Reflections on the Path to Senate Reform

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In a speech to the Senate in 1982 Eugene Forsey noted that "almost from the morrow of Confederation, there has been talk of Senate reform, so much so that when, in 1925, Prime Minister Mackenzie King put into his election platform a characteristically vague promise on the subject, Arthur Meighen, the Conservative leader, commented scornfully: 'So that old bird is to be provided with wooden wings and told to fly again!'"
This article looks at the question of Senate Reform and suggests how reform can best be approached over the next few years.

Scarcely seven years after Confederation, the Senate of Canada was already the target of criticism and calls for its reform. On April 12, 1874 the House of Commons considered the following resolution by David Mills, subsequently Minister of Justice and Member of the Supreme Court:

> "That the present mode of constituting the Senate is inconsistent with the Federal principle in our system of government, makes the Senate alike independent of the people, and of the Crown, and is in other material respects defective, and our Constitution ought to be so amended as to confer upon each Province the power of selecting its own Senators, and of defining the mode of their election."[1]

Mr. Mills, though among the first, would certainly not be the last Canadian to call for reform of the Senate. Indeed, in the 118 years that followed his motion[2], the Senate became the lightning rod for the discontents and growing pains of Canadian federalism. To some extent Senate reform has come to represent a panacea to the difficulties first of building, and then of sustaining, a vast and disparate federation.

Federalism, by its very nature, embodies an element of tension between the opposing forces of unity on the one hand, and demands for regional recognition or "diversities", on the other.[3] In the case of Canadian federalism, this tension has been a defining feature of Canadian national politics. A reformed Senate is perceived as the singular federal institution through which that defining tension might be exorcised, or at least assuaged – the improbable fulcrum across which regional antagonisms and federal-provincial aggravations might be weighed and resolved.

And yet, despite all the proposals for Senate reform, there has been very little consensus as to what that institution should be and, what if anything, it should do. In

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fairness, the question of the constitution and powers of second chambers is not an easy one.

> How to constitute a Second Chamber based on any direct form of responsibility which, at the same time, would contain the 'checks and balances' which even the most democratic nations consider necessary to give stability and continuity to popular government has been the Gordian knot of the world's statesmen.[4]

Canada's situation is not unique. "The reality is that, whatever the reason, senate reform is a perennial item on the political agenda of parliamentary democracies..."[5] The Senate of France is presently the focus of a reform proposal[6], and in the United Kingdom the reform of the House of Lords is the object of a study by a Royal Commission.

There has, however, been one enduring and consistent element of the Senate reform 'movement': the assumption that effective, meaningful reform of the Senate would require a constitutional amendment. This has been the prevailing and unquestioned wisdom. Add to the absence of consensus, the extreme difficulty of amending the Canadian Constitution, and we see immediately why the Senate has remained fundamentally unaltered since 1867. Despite endless criticism, repeated historical calls for reform and even abolition, there have been only two significant changes to the constitutional provisions for the Senate: the establishment of a retirement age in 1965; and the qualification of the requirement for the consent of the Senate under the constitutional amending formula adopted in 1982. Indeed, we might say that the existing Senate was validated as recently as 1982, when the chance for constitutional change was not pursued.

In the past thirty years alone, there have been at least 26 proposals for Senate reform. Each of these ended in failure, or died on the drawing board. The last of these proposals, contained in the Charlottetown Constitutional Accord, would have significantly altered the existing Senate. The Charlottetown Accord – along with its provisions for Senate reform– were defeated in the 1992 national referendum, thus bringing to an unequivocal end the era of "megaconstitutional politics" that had defined the three previous decades of intergovernmental relations in Canada. This heralded, in turn, an extended period of non-constitutional 'renewal'. Ironically, at a time when Canadians and their governments have displayed an utter aversion to all things constitutional, popular support for radical change to the Senate and for abolition have reached an all-time high, despite the fact that both of these would require constitutional amendment.[7]

In the first century after Confederation, there were significant non-constitutional adjustments to the distribution of power between the federal and provincial governments. With the power of formal constitutional amendment residing in a foreign Parliament, non-constitutional adaptation became the cornerstone of Canada's evolution[8]. Since the defeat of the Charlottetown Accord in 1992, the federal government has sought to renew federalism through intergovernmental agreements and mechanisms. Some broad-based changes have been effected without recourse to the complex constitutional amending formulae, and their requisite levels of consent.[9] I believe that the same dynamic – that of non-constitutional evolution - should be applied to the Canadian Senate. In order to do so, it will be necessary to reflect on the origins, record and current functioning of the Senate, and the institutional and political context within which it must function.

Toward that end, I am undertaking a book of essays on the subject of the nature and role of the Canadian Senate. The purpose of the work is to review the role of second chambers in national legislatures generally and the history, evolution and adaptability of the Senate since 1867 in particular, within the context of Canada's bicameral Parliament and system of responsible government in a federation operating as a constitutional monarchy. By inviting Canadian academics to write the various essays, I hope that this debate might be opened up and a new mindset applied to the contemplation of the Senate, which might in turn further a broader understanding of the institution and the system within which it functions.

> ***In order to advance the debate, we must set aside the intellectual straight-jacket of the Constitution and contemplate the ways in which Canadian institutions might effectively meet contemporary needs through traditional self-adaptation and conventions.***

A project to address the lack of understanding of the Senate and its potential would have to address a number of issues, several of which are briefly outlined here.

The Role of Second Chambers in a Federal System of Parliamentary Government

Bi-cameral parliaments and legislatures are a feature of most mature democracies, certainly of the G7 countries, and they are essential to the effective operation of most federal states – the United States, Australia, Germany and India, for example. There are only three federations

with a unicameral national legislature: the United Arab Emirates, St. Kitts and Nevis, and Micronesia.

In Britain the development of responsible government yielded a new dynamic between the House of Lords and the House of Commons. In the 19th century this was reflected in colonial institutions as well, and had an impact on the relationship proposed between the Canadian Senate and the House of Commons. Although both Canadian federal Houses were given the same privileges and powers as the British House of Commons, it was clear from the outset that the Canadian House of Commons would enjoy pre-eminence as the "confidence chamber". These institutional imperatives are different than those governing American institutions, as the United States is a republican system, characterized by the separation of powers, which operates on an overarching institutional design of checks and balances among the executive, legislative and judicial branches of government.

The Foundations of the Canadian Senate

An historical overview, with the theme of evolution and adaptation as its underpinning, is essential to an understanding of the role and *potential* of the Senate. History lends a natural emphasis to the experience of the elective Legislative Council for the United Provinces of Canada, the ancestor of our Senate, as well as to the Confederation Debates on the subject of the Senate.

The Fathers of Confederation gave inordinate consideration to the subject of the upper chamber, precisely because of the integral role they intended it to play. The primary arguments for and against an appointed Senate at the time of Confederation were: the removal from the people of their power to select their own Senators[10]; the increase or decrease in the probability of a dead lock with an appointed Senate; and, the possibility of the Senate becoming too party-driven if it were elected. Some members further argued that the nominative character would create an irresponsible institution, out of touch with the best interests and desires of the citizenry. All members nonetheless agreed that the role of the Senate was to be a check on the House of Commons.

The experience in the United Province with a partially elected Legislative Council contributed significantly to the choice of model for the Senate. Sir John A. put the following case: "The arguments for an elective Senate are numerous and strong... but there were causes – which we did not take into consideration at the time – why it did not so fully succeed in Canada as we had expected."[11] MacDonald dismissed the argument that the independence of the Senate would cause a deadlock between the two Houses, saying that there was "a greater danger of an irreconcilable difference of opinion between the two branches of the legislature if the upper be elective, than if it holds its commission from the Crown."[12] Mr. Allan[13] further reminded delegates that the only instances of deadlock had occurred since the elective principle had been implemented.

These early considerations have continued to play their part in the evolution of the Senate and its role. Ultimately, this historical examination would attempt to analyse to what extent the Senate has adapted its legislative role and functions over the years, to the needs of the times.

Survey of Criticisms of the Senate

Such an examination would serve to focus the discussion by identifying the genuine problems that need to be addressed by non-constitutional reform initiatives. We should not try to hide from the fact that the existing Senate, as one House of Parliament, certainly needs to be improved, but that recognition should not lead us to blindly accept as legitimate any and all criticisms of the institution. Senate reform should be considered in conjunction with reforms to other federal institutions, namely the House of Commons and the powers of the executive government.

Abolition of the Senate is an "intellectual shortcut" to avoid discussing the fundamental question of whether or not a unicameral form of government is a feasible one for the Canadian federation. Some very real questions arise from the contemplation of abolition – questions which are seldom, if ever, addressed – such as: What benefits would flow from such a radical change?; How would the function and composition of the House of Commons have to change?; How might a unicameral system provide for check and balance on the executive and on the legislative role of the House of Commons, given the extensive power the executive has developed over the House by virtue of the party system?[14]

It is also important to consider whether the Senate is the best mechanism for addressing needs which are unmet and to anticipate the impact that specific reforms would have throughout the political process – and whether these would be compatible with the continuing workability of Canada's Westminster model of government. In short, there is a need to distinguish real deficiencies from commonplace myths about the Senate, its members and its role in our political system, taking into account that the provinces of Canada have considerable legislative autonomy.

Evolution of the Senate

The Senate has remained primarily a legislative body, but has adapted itself to perform a role complementary

to the one performed by the House of Commons. The most recent "incarnation" of the Senate emerged in the period from 1984-1993.

> In this 1984-1993 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.[15]

The Senate was designed to act as a check on the power of the executive [16]and yet it is roundly criticized for using its powers because it is not elected.

An analysis of the "modern" behaviour of the Senate will address the dual criticism that the Senate is both too active, and not active enough, and determine whether the resulting conclusions hold true for periods of government minority as well as for periods of government majority in the Senate.

Analysis of Legislative Work and Special Studies

A comparison of treatment of legislation by each chamber will help reveal how the Senate can most usefully contribute to the legislative process. Individual rights, minority language rights and regional representation are examples of themes which might be the focus of research. Such analysis would elucidate the distinct function performed by the Senate in the study of legislation.

In some cases, the work of Senate investigative or "special" committees has paralleled the depth and impact of Royal Commissions. Charter 88, the pressure group committed to advancement of democracy in Britain, recently proposed in its submission to the Royal Commission on Lords Reform that the reformed House of Lords should follow the model of the Canadian Senate. Charter 88 noted that the Senate's committees investigate major issues and bring about important changes in policy, and does so for less money than Royal Commissions. From the Land Use Report to the Report on the Mass Media to the Special Committee on Euthanasia and Assisted Suicide, to the Study of rBST, how do Senate studies compare to Royal Commissions over the last several decades? A comparative analysis should include the depth of research, the analysis of public policy, the cost of performing the inquiry, the involvement of the public. In addition the institutional memory, legislative role and long tenure of senators enables them to follow up and help implement recommendations many years after the original study.

Improvement of the Senate by Non-Constitutional Means

It is important to draw some conclusions about the roles of the Senate, and use this information as a basis for the functioning of the institution. For instance, if diversity of representation is identified as an important character of the Senate, we might examine options for fulfilling that role through means other than formal constitutional amendment. If its legislative role is identified as primordial we would want to look at its relationship with other parliamentary institutions to see how the Senate can be an effective check and complement, rather than a duplication of the House of Commons.

> ***I believe it is time to stop denouncing the Senate with facile criticisms, and actually do something about it.***

Whether or not one accepts that the Senate is an integral part of the parliamentary process in Canada – as I do – one has to realize that constitutional change may not be possible in the foreseeable future. We must therefore decide whether we would like the Senate to play a constructive role and, moreover, determine what that role should be. In order to do that we need to engage in a different kind of debate about the Senate, that is to say, one that is rational, intellectual and productive. This, in the end, may prove to be the greatest challenge yet.

Notes

1. See Canada, House of Commons, *Debates*, April 12, 1874. Senate reform was also the first topic of discussion at the Dominion-Provincial Conference in 1927. The provinces took sharply divergent positions on the question of the constitution of the Senate, and no consensus was reached
2. From 1874 until the death of the Charlottetown Accord (the last Senate reform package) in 1992.
3. See William S. Livingston *Federalism and Constitutional Change* (Oxford at the Clarendon Press, 1956).
4. Sir George Ross, *The Senate of Canada: Its Constitution, Powers and Duties Historically Considered*. (Toronto: The Copp, Clark Company, Limited, 1914), p.95. Ross also cites Professor W.E. Hearn: "There is, perhaps, no more difficult question in practical politics, or one towards the solution of which the political thinker can give less help, than that of forming in a new country an Upper House."
5. Samuel C. Patterson and Anthony Mughan *Senates : bicameralism in the contemporary world*, (Columbus: Ohio State University Press, 1999), page 340.
6. See Jean Cluzel, *A propos du Sénat et de ceux qui voudraient en finir avec lui*, (Paris: Editions l'Archipel, 1999).

7. A May 1998 Angus Reid poll showed that very few Canadians wanted to leave the Senate as it is: 43% of those polled preferred that the Senate be reformed, while 41% supported abolition, and 11% supported the status quo (*Canadians and the Senate*, May 11, 1998, Angus Reid Group Inc.). A subsequent report by the Canada West Foundation argued that support for abolition has occurred as a result of the total collapse of support for the status quo, and the decline in the number of people with no opinion (Canada West Foundation, *Taking a Look: Public Opinion in Alberta and Canada on Senate Reform*, Sept. 1998, p. 9).
8. From 1867 to 1982, there were only 20 formal amendments to the *British North America Act*.
9. There have, of course, been a few *bilateral* constitutional amendments since 1982, i.e. in education (Quebec), Terms of Union (Newfoundland), fixed link (Prince Edward Island), and the equity of status of the two linguistic communities (New Brunswick). There has also been one multilateral amendment relating to aboriginal rights.
10. The "Democratic" principle.
11. *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces.*, 3rd Session, 8th Provincial Parliament of Canada (Quebec: Hunter, Rose & Co.), 1865, p.35. These causes were two-fold: the "enormous extent of the constituencies and the immense labour..." (p.35) needed by those seeking election; and, the expense of seeking election was so great that men fitted for the positions in the Council were prevented from running.
12. *Ibid.* p. 36.
13.. Member (York, Upper Canada) of the Legislative Council of the United Provinces of Canada.
14. On this subject see, Donald J. Savoie, *Governing from the Centre*, University of Toronto Press, 1999.
15. C.E.S. Franks, "The Canadian Senate: Not Dead Yet, But Should it be Resurrected?" in Patterson and Mughan, *Senates*, 1999, p. 139-140.
16. Even at the turn of the century, the Senate was regarded as such a check, as noted by Sir Clifford Clifton: It must also be remembered that, under our system, the power of the Cabinet tends to grow at the expense of the House of Commons. ... The Senate is not so much a check on the House of Commons as it is upon the Cabinet,and there can be no doubt that its influence in this respect is salutary." ("The Foundation of a New Era", in J.O. Miller, ed., *The New Era in Canada*. London, 1917, p. 50.