

# *The Second Chamber in the Canadian Federation*

*R.M. Burns*

**T**he present interest in reform of the Canadian Senate is not a product of any newly awakened concern for parliamentary reform. If it were we might be encouraged to hope that as a by-product we might find some political interest in electoral reform instead of such interest being confined to quite a small academic circle. The concern with making the Senate a more effective body of regional representation is almost entirely the result of the growing fragmentation of Canada as federal and provincial political leaders vie with each other for a place on the national news. It is not that such interest is unjustified or that regional concerns are without validity, but rather that the whole process has become confused and misdirected. It is time for us to seek out some first principles as well as a few essential priorities before we commit ourselves to the future.

Originally, second chambers or upper houses were designed to retain power for the ruling classes, faced with the growth of the popularly elected assembly or lower house. A second chamber could forestall the acts of the assembly when its actions were considered ill-advised or when they trespassed upon established interests (often regarded as much the same thing). In a federal system an additional function is brought into operation. Given that the main legislative body is popularly elected on a basis of national representation by population, the second chamber is seen as a means of bringing greater political balance for the less populated units of the federation.

With the growth of regional interests and prejudices in modern federal systems, interest in second chamber reform has been concentrated increasingly on the regional purpose. The function of review or "sober second thought" has tended to fall into the background as existing bodies have often failed to exercise this function either with objectivity or consistency.

The problem we face is two-fold. How can a national second chamber aid in the rationalization of both regional and national needs and of special issues while at the same time providing an objective scrutiny of legislation fundamentally national in nature?

In their consideration of a Canadian Senate, the Fathers of Confederation were strongly influenced by their knowledge of the role of the British House of Lords. They were, as well, fully aware of

the importance of the second chamber in a federal system as representative of regional interests in the national government. But they also viewed the American Civil War as being caused by "state rights" which made them suspicious of too great concessions to provincial powers in matters of national import. They attempted to reach an acceptable compromise between national and provincial interests by way of regional divisions for second chamber representation. But it was soon apparent that they had been more successful in devising a chamber of review than one that could effectively reflect regional concerns. A workable solution to this latter part of the problem remains a constant objective.

In Canada over the years, intermittent discussion of Senate reform has been concentrated more on the method of selection and the consequent lack of any positive role for the Senate than on its short-comings as a regional (provincial) representative in the national parliament.

## **Selection: The Present System**

The present method of appointment by the Governor-General (actually by the Prime Minister in consultation with the party organization) has resulted in the Senate becoming something of a house of political refuge or retirement. Certainly this is how it is generally perceived by the public. Geographically it is unbalanced in representation. Politically it is unrepresentative of important elements of political belief in Canada.

This method of selection has resulted in a body ill-suited to the understanding of the rapidly changing facets of Canadian life. But even if such an understanding existed, the Senate would be largely ineffective in a conflict with the policies of a government supported by a majority in the elected House.

The end result of the present process is that members of the present Senate generally tend to lose any continuing character as regional representatives. They become residents of the Red Chamber rather than of the provinces from which they came. To a large extent they are insulated from most influences beyond their immediate political scene. They owe no political loyalties and party lines are not as tight as they are in the Commons. But these loyalties, nevertheless remain and are a greater force than any regional attachments. Even if this were not so, the lack of an active political base would make members ill-equipped to oppose the House effectively on issues of real importance, regional or otherwise. While the Senate has acted on occasion with distinction in

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special situations and even sometimes as a body of "sober second thought", its impact as a house of regional representation has been minimal.

## Selection: Alternative Methods

There are some other obvious alternatives available to the present system of federal appointment in which the essence of the present dissatisfaction is found:

### By Joint Power of Appointment

It has been argued that what is needed is a voice representative of provincial interests. Proposals have been made for equal sharing of the power of appointment by the two levels of government. Various methods have been offered as in the original federal plan in Bill C-60. While the system of joint appointment might be the most easily adaptable to existing conditions, many observers question whether the sharing of the power of appointment would accomplish much in providing more effective regional representation. In actual practice we might merely substitute confusion for inaction. Varied provincial interests might move in and out of floating coalitions among themselves and/or the federal appointees. True, there would be a greater regional voice but it would often be distorted and ill-expressed. There is neither reason to expect a higher calibre of appointments from such a process nor an elimination of the shortcomings of the present institution. Joint appointment does not seem likely to provide any useful answers.

### By Exclusive Provincial Appointment

Many of the same judgments apply to exclusive provincial appointment. Choice by the premiers instead of by the Prime Minister might result in a greater concern for regional interests, at least until the appointees were acclimatized to the atmosphere of the Red Chamber. But unless the appointments were of a higher calibre (which there is no reason to expect) the problems now experienced with a politically appointed second chamber would remain.

In the search for alternatives, the example of the Federal Republic of Germany in its selection of the Bundesrat has attracted considerable interest. Here the *laënder* (states) are directly represented in the second chamber by their executives. Insofar as matters of fundamental concern to the *land* governments are involved such representation by direct governmental participation has much to recommend it. In this way the desired criterion of popular election is also present, if indirectly. A line of responsibility is provided which is a direct link between those responsible for the affairs of the regions and those who hold the legislative powers in the national government.

But because a system works in one country is no reason to guarantee that it will work in another, even though there is much that can be learned by example. Historical, political, geographic and national characteristics tend to be more homogeneous and better disciplined in West Germany than in a fluid and diverse society such as ours. The public attitudes which in the past have made for effective co-operation between the Bundestag and the Bundesrat certainly do not now exist in Canada.

In the post-war years of its new existence, the Federal Republic experienced a political climate which made co-operation essential. A similar need, although much less urgent, made feder-

al-provincial co-operation much easier in Canada in the 1940s and 1950s than it has been since. The current situation in West Germany, however, appears to have deteriorated as the problems of opposing political aims in the two houses have resulted in a breakdown of the former harmony. With Canada's current regional fragmentation a continuing harmony between a provincially controlled second chamber and the national government cannot be taken for granted.

Various attempts have been made to adapt the German system to Canadian conditions. While the proposals vary in detail, essentially they provide for provincial representation through direct appointment to the second chamber of representatives of the provincial government. They would vote *en bloc* on matters of direct provincial concern over which they held an absolute veto. Other matters would, in most cases, be governed by a suspensive veto only. The terms of provincial government representatives would generally coincide with that of the government appointing them.

When a proposal along these lines was made by British Columbia in 1978, the Government of Canada showed some interest. Other provinces received the idea more coolly. Since that time provincial interest has increased substantially, but there is now reason to wonder whether the national government can consent to such provincial control of its constitutional powers. Some consider the procedure inconsistent with basic federal principles. And while it can be argued that a limited provincial voice in the second chamber is necessary, to many there can be little justification for giving power to the provinces over matters specifically national in character.

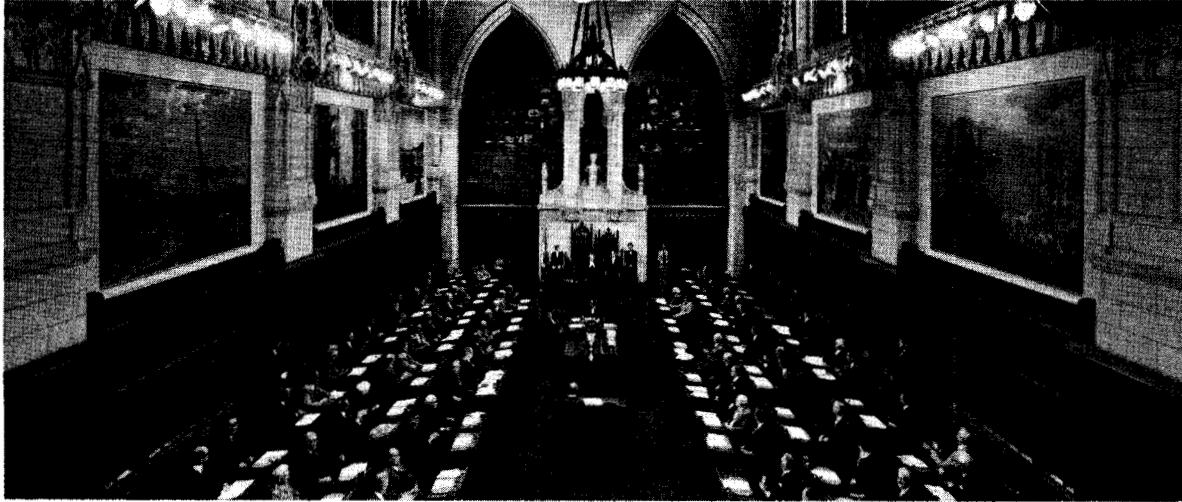
Consent might be more easily forthcoming if the role of a provincially controlled second chamber was limited to specified areas of direct provincial involvement such as the use of the discretionary power, the spending power, federal legislation in matters under provincial administration, etc. These are often referred to as Category A powers. Responsibility for matters primarily of national interest (known as Category B powers) could be left exclusively to the Federal Parliament or alternatively as the British Columbia revised proposal suggested, to a jointly appointed body.

This situation was tacitly recognized in a report of the Continuing Committee of Ministers on a New Upper House dated September 8-12, 1980. In it a new institution was proposed representative of all provinces equally, with the Government of Canada having the right to appear before it, but not to vote.

The powers of this institution, to be known as the "Council of Provinces", would cover a limited field, essentially of Category A items, with other related interests. A two-thirds majority would be necessary for approval of matters coming before it. Those concerned with French language or culture would require the acquiescence of Quebec.

An important aspect of the report was the limitation it proposed for provincial powers. No mention was made of any power of review of Category B matters — that is those primarily of national responsibility and concern.

No further action appears to have been taken with respect to these proposals by the first ministers. Its importance lies in its recognition of the limits of provincial interest. There is also a strong



**Senate reform: much of the debate is over who will fill these seats and how they will be selected** (National Film Board, Photothèque)

similarity to certain existing institutions in its "Council of Provinces", such as the First Ministers' Conferences and those of the provincial premiers.

In considering the various ways in which a second chamber might be formed, it is essential to remember that it is an integral part of the national governmental structure. The confidence of the elected members (at least a majority of them) is necessary to the life of a government. While the second chamber cannot directly affect a government's claim to office, any system of selection which imperils that necessary confidence and which fertilizes dispute, must be regarded with concern. Even though there is no direct effect there can be important indirect pressures. The extent to which these will operate will depend on the breadth of the powers involved. If these are limited to acts of the central government which directly affect the provinces (Category A), the authority of Parliament, while constrained, will not usually be seriously infringed upon. It is a practical acknowledgment of the complex nature of the federal system under which we operate.

But if the powers of a provincially appointed second chamber, particularly one that is directly representative of the provincial government, go beyond this (even if only to a suspensive veto on Category B powers), one might well question the real extent of the national government's powers to initiate and implement policies which might be contrary to the wishes of some, at least, of the provinces.

The British Columbia proposal of 1978 attempted to meet this by making any second chamber vote on Category B matters a free vote, unfettered by the controlled bloc voting of Category A. But, given the nature of appointment, it is questionable how effective this freedom could be on matters contrary to the policies of the provincial government which made the appointments. To some extent the situation could be remedied by making provision for tenure for a specific period for members who were not of the provincial government itself. The area of government influence would remain. A revised British Columbia proposal for equal federal representation on Category B matters would increase federal

authority but might also provide an added opportunity for friction, if past experience is to be relied upon.

#### **By Direct Popular Election**

There is a good deal of support for the direct election of the second chamber under some form of popular franchise. More often than not, this seems based more on democratic sentiment than on any base of functional understanding. What has not yet been clarified or perhaps even considered sufficiently in this debate is whether we are seeking to develop another level of representative government or what is essentially an instrument of control within the governmental structure that is already in place.

Insofar as Category A matters are concerned we are looking for an informed influence in the protection of certain basic provincial interests not some new elected legislative body. It may be that this influence could be more effectively exercised by those who have some direct link to the responsibility (such as members or appointees of the provincial governments) rather than by those whose election could be based on other and often unrelated considerations. The influence of party loyalties cannot be ignored. We might sometimes find a lack of political harmony between provincial governments and those elected to protect provincial interests. The results could add to the paralysis that often now seems to pervade federal and provincial relationships.

This is a problem of no small significance in our parliamentary form of government. We have only to consider experience with the Australian Senate to cause us to wonder whether popular election to the second chamber can provide any useful answers. In the Australian case, some of the delegates to the original Constitutional Committee saw the development of partisan political influences as over-riding the regional responsibilities. Experience has borne them out, for a recent study shows that on nearly all occasions elected Senators have voted according to their party affiliations rather than according to their states. How serious this can be for effective operation of the national government was illustrated by the crisis in Australia of November 1975. On that

occasion the Senate refused to pass supply on the basis of considerations largely of a partisan nature. Given the fragmented nature of Canadian party politics, such a situation here is not hard to envisage. The life of a government could be one of continuing uncertainty, if it were to be responsible to two elected houses.

There are a number of side influences which must also be considered. From the Federal Government's point of view, an elected second chamber has some positive attractions despite its dangers for the effective operation of the parliamentary system. Emphasis on its popular democratic form could diffuse the growing regional drive for important direct provincial power over areas of federal authority. Much would, of course, depend on how the elections turned out, whether on the side of the government or of its opponents.

From the provincial side it is hard to see what attractions an elected chamber might have. Regardless of how it was elected and regardless of where the political control lay, the provincial voice would be beyond the direct control of the provincial government and often beyond its influence. Even the activities of the federal-provincial conference structure could be seriously weakened by the existence of an elected second chamber.

### **By Means of An Electoral College**

An electoral college, or some such institution, which would be charged with the selection of the best people available from the community at large, has been suggested as a way of insulating the second chamber from direct partisan influences. It could be selected in a number of different ways: by unilateral federal appointment, by joint appointment or by popular election. Aside from the opportunity for increased objectivity, an important consideration, most of the same factors would apply as in direct election. However, in the case of popular election of the electoral college, any political challenge to the supremacy of the lower house by a second chamber so chosen would be less evident than where direct election of members had taken place.

### **Conclusions**

Many will question the wisdom of giving provincial governments any extensive powers over national government activities. These are regarded as a proper responsibility of Parliament which does, in fact, enjoy a legitimate claim to regional representation in areas of its constitutional interests. Admittedly such a claim might be more persuasive if necessary electoral reforms to provide a better balanced representation in the House were to be undertaken. It might make more sense to remove from the Constitution any federal powers which infringe upon basic provincial rights.

There does not appear to be any easy answer. A second chamber that can perform as a satisfactory agency of review is not likely to be appropriate to the exercise of regional representation. Perhaps the answer lies in not asking one body to perform the two tasks. The solution may lie in limiting provincial participation to Category A matters. If a body representative of provincial governments were to be empowered with an absolute veto under some pre-arranged majority requirement such as two-thirds of the provinces representing fifty per cent of the population the basic needs of the provinces would be met. Such ancillary powers over appointments, as have been discussed, could be added as necessary.

There will be difficulties in defining what should constitute Category A matters. But these would seem to be quite few in number and the answer should not be beyond us if we want to find it. Perhaps if these matters could be clearly defined and entrenched in the Constitution, there would be less need for a special body to oversee the protection of provincial rights. Until a body of law is built up, however, some judicial body would have to be empowered to decide disputes. Whether this should be the Supreme Court of Canada or some form of constitutional court would have to be decided.

If we look more closely at what we already have, we may discover that a new body to protect provincial interests is not really required at all. One may already exist in the on-going system of federal-provincial conferences at various levels of authority. If given constitutional recognition and provided with the proper support structure, the Federal-Provincial Conference of First Ministers could fill the role at least as effectively as any newly established chamber. It would have the additional advantage of having established federal and provincial governmental participation in the discussion and resolution of matters at hand. The powers and voting procedures would have to be worked out and there would undoubtedly be difficulties, particularly in the fixing of the extent of federal voting powers. But matters that would be before the conference would be of national impact and an active federal role rather than a purely advisory one would be essential to success. If such federal participation cannot be agreed upon, the rules could be so ordered that federal participation would be limited to where matters of purely national concern were involved.

Such an arrangement might appear to require extensive bureaucratic organization, but that is unlikely to be any more extensive than that needed by any new parliamentary body. It should be remembered that the German Bundesrat, on whose example so much of current thinking rests, has an extensive structure of bureaucracy. The basic activities of the Bundesrat itself are largely concerned with the approval of the recommendations of its support organization (other than on purely political questions). Some observers have suggested that the Bundesrat is really more a branch of the executive government than a true legislative body.

Under such a system, responsibility for "sober second thought" could be left to the present Senate, to some modification of it, or in case of its abolition, the Commons itself could assume such responsibilities through a modernization of its procedures. This is an area in which provinces need have no direct involvement. For while they are obviously concerned in the results of national policies, it is in protection against federal actions in areas infringing upon their basic interests that they are most concerned. If that is not the case the whole concept of the federal division of powers is called into question.

If there is any lesson to be learned from our search of an acceptable solution, it is that there are no final or perfect answers to the problems of a federal system. Simplicity and clarity are essential assets and far too many of the proposals for second chamber reform are so complex that there is no way of knowing just what their effect will be in actual practice. The best we can hope for is a system that will work if we really want it to. "For forms of government let fools contest; whatever is best administered is best" (Alexander Pope)