

An Appointed Chamber will Always Lack Credibility

Senator Michael Pitfield

Why reform the Senate? The senate has done a good job in legislative review, and in the technical sense, in my view, certainly a better job than the House of Commons.

My experience since becoming a senator has opened my eyes in a very major way to how big a job there is to do in this regard, and how very important it is that it be done. I believe the recent increased emphasis on pre-study is also an exceptionally promising and useful development.

At the same time, in its second and more important role of regional representation, I believe the Senate has done a very poor job. This is a tragic failure because, particularly in a federation, this is a special, and in a sense, unique role for a second chamber. The failure is not the fault of senators; to the contrary, many excellent men and women have worked hard to have the Senate perform this function. But it cannot, because as an appointed chamber it simply does not carry the credibility necessary to perform the role in this day and age.

Most recently, for want of a proper Senate, Cabinets of both major parties have not contained adequate regional representation to ensure that the host of decisions the executive takes, are appropriately regionally sensitive. These two shortcomings have been important factors in preventing our federal system from evolving as it should. They have contributed significantly to the high degree of confrontation, the damage to national unity, the inefficiencies and ineffectiveness of which many Canadians rightly complain.

This is not merely a matter of the Senate's not being able to do what it should do. It is also a matter that no other institution one can envisage in a federal system can fulfil these roles nearly as well. To leave the Senate as it is and try to do the job by innovation elsewhere in the federal system would be terribly counter-productive.

As I do not believe Canada can be strong, much less prosper, in the modern world without much better regional representation in day-to-day political decision-making at the parliamentary level, inside the federal government, I believe Senate reform is of surpassing importance and urgency.

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Functions of a Reformed Senate

So what should a reformed Senate do? It follows from what I have said that the functions of the second chamber include legislative review, regional representation and representation and protection of minorities.

With regard to legislative review, this is a very important function. The Senate does it well and with greater credibility would do it better. It is an important complement of the House of Commons which, because of its heavy partisan bias and because of its traditional methods, does not do the technical side well. I think it is unlikely that it can or that it ever will. It is important in constitution-making to build on what exists, not on what is envisioned as ideal. We should not imagine that the House of Commons will change its spots, but build to complement it.

As regards regional representation, I take this term to mean more than geographic representation and to include the representation of all of what John A. Macdonald called sectional interests. They are the concerns that Canadians in the various regions of our country expect our federal system to protect from the simple representation by population rule that is the basis of the House of Commons. Today these fundamental regional interests include: in the Maritimes, regional disparities; in Quebec, language and culture; in Ontario, industrial policy; in the west, resource policy. An appropriately designed second chamber is the classic method of recognizing and protecting such fundamental regional interests, especially in a federation.

How the Senate should perform this function in our federal system is a uniquely Canadian challenge. Meeting it will colour the selection, powers and composition of the Senate.

In constitution-making it is important to recognize what is uniquely Canadian, to avoid seduction by what can be taken discretely from foreign systems because it simply happens to look good in another context. We should not figure that an American Senate or a German Bundesrat, which works one way in their culture and system, would work in anything like the same way here. To the contrary, the chances are that transplants would cause, in practice, grave distortions to our own system of government.

It is only a half step from regional representation to protection of minorities. Bearing in mind that the protection of French Canadian language and culture — and by necessary implication the protection of the English-speaking minority in Quebec — is largely subsumed under the heading of regional representation, what other minorities require representation and protection? The

native peoples are obviously some who do, but even here, and especially as we move into other minorities, it seems to me that we must recognize the role of the Charter and, consequently, of the Supreme Court.

In constitution-making it is also important not to overload an institution with too many missions, and particularly with missions that are already done or could be more naturally done elsewhere. Recent constitutional developments in Canada seem to me to have reduced the necessity and the efficacy of using the Senate to the extent that might once have been desirable for the representation and protection of minorities other than the two large groups I have mentioned.

Likewise, in the case of intergovernmental relations it is clear that we have evolved in Canada the mechanism of federal-provincial conferences at a variety of levels to provide a working relationship between governments. I doubt very much that the inter-institutional relationship could be better done by mingling the legislatures or the governments of the constituent political units to participate in the exercise of legislative and executive power by the central authority. Indeed, such a development would be in complete and obvious contradiction to the doctrines elaborated during the past hundred years by the Judicial Committee of the Privy Council and the Supreme Court in their interpretations of our Constitution.

It is important to build on the genius of the system itself, to avoid trying to achieve some sudden change of thesis or basic direction by simply declaring it shall happen. Development should always take account of the natural trend and momentum. These can be shaped and bent, but trying to break or stop them invariably leads to serious trouble. The latter is what I believe we would be trying to do if we were to invent a formal role for the Senate in intergovernmental relations.

In short, we have managed through the mechanism of federal-provincial conferences to steer a careful path between executive federalism, on the one hand, and splendid isolations, on the other, and I see no great benefits and many costs to abandoning this course.

An Elected Senate

How then should a reformed Senate be chosen? I have already implied the convictions that a reformed Senate cannot be credible without drawing its authority in some way from the people, and that the way chosen must be entirely within the system of the federal government and not shared with, much less governed by, provincial governments. From this it follows that I would reject: appointment by the federal government, appointment by both federal and provincial governments, and appointment by provincial governments. This leaves us with indirect and direct election.

Indirect election by the legislatures of the provinces has two drawbacks. The first is that it invites the mingling of the provincial government system into the system of the federal government. I believe that to be in fundamental contradiction to the essence of our system and, hence, to be fraught with great dangers. The second drawback is that indirect election by the legislatures is

almost inevitably a half-step to something else, perhaps a fallback to the mingling I have just mentioned, but more probably a step towards a directly elected chamber as happened in the United States. The first step in reform is almost never the final step. To the contrary, it sets off a process of evolution usually quite rapid at first and gradually petering out. This reality can be used constructively, but only if it is carefully thought through. Focusing merely on the change and not on its consequences as far as the eye can see, is to invite mistakes and chaos. Given its profound contradictions and uncertain consequences, I believe that resort to the technique of indirect elections by provincial legislatures would be foolish.

This leaves us with direct election, either by simple majority vote or by proportional representation. The problem with direct election by simple majority vote is that it would immediately pose a challenge to the supreme authority of the House of Commons, especially as regards the locus of confidence. This would raise huge and fundamental issues of ministerial responsibility and accountability, thereby leading to a requirement for basic and far-reaching changes in the nature of our governmental system. Clearly, this is unnecessary and undesirable and must be avoided.

It is true that the powers of a directly elected second chamber could be reduced vis-à-vis the first chamber. This could be done by statute in a number of ways. But in constitution-making it is important to recognize that, as the case of the American Senate clearly demonstrates, sooner or later, no matter what the law says, the fundamental authority conveyed by an electoral mandate will eventually be realized. Thus it seems to me that a second chamber elected by simple majority vote is not in the cards.

Direct election by proportional representation, on the other hand, has virtually no drawbacks and a number of important attractions. It provides a popular mandate, real but somewhat less authoritative than members of the House of Commons would enjoy. It operates entirely within the system of the federal government, avoids mingling with provincial governments while at the same time maintaining the credibility of regional integrity. And it could be crafted to provide our federal parliamentary system with a different kind of member than election to the House of Commons provides. This last point is important.

I propose we use the single transferable vote system with party labels uncontrolled by party apparatchiks. This would permit the design of a system of indirect proportional representation, a system that would encourage the election of senators not only regionally credible in their own right, but also somewhat less rigidly partisan, somewhat less dependent on the party system in general or the party leaders in particular, and somewhat more specialized in public policy terms and more carefully picked in representative terms than a system of direct election by simple majority vote would provide.

At least four great advantages would be obtained. First, such people are desperately needed in government; second, the tempering of pure partisanship, of the tremendous power of a handful of party leaders that would flow from such an innovation, both immediately and consequentially, would be a breath of fresh air to our governmental system; third, regional representation and legislative review in Parliament would be greatly improved; fourth, extremely serious and far-reaching defects in Cabinet-making and Cabinet decision-making that now plague us could be corrected.



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In all of this, the question of tenure is important. The role and nature of the kind of senators I have described obviously argues for a term not coincidental with, and somewhat longer than, that of members of Parliament. I believe a term of six years, one and a half that normal for the first chamber, staggered so that one-half of each provincial contingent would be elected every three years, would fit the needs of new governments and of continuing government. That this would entail moderately more elections seems to me an advantage to democracy far exceeding the financial cost or inconvenience to the community. That the standard cycle of senatorial elections would not be coincident with general elections for the House of Commons is necessary to secure the second chamber's longer term perspective and independence from the bandwagon effect of a general election. The non-coincidence of elections would also provide for continuity of government.

Some may fear that Senate elections might take on the colour of a by-election protest vote, but that is unlikely and, to the extent it might occur, would not necessarily be a bad thing in such a subordinated chamber.

Distribution of Seats

How should seats in a reformed Senate be distributed? Several general observations can now be made in that regard. First, because of the agreements with the provinces underlying confederation generally and the present Senate in particular, equal representation of the provinces is probably out of the question. Mr. Gordon Robertson's speech at Laval last March made an especially powerful case for Quebec to this effect¹ but without detracting from it there are other historical considerations that argue strongly in the same direction. Second, because of the nature of

confederation, the size and demography of the country, whatever system of weighted representation is selected, should continue to reflect a certain regional equilibrium between the east, Quebec, Ontario and the west; third, because of the present distribution of population and wealth in Canada, western representation should markedly increase.

With regard to overall numbers, there are three reasons for keeping the Senate at about its present size. The first is that a much smaller Senate would encourage faction, which in the context of a reformed Senate could be quite damaging. The second is that a smaller number would entail trying to reduce the existing representation of some of the provinces, which could be quite difficult to secure. As I have already suggested, in constitution-making — as in so much of politics — it is easier to add than to take away.

The third is that as the present number is decreased in a system of weighted representation, the appropriate representation of the legitimate regional interests as broadly defined becomes more difficult.

Powers of the Senate

To fulfil its role, a reformed Senate must have the power to reject government bills, but not, as I have said, to the point of defeating the government that retains the confidence of the House of Commons. Since the Senate would be definitely the subordinate of the two chambers, the government as a general rule should be able to override the rejection of ordinary legislation by simple majority vote in the Commons at any time during the same session of Parliament. Some might argue that this is not enough authority; but, backed by the indirect electoral mandate it would have, the likelihood is that the Senate would use the full amount of that authority rather than feeling bashful and rarely speaking out at all as it now does.

There is a nice balance to be struck between authority and credibility and legality. The key to that conundrum is to have a careful eye on political reality. This is partly a question of clout with the electorate and partly also it is a question of the degree of trouble that can be inflicted on other decision-makers. Intellectuals tend to overlook the latter but the truth is that a government will always look ahead to obstacles, such as possible rejection by the second chamber, and all the damage that delay and further debate could engender. Consequently a government will quickly develop techniques of consultation and trade-off that will prevent problems from arising before they do. It is important to bear in mind the preventative behaviour engendered before a requirement has to be met and to take account of the informal political processes thereby set loose. Such political activity is good, constructive, and a necessary shock absorber in the decision-making process. Everything does not have to be set down in letters of law. Often the most important part of a constitutional mechanism is entirely conventional. Hence, my reading is that a Senate that actually rejected legislation would be by that fact alone a real power to be reckoned with.

Of course, the rejection powers of the Senate could be cast immediately in stronger terms. The danger in doing so is to overshoot the mark and turn the Senate from a subordinate into an

equal or even superior chamber. Better to start with a minimum and let matters evolve. It is true that later changes are difficult to formally secure, but usually the difficulties of stepping back are harder than those of stepping forward. It is in this vein that to provide immediately for a refinement of powers that would require joint sessions and conference committees and so forth seems to me to be tempting fate. These should be left to evolve.

In only one area would I see a reformed Senate with power that the House of Commons could not overcome by a simple majority vote, and that is in the area of federal-provincial relations involving the fundamental regional interests I mentioned in the context of a reformed Senate's unique role in regional representation. Thus, where the reformed Senate deems a measure by a two-thirds vote as a fundamental regional interest and then rejects that measure by a simple majority, I suggest the House of Commons should only be allowed to override by passing the measure again by a two-thirds vote. If this requirement is regarded as too onerous, perhaps a lesser hurdle would be better: a different set of thresholds could be used or a resort could be had to a relatively long suspensive veto. To reduce the inflexibility of the suspensive veto technique, its duration could be set within constitutionally established limits by the Senate in each case in its deeming resolution. There are many techniques that could be thought of, but one way or the other the objective would be to amplify the power of the reformed Senate in its unique function of regional representation without deadlocking the government of the country.

For the matter of languages and culture a special formula is required. By the nature of the number of representatives involved, the single threshold deeming resolution would obviously not be appropriate here. What might work is a variation on the double majority principle which would permit the Senate to deem a measure to be of special linguistic or cultural significance, not by a two-thirds vote but by a simple majority vote that included a majority of the French-speaking senators.² If such a bill were then rejected by the Senate by a simple majority, its subsequent enactment would require the special override by the House of Commons.

Other powers that have been suggested for the Senate include approval of appointments to certain federal bodies of special regional significance, which seems to me a development entirely appropriate to a reformed Senate and extremely useful to our constitution. A second is approval of the exercise of certain federal powers — the spending, emergency, declaratory, reserva-

tion, disallowance and treaty powers — which seems to me both inappropriate and entirely unnecessary. The contested use of these federal powers would be just the sort of thing that should engender the process of a deeming resolution that I have proposed.

Conclusion

I would urge two things: one, to work out the best proposal on which consensus can be obtained; and two, to propose the process which could be successfully followed to obtain popular parliamentary and provincial acceptance of that consensus. We tend to think of proceeding immediately to negotiations, but I would emphasize the need to build popular understanding and consensus early in the process.

I said at the outset that the Special Joint Committee on Senate Reform has an historic responsibility and opportunity to advance the important and urgent issue it is considering to the great benefit of Canada's future well-being. To propose a consensus and a process, as I have suggested, would by any measure be in itself a giant step forward. To try to do more by dotting every "i" and crossing every "t" — to try to work out a precise formula for proportional representation, for example — would probably be to try to do too much. It would be not only a waste of time, but would uselessly create trip-wires on the road that lies ahead.

In reviewing my own proposals, I am mindful that so many are the variables in Senate reform that it is possible to create almost innumerable sets of proposals. Furthermore because a government is a large system with an overall equilibrium all its own, any change in one place is bound to have repercussions elsewhere — sometimes in surprising and far-off places, sometimes with far-reaching and even contradictory effects.

Thus, in the final analysis the most important rule of constitution-making is to keep changes as few, as simple, and as intelligible as possible and to allow for the natural operation of politics to create conventions over time that can gently update and modify governmental arrangements as circumstances change. The great British constitutional scholar, Sir Ivor Jennings, once said that treated this way, a constitution that has lasted 100 years should last forever, and that the well-being secured by such constitutional stability is one of the greatest gifts that governors can confer on both the individual citizen and on society as a whole.

Notes

¹See Gordon Robertson, "An Elected Senate: Our Best Hope for Real Reform", paper presented to a seminar on "Constitutional Act 1982: A Year After", Laval University, Quebec City, March 26, 1983.

²*ibid.*, pp. 9-11.