the choice of a party list from which the number of seats proportional to its vote share can be allocated to the party in the parliament. This hybrid system sounds simple but it is the most complex of all electoral systems to design. The Citizens' Assembly seriously considered adopting an MMP system

but abandoned it because of its complexity and the difficulty of reducing party control over the members of the party lists.

The system the Assembly endorsed was a variant of proportional representation by the single transferable vote (PR-STV), similar to the systems used for the ACT Legislative Assembly, the Tasmanian House of Assembly, and the Irish Dail (the lower house of the Irish parliament). Some aspects of the proposed system were like the system used to elect the Senate and the upper houses in New South Wales, South Australia, Western Australia (and soon, the Victorian Legislative Council) but without the option of ‘above the line’ voting (which the Assembly explicitly rejected). The Citizens’ Assembly was not required to set out the electoral boundaries for the proposed system but stipulated that the multimember electoral districts required by the new system could have no fewer than two or more than seven members (it was assumed that almost all districts would have three, four or five members). The new system was labelled BC-STV and incorporated a number of features to ensure that voters had lots of choice and that parties could not rank their candidates on the ballot in a party preferred order.

It could be argued that the choice of the three core values by the Citizens’ Assembly—electoral choice, proportionality, and access to a local member—meant that PR-STV was the only logical outcome. It not only incorporates these values but can have the added characteristic—shared with similar systems in the ACT and Tasmania—of having a slightly anti-party effect. To be successful, a candidate needs both endorsement by a party and a degree of personal appeal to ensure that voters will vote for him or her rather than other candidates running under the same party label. Under this version of PR-STV, there are no safe seats which are the gift of the party organization; parties cannot play favourites with particular candidates by guaranteeing that a place on the party ticket will ensure a seat in parliament.

### *The outcome*

The Assembly’s recommendation of PR-STV had been signalled during the final weeks of the Assembly’s deliberations, but the recommendation still came as a shock to many of the political class. For parliamentarians and established political parties it represented at best a major challenge to the existing pattern of electoral and parliamentary politics and at worst a threat to the influence of the major parties. Some groups which favoured electoral reform

were not happy with the Assembly's commitment to PR-STV. The electoral system of choice for several of these groups was MMP, and the rejection of this system by the Citizens' Assembly undid the image of MMP as the perfect electoral system and the unquestioned choice for reform minded people. Even the Greens, who had much to gain from a proportional electoral system, were divided over the virtues of PR-STV; several of those in executive positions in the party liked the idea of MMP with closed party lists as a way of ensuring a socially diverse slate of candidates.

But the challenge for the Assembly's recommendation was to gain public support for the new system at the referendum to be held with the provincial general election in May 2005. The government had not allocated funds for 'Yes' and 'No' campaigns. There is no evidence that this was part of a plot to thwart electoral change, but derived from a failure to plan for the period between the release of the Assembly's final report in December 2004 and the election in May 2005. The consultant's report on the setting up of the Assembly had assumed that the publicity and information generated by the Citizens' Assembly itself would carry over to the referendum so that a separate campaign for any referendum proposal was not necessary.

This was not the case. The Assembly ceased to exist at the end of December 2004 and, although a great deal of information had been distributed to the public by the end of 2004, there was no administrative structure to mount a campaign leading up to the referendum in May 2005. This task was left to the individual members of the Assembly, the large majority of whom campaigned vigorously for their recommendation.

Although the two large parties were unhappy with the proposed BC-STV, they did not campaign against it. Winning the general election was the dominant issue; electoral reform was a minor—and awkward—side show. The premier had said that individual members of the Liberal Party could make up their own minds and campaign either for or against the referendum proposal, but he was not going to participate in the debate himself. This gave Liberal candidates an excuse to avoid comment on electoral reform and the referendum; their mantra was that 'it was up to the people to decide'. The New Democratic Party was divided on the issue but electoral reform was a minor concern for a party struggling to ensure substantial representation in the legislature and to regain its position as an alternative government. As a consequence, there was little mention of the referendum although the NDP



leader indicated that she would have preferred an MMP system, a comment which implied a vote against the proposed BC-STV system.

This meant that the debate over the merits of electoral change was often lost in the noise of party campaigning. There were no television or radio commercials for or against electoral change and the debate, such as it was, was carried out in talk-back programs, news stories and commentary in the press. Citizens' Assembly members were the major players in fostering a 'Yes' vote and many worked tirelessly to publicize the virtues of the proposed electoral system and to respond to critics.

Their opponents were an odd collection of political activists and media commentators. Much of the opposition to BC-STV was based on faulty information and, in some cases, appeared to be wilfully uninformed about the nature and operation of PR-STV; a great deal of the time of those arguing for BC-STV was spent trying to correct inaccurate claims made about the proposed system. The most effective arguments against change were of three kinds: if it ain't broke don't fix it; it is too complicated and too much of a change from the current system; and, it will foster a very different, and less desirable, style of politics from the one British Columbia had been used to. This last objection was the key one. Several former ministers and senior public servants argued that the Citizens' Assembly had been too concerned with the problems of fair representation and had ignored the importance of effective government which only single party majority government could deliver. For these commentators, coalition and minority governments would undermine the system of government which had served British Columbia so well for most of the period since 1871.

On election night, the results showed that the Liberal government had been returned but with a much reduced majority. The referendum results were slow to come in, but it was clear from early in the counting that a majority of voters supported change; the only question was whether the majority was large enough to clear the two additional requirements. By the end of counting, all but two of the 79 electoral districts returned majorities for electoral change. But the province wide vote was only 58 percent in favour, 2 percent short of the required number.

This result was remarkable. Even though the referendum did not fulfill the requirements for acceptance, a substantial majority of the electorate had voted for electoral change in spite of an almost complete lack of organized campaigning.

But what had the voters really been voting for? A survey run by members of the Political Science Department at the University of British Columbia showed some counter-intuitive results. Few voters knew much about the proposed electoral system, and knowledge of the system was not the key for explaining how people voted. For voters with higher than average education, believing that the members of the Citizens' Assembly, although ordinary people, had become expert in electoral matters, predisposed these voters to support the new electoral system even though they knew little about it. For all other voters, believing that the members of the Citizens' Assembly had been ordinary people like them, predisposed these voters to support BC-STV irrespective of the extent of their knowledge of BC-STV.

The critical factor, then, turned out to be trust in the randomly selected members of the Citizens' Assembly, moderated by voter beliefs about the Assembly's expertise and representativeness. Forty-six percent of the electorate returned the Liberal Party to government (with 58 percent of the seats), but 58 percent of the voters supported an electoral change recommended by the Citizens' Assembly even though most had little idea of how the proposed electoral worked and what effect it would have on the political process.

In a strange way, this encapsulates the problems facing Canadian parliamentary government. Why would a randomly selected group of citizens evoke more trust from the electorate than representatives chosen by the voters themselves? What was it about the Citizens' Assembly that led many hundreds of people to express gratitude for the opportunity to make a submission to a body which they believed was willing to listen to their opinions and debate the relevant issues fairly and openly? One response might be that the Citizens' Assembly was set up to deal with an issue which dealt with process rather than substance, and one which had long excited the interest of a small, but vocal, minority. In addition, the decision by the major parties to avoid participating or commenting on the work of the Assembly had given it the appearance of being above politics and separate from the sniping and back-biting of day-to-day partisan politics. It was not the composition or mode of operation of the Assembly that distinguished it, but the nature of its task and the way the governing and opposition parties had withdrawn from the work of the Assembly.

There is some truth in this view, but it does not do justice to the Citizens' Assembly. The way in which the Assembly handled its task was very different from the usual style of parliamentary politics. Its deliberations were not adversarial, the discussion was based on principle not partisan difference or personal contestation, and votes were taken only after extended attempts to accommodate differing views. Perhaps these characteristics are not possible in parliamentary politics, but they explain the goodwill always evident in the Assembly and the admiration of seasoned political commentators towards the quality, sophistication and passion brought to the Assembly's final deliberations. The way the Citizens' Assembly dealt with its task was a stark contrast to partisan political debate, and demonstrated to many Canadians why they felt that conventional parliamentary politics had lost its way.

#### *Consequences and implications*

The experience of the British Columbia Citizens' Assembly has generated three sets of consequences. The first, and most immediate consequence, was its recommendation for BC-STV, and the narrow defeat of this proposal at a popular referendum in 2005. But its recommendation is not dead—only sleeping. Several months after the election, Premier Gordon Campbell proposed that reform be given further consideration. While committed to the same special majorities for success at a referendum, the premier recognized that there was broad support for electoral reform and that consideration of BC-STV during a general election campaign was likely to have denied electoral reform the full discussion the issue deserved. Accordingly, after the 2006 census, a redistribution of electoral boundaries would be made in 2007, and maps created showing the boundaries for the existing single member district system, and the boundaries for a BC-STV system. Another referendum under the same rules would be held on the BC-STV system in 2008 at the same time as municipal elections, and the winning system—BC-STV or the existing first past the post system—would be used for the provincial general election due in 2009. Money would be allocated for 'Yes' and 'No' campaigns at the referendum

As Sir Humphrey might say, this was a brave decision and must have troubled many in the premier's cabinet, caucus and party who may have thought that the issue had been put to rest. But 2008 is a long way away, and the defeat of the proposal in 2005 may have reduced apprehensions about the likelihood of change.

The second set of consequences follow from the success of the Citizens' Assembly process. The widespread admiration for the activities of the Assembly—and the kudos it brought to the government which set it up—have not gone unnoticed in other jurisdictions. The province of Ontario is considering a similar Citizens' Assembly on the electoral process and the model has been adopted in a modified form for Dutch deliberations on electoral reform during 2006.

Other Canadian provincial governments have had their fears confirmed—giving a group of citizens the power to suggest electoral reform is too risky. If electoral change is to occur, it must be through the traditional methods of partisan debate and governmental decision.

Many aspects of the Citizens' Assembly process have caught the imagination of commentators and academics. The elements of random and self-selection which went into its selection, the concern with consensus and the articulation of common values, the sequence of study, deliberation and decision which characterised the Assembly's operation, and the stress on openness, accountability and public consultation, have all impressed those who study public participation in the political process. For some, a citizens' assembly is a new way of involving citizen voters in public decision making in policy areas extending beyond electoral reform. For others, it demonstrates the power of participatory democracy and the need to transform existing representative institutions. Whether the concern is exploring new modes of citizen involvement in public policy, or reworking ideas of representative democracy, the Citizens' Assembly has become the focus of a great deal of attention.

The third issue raised by the Citizens' Assembly—and the one I am most concerned with today—is the reason why such an Assembly was felt to be necessary. The political process in Australia differs little from that of British Columbia and the style of parliamentary politics is certainly no less combative and abrasive than that in Canada. And yet there have been few demands for electoral reform in Australia and dissatisfaction with the parliamentary process has not prompted calls for wholesale review of the style of parliamentary government. I believe that the explanation for the apparent satisfaction with representative government in Australia stems from the two institutional differences I mentioned at the beginning of this talk—the tradition of strong, elective parliamentary bicameralism, and the absence of a constitutionally entrenched bill of rights.

### *Bicameralism*

Let me start with the less contentious of the two. The origins of bicameralism in Australia were shaped by the broad franchise granted to the Australian colonists when they gained self-government one hundred and fifty years ago. The political establishment was apprehensive that governments based in a popularly elected lower house might propose radical legislation and that, whatever other arguments there were for an upper house, a powerful conservative brake on the lower house was a political necessity. The colonies differed in how the members of the upper house were to be selected, but the legislative powers given to upper houses were extensive and included the power to block financial legislation and veto constitutional change.

As a recent article by Bruce Stone has shown, state upper houses (and the Commonwealth Senate which copied their design) have travelled a long way from their origins. From being seen by many as houses of conservative obstruction, they sank into political irrelevance by the 1950s only to emerge in the second half of the 1900s with justifiable claims to be the more representative and responsive of the two chambers of parliament. The adoption of proportional representation has played a critical role in this transformation by frequently removing control of the upper house from both the government and the opposition parties and giving the balance of power to minor parties and independents. This has enabled upper houses to play an active and autonomous role in scrutinizing legislation and monitoring executive activity.

Governments are dependent for their existence on majority support in the lower house and, as consequence, disciplined political parties ensure that the executive controls the parliamentary process and stifles any signs of parliamentary independence. This is not to deny that lower houses have an important function as a place for debate over issues of current political concern, and as a forum for testing leaders of both the government and opposition parties. But lower houses do not give an opportunity for using the formal machinery of parliament to do what parliament is supposed to do—force governments to justify their policies and to amend them if parliament requires.

This is where upper houses have played a critical role. By providing an avenue for independent parliamentary scrutiny, upper houses provide an opportunity for the direct involvement of interests other than those of the governing party in the framing of legislation and public policy. While governments loathe this interference in what they regard as their

right to govern without unwelcome parliamentary questioning of their policies, upper houses are a public demonstration of the ability of parliamentary institutions to represent a diversity of interests. And the differing electoral systems between upper and lower houses permit differing patterns of representation which, by itself, enhances the claims of parliament to speak for the whole community.

In this way, upper houses have given a visibility and legitimacy to the parliamentary process that is usually denied to unicameral parliaments. It was striking to see how much media commentary on government control of the Senate after the 2004 election—assuming that all National Party senators are part of the government—viewed the prospect of the loss of effective Senate scrutiny as a loss of a critical aspect of the parliamentary process and, perhaps surprisingly, as a source of danger for the government. Governments are more error-prone without effective parliamentary scrutiny and, more to the point, the public has less reason to pay attention to parliament or to view it as forum for debating public policy.

Canada has no tradition of strong, elective parliamentary bicameralism. Five of the provinces have had second chambers but none was fully elective and all were abolished by the 1960s. The Canadian Senate has been a nominated house since its establishment in 1867 and, although there is perennial talk of its reform, the Senate remains a creature of the national executive and a source of patronage appointments for the prime minister. On those occasions, as now, where the government faces a hostile partisan majority in the Senate, its lack of political legitimacy severely limits the Senate's ability to use its extensive powers to thwart the government.

The lack of elected upper houses has meant that the Canadian public equates parliament with an executive controlled, party dominated institution in which the idea of community representation has been lost in the continuous struggle between government and opposition. This pattern is replicated across all of Canada's provincial parliaments. It is hardly surprising that governments, when they wish to demonstrate their concern with public disenchantment with the parliamentary process, have turned to extra-parliamentary inquiries for advice on parliamentary and electoral reform. And it explains the overwhelming public endorsement of the Citizens' Assembly when it appeared to embody all the desirable characteristics which the parliamentary process lacks.

So, strong elective bicameralism inoculates the parliamentary process against the most egregious forms of executive dominance of parliament and, in so doing, helps to preserve public faith in representative institutions. There are, of course, no guarantees and it is one of the ironies of Australian politics over the last fifty years that upper houses have blossomed at the very time that the pressures for executive dominance have been growing. Canada has not been so lucky.

### *Parliament and the judiciary*

But what about Canada's constitutionally entrenched Charter of Rights and Freedoms adopted in 1982; hasn't that operated to check the excesses of executive government? The answer is a qualified yes. The list of individual and group rights in the Charter has provided an avenue to strike down legislative provisions and limit government action in a way which had not been possible before. This has given Canada a much larger component of consensus politics by greatly increasing the scope for minority veto of government action and requiring judicial sanction for a wide range of public policy issues.

But this change has had a number of effects on the parliamentary process; the monopoly of legislative and executive authority in areas of social policy has been broken, the visibility and political salience of the judiciary has been increased, and, to the extent that the Charter is a national instrument whose final interpretation rests with a national Supreme Court, there has been a transfer of power from parliamentary politics in the provincial sphere to judicial politics in the national sphere. The biggest loser has been the executive branch of government. It is not that judges are constantly looking over the shoulders of provincial premiers—only a minute proportion of governmental activity is scrutinized by the courts—but that there is a rival institution to speak to the public on behalf of citizen voters and claim constitutional legitimacy. After more than twenty years experience with the Charter, it is clear that the settled pattern of majoritarian parliamentary politics has been disturbed; there is now a more limited scope for mass politics and those institutions which rely on public endorsement through elections. Even if the Charter has done no more than change the way governments consider the consequences of legislative action, it is hard not to see the Charter and the potential of judicial involvement across the whole ambit of public policy, national and provincial, as major contributors to a sense of uncertainty and a loss of legitimacy felt by governments and parliaments. Where it can be deployed, the politics of individual rights can trump the politics of collective choice.

The result has been further erosion of the political legitimacy of the parliamentary process. This is, perhaps, an inevitable consequence of a bill of rights in a parliamentary system unless the parliament is sufficiently representative and politically self-confident to challenge the judiciary when parliament believes the judiciary to be mistaken in its judgement or at odds with the clear choice of the electorate. This is not the case in Canada where considerable deference is paid to the Supreme Court of Canada; to suggest that some of its decisions are unreasonable or wrong-headed is regarded as heresy by large sections of the political class. The courts have gained a large measure of the public support which used to attach to parliament as the forum in which public policy decisions are made.

### *Citizens' assemblies and parliamentary reform*

The rehabilitation of parliamentary legitimacy in Canada could be achieved by extensive reform of the parliamentary process to ensure, for example, representation of a wide range of interests, a legislative process which required the consent of parties other than the governing party, and a parliamentary committee system controlled by non-government majorities. But to list these requirements is to indicate why such changes are unlikely; each strikes at the current style of majoritarian politics and severely limits the power of the executive in a realm which it sees as its own.

Nonetheless, Canadian governments have become aware that some kind of change is required. But, as we have seen, Canadian governments are in a bind. At the provincial level, there are no upper houses to use as surrogates for lower house parliamentary reform, and at the federal level, the difficulty of reforming of the Senate is compounded by questions of federal representation. And the prospect of using even the limited opportunities provided by the constitution for partial constraints on the scope of judicial activity would be highly contentious.

All that is left is electoral reform of the lower house of parliament. But even moderate change in the system of representation is regarded with great apprehension by current governments and the parties which support them. The adoption of electoral systems based on proportional representation would mark a major shift from majoritarian to consensus politics, a change which would have major implications for the style of parliamentary government. This why the experience of the British Columbia Citizens' Assembly on Electoral Reform is critically important and widely celebrated. It has reaffirmed the belief in the ability of ordinary citizens



to deal effectively with complex constitutional issues, and provided persuasive justifications for a move away from the current system of executive dominated politics. In so doing, the Citizens' Assembly has reminded Canadian governments that there are broadly popular solutions to the decline in parliamentary legitimacy. The challenge is for a government to be brave—or foolish—enough to take the plunge.

And the Citizens' Assembly is a reminder to Australians about how fortunate most of us are to have avoided two, once fashionable, alterations to our governmental system; the abolition of upper houses and the adoption of a constitutionally entrenched bill of rights. Citizens' assemblies may well be set up in Australia, but it will be for their inherent virtues not because of the decline of parliamentary legitimacy.

Campbell Sharman

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