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Challenges in Senate Reform

Conflicts of Interest, Unintended Consequences, New Possibilities

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Contents

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Executive summary

Efficacy of reforming the Canadian Senate Senate reform is neither a necessary nor a sufficient answer to problems of governance. Many of the alleged failures of our political system for which Senate reform is claimed as a cure are in fact failures of the House of Commons or built-in features of the Westminster system. Inadequate regional representation and dominance of the executive branch fall into this category.

Other apparent problems—such as the excessive power of the central government—can be solved by decentralization.

The Senate as the framers saw it The concept of a powerful Senate interacting vigorously with the House of Commons on equal terms was carefully considered by the Fathers of Confederation and rejected. Today's Senate might be something of a disappointment to the framers but the dangers of bicameral conflict they wished to avoid have in fact been avoided

This does not mean, however, the framers were necessarily correct. Australia is a successful example of a vigorous Senate married to a federal and Westminster system rather like ours.

Reform of the Senate and the Constitution In legal terms, the Senate is very intimately tied into the constitution. Truly significant change, of the sort desired by most reformers, will require constitutional amendment, very difficult to achieve.

Should the Senate be reformed? It is not *prima facie* obvious that fundamental Senate reform would be a good thing. Indeed, it may be argued that with the exception of the power to choose the government—a monopoly of the Commons—in terms of legislation and policy consideration the Senate is actually the more useful chamber, and reform energy should be concentrated on the House.

Unintended consequences Fundamental Senate reform could lead to unintended consequences. One of these, as long as we retain the Westminster system, would be major problems with the theory of accountability with the Commons-based government. An even more important unintended consequence (at least for many would-be reformers) would be a major impetus to centralization and big government.

Typology of reformers Senate reformers come in two types: the incrementalists and those advocating a global solution. The incrementalists call for an immediate commitment by Prime Ministers to appoint as Senators only those chosen by election or other provincial decision making. They say this would lead in due course to full reform. But the fully predictable result would instead be a horror show. Those advocating a global solution have to overcome nigh impossible hurdles, not only of constitutional law but of practical politics, including the self-interest of Prime Ministers, MPs, and Premiers.

Indeed, the only conventional manner of attaining constitutional Senate reform would be for some Prime Minister to decide upon this as a career "legacy", as did Pierre Trudeau with his 1982 amendments.

Internal reform By contrast, non-constitutional and internal reform of the Senate does hold out some interesting possibilities, without major problems.

Reform via a citizens' assembly For those determined to achieve Senate reform notwithstanding all of the questions and difficulties involved, the best hope would be the mandating of a Citizens' Assembly process to consider the matter, much as British Columbia is doing with electoral reform. A national Assembly for this purpose could be empowered either by the central government or by the Council of the Federation.

The driving force for Senate reform—a serious flaw in a worthy idea

This paper is in part about a serious flaw in a worthy idea. The idea is that Canadians should have an upper house for our federation, as is the virtually universal practice in major federations around the world. The serious flaw (there are others) lies in the manner of appointing its members. This paper is also about reform of that appointment process and of other aspects of the Canadian Senate considered more broadly. But reforming the Senate is not an easy thing to achieve: dozens of schemes littering Canadian history give ample testimony to that. Indeed, such reform should not be easy to achieve, for the perils are many and the current situation is at least workable. This paper is therefore also about finding a viable way to reform the Senate, canvassing the many difficulties in the way of even such a currently popular and seemingly simple idea as appointing only "elected" candidates; and describing the many interests naturally ranged against any serious constitutional reform of any kind.

Finally, this paper is not prescriptive in the sense of suggesting what an "ideal" Senate might look like, though a variety of possibilities will be considered briefly. Instead, it will suggest a new way that we might break the reform "log jam"—if Canadians in the end come to think that reform would be wise, which they may not, for reasons that will be elaborated.

One cannot talk about the Senate in isolation: the Senate is only a part—and at the moment a small part—of the governance structure of the Canadian federation. At the central level of government, one must consider not only the Senate in Parliament (which includes the Commons and the Crown; i.e. the government of the day), but also the rest of the governance apparatus. This includes not only the extraparliamentary operations of the executive branch, which are legion, but also the vast system of federally appointed courts and all of the quasi-independent boards and commissions regulating various aspects of our lives.

Then there is the large and constitutionally empowered provincial sector of governance, taken together now considerably larger and more important in the lives of Canadians than is Ottawa, plus the "hidden level of government," the complex network of intergovernmental relationships and agreements between provinces, and between the provinces and the centre. The Senate has some notional relationship with all of these aspects and should, in the view of some reformers, become much more active in representing the provincial level.

Is the Senate really the problem?

At a minimum, in discussing reform of the Senate, one must talk about Parliament as a whole and the somewhat pathological Canadian version of the Westminster system. It is simply not possible to talk about Senate reform without discussing the House of Commons. Many of the "faults" commonly argued in our system—that it is remote, unrepresentative, partisan to a fault, dominated by party leaders, regionally insensitive (at least to the West), unresponsive to the citizenry, and so on—really have much more to do with the Commons than with the Senate.

Thus, one of the underlying realities that quickly becomes apparent to a student of ideas for improving the Senate is that many would-be reformers have seized on the Upper Chamber as a means to goals that have not been achievable in other, more direct ways—that is, through the Commons or the government. After all, most of the alleged ills and many of the alleged glories of our political system really come back to the constitutional reality that we have a "responsible government" in the British tradition. That necessarily implies a House of Commons that by definition simply does not, and often cannot, do the kinds of things many people think or assume it ought to do.

In ordinary times (and this is written as we enter a period of a minority government, so that will bring modifications of ordinary practice) the House of Commons does not govern. Senator Lowell Murray quotes Gladstone as saying that the role of the House is "not to govern but to hold to account those who do" (Joyal, 2003: 136). C.E.S. Franks is even more explicit: "The primary function of the elected House of Commons, unlike that of the American Congress, does not lie in its legislative role, nor does the Commons perform that function well. The key functions of the Commons lie in the making and unmaking of governments" (Joyal, 2003: 169).

The reference to the United States Congress is apt. As with widespread views about the desirable and actual state of crime, the courts, police, and the justice system as picked up from American television, we Canadians unconsciously glean many of our expectations about political institutions from events south of the border. However the US Congress is a dramatically different institution from the Canadian Parliament. The Congress (which includes the House of Representatives and the Senate) is independent of the executive branch; Parliament is not, and therein lies a world of difference. The House of Commons does not and cannot "legislate" or "represent the people" in the American style. That would not be consistent with our system where, in fact, the government (i.e. the "executive branch" as the Americans would have it) governs and arranges for the making of law much as it sees fit, in part through its constitutional and statutory powers and in part through its usually fairly complete control of Parliament.

The failings of the House of Commons

It may well be that the Canadian system should change to be more representative of the people and influential over the government (see Gibson, 2003), and it may well be that the current period of minority government will make changes in that direction. But, there are constitutional limits.[1] Even within those limits, however, the Commons does not function up to its potential. Indeed, a good start in meeting public expectations would be for the House of Commons to exercise effective oversight on governmental activity, which it is unquestionably mandated and empowered to do. The place to start is watching the money but, to cite Franks again, "The House fails to examine estimates for expenditure in any but a cursory way" (Joyal, 2003: 170).

Perhaps this is not surprising, for at least two reasons. First, the House lacks continuity: "Normally between 40% and 60% of members are new to the House following a general election in Canada" (Joyal, 2003: 171). That means the House tends to be dominated by the government, the elected Prime Minister and other Ministers who themselves tend to have experience, information, and resources—if not of their own, then of the public service. Second, the members of the government party in the House of Commons almost always see their duty as defending the government against the opposition and, if required, even against the people rather than as the original, ancient British idea of defending the people against the government.

This is a very fundamental point, worth emphasizing. In Canada, the usual first loyalty of the government MP is to his party, not to his voters. MPs will not normally admit such a nasty little secret, claiming instead that there cannot possibly be any conflict since the government itself is always working in the best interests of the voters. This argument fails the test of common sense and actual experience in several ways. For example, the government MP virtually always supports the government. But, can the government possibly always be right? Obviously not by the very terms of the debate, since the voters turn governments out from time to time.

When governments make choices, as they must, they often advantage voters in one part of the country and disadvantage those in another part. MPs from the disadvantaged region invariably support the government rather than their constituents. When there arises one of the rare situations where a House of Commons stumbles across evidence of incompetence or impropriety

1 For example, under Section 54 of the Constitution Act, 1867, only the government may propose expenditure or taxation measures, which is to say, most of the work Parliament considers. Ordinary parliamentarians may not propose such measures (though they can defeat them), unlike the most junior Congressman in Washington.

by a Minister, government members of the Committee almost always act to protect the Minister rather than the public interest. Of course, usually such treacherous areas of inquiry are never voluntarily entered in the first place because of the obvious danger to the partisan interests of government MPs.

In short, members of the government party in the House of Commons in general act to protect the government from the people, rather than protecting the people from the government. This unhappy state of affairs is not the fault of MPs; it is one of the characteristics of the Canadian version of the Westminster system. Most Canadians do not understand this. They simply have a vague sense that things are not working as well as they should do. Were the matter put to a clear vote—"Should your MP work for you or the government?"—there can be no doubt as to the response. The question is not only never put; its very possibility is avoided.

So, the failings of the House of Commons, which many feel inadequately reflects popular sentiment, ineffectively checks the government, fails to represent regions vigorously, and so on, are somehow taken as givens, just a part of the way the world is, perhaps because the House is elected. There is much less agitation for reform of the House than there is for reform of the Senate: we have constructed it ourselves by our ballots and what more can we do? In fact, a very great deal could be done by way of parliamentary and electoral reform in the Commons, but for many it seems easier to turn attention to the other house, the Senate, to see what might be done there.

The Senate of fact, not fiction

For most reformers, the Senate of Canada is properly regarded as the most ineffective and useless Upper House in the democratic world. This is incorrect. While it is not the purpose of this paper to defend the existing Senate, any reader with a deep interest in reform would do well to peruse two excellent recent books on the subject. One is *The Canadian Senate in Bicameral Perspective,* by David E. Smith (University of Toronto Press, 2003), which, in addition to its thorough treatment of the Senate and the merits of bicameralism, contains an uncommonly thorough bibliography. The other book is *Protecting Canadian Democracy: The Senate You Never Knew,* edited by Senator Serge Joyal (McGill-Queen's University Press, 2003), which contains a variety of contributions from some of Canada's most eminent political scientists and practitioners. Both books are broadly supportive of the existing Senate as performing useful work and cautionary on reform at the constitutional level. At the same time, they advance helpful suggestions for more modest reform.

These books effectively debunk the idea that, while the Senate may not quite be nothing, neither is it much. Some believe that in terms of value for money spent, over $70 million per year, the occasional useful reports and hearings of the Senate could easily be provided by a few Royal Commissions with considerable money left over. In rebuttal, Paul Thomas argues that, compared to Royal Commissions and task forces, Senate inquiries "take less time, are less expensive, and often have more success in gaining adoption of their recommendations" (Joyal, 2003: 227). Indeed, a case can be made that, apart from the counting of partisan noses to decide which party shall form government—a function that only the House of Commons may constitutionally perform—the Senate is actually the more useful of the two chambers. Certainly, in my experience Committee proceedings of the Senate are characterized by a less partisan atmosphere and more thoughtful questioning and debate. A series of reports on health care, legalization of drugs, and security issues in the transportation chain, to mention just a recent few, are far superior to similar work from the Commons.

In the end, however, the representation and oversight that many expect of an Upper House are simply not achieved. While the Fathers of Confederation felt that they were creating a "representative" body in the Senate and while minorities are a larger part of its makeup than of the Commons, the manner of making appointments to the Red Chamber means that, in the end, the Senate really does not represent Canada but rather the choices of Prime Ministers from time to time. Those choices may be worthy or not but any "representative-of-the-people" character is a matter of chance, not design. Since legitimacy flows from acceptance, which in turn in a democracy normally flows from consent, and since there is

here no popular consent, this appointment process is a serious flaw. This is not fatal—the Senate can and does do useful work—but the lack of popular legitimacy does effectively cripple the upper house.

Moreover, the Senate of Canada does not reflect provinces or regions in any useful way. Of course, that was not really the intent of the Fathers of Confederation but it is a widely desired function of the Senate today. As will be argued below, effective representation of the provinces in the Senate would be a major, and arguably negative, change in our system but that is not the current popular view.

In addition, the Senate does not act as a check on the executive in most instances. In part this is because, in the end, the Senate is a partisan chamber and is normally partial to the executive of the day, or quickly becomes so as vacancies arise. In greater part, it is a matter of two other things: Senatorial restraint, and the intent of the Fathers. While the Senate's powers are in theory virtually co-equal with those of the Commons, in practice the Upper Chamber almost always defers to the popularly elected body.[2] The prevailing theory is that in a Westminster system any other result would lead to chaos, though the Australian example demonstrates otherwise. (The Australian Senate, having the legitimacy of direct election, does not suffer under the Canadian Senate's inclination to restraint.)

The Senate has other functions, not specified in the constitution, which it performs well. It serves as a repository of political wisdom for the two parties that currently have Senatorial representation and there are some superb individual Senators. The chamber can also act as a useful personnel disposal ground for the government party. Above all else, the Senate is Canada's response to the nigh universal arrangement of bicameralism in federations. As noted by Ronald Watts, "all the major contemporary federations have bicameral federal legislatures as an essential feature of their federal character" (Joyal, 2003: 75). Watts quotes Campbell Sharman: "Bicameralism is the natural ally of federalism: both imply a preference for incremental rather than radical change, for negotiated rather than coerced solutions, and for responsiveness to a range of political preferences rather than the artificial simplicity of dichotomous choice" (Sharman, 1987: 96). Bicameralism's natural effect is to slow things down, to allow more thorough consideration, and to allow second consideration. The Canadian Senate, for all its restraint, does these important things at a relatively low cost. Those who would abolish the body should reflect on that.

Two relatively recent examples illustrate how the checking power of the Senate can be more dramatic. Both came during the term of the Mulroney government, when a Liberal majority still obtained in the Senate and Senator Allan MacEachan led an unusually activist caucus. The Liberal-dominated Senate chose to force the hand of the government on two highly controversial issues of national policy. The first was the idea of expanding free trade. The Senate opposed the government on this issue and forced an election on the matter. (The Liberals were not monolithic: Senator George Van Roggen resigned as Chair of the Foreign Affairs Committee over the question.) When the Mulroney government was re-elected the Senate acquiesced.

Later came the furor over the imposition of the Goods and Services Tax. In this case, the matter was resolved not by an appeal to the people but by the use for the first time in Canadian history of an obscure clause in the constitution allowing for the appointment of eight extra Senators if required to resolve a deadlock.

In each case the Senate forced a national debate of some length on matters of national importance. Overall however, the Senate has been extremely restrained about challenging the House of Commons overtly. But it retains that power. While the two cases cited above might be thought more partisan issues of the day than truly enduring matters of cataclysmic moment, such an issue could arise. Unlikely as it may seem today, there could come a time in Canada when the government controlling the House of Commons totally loses its way on some major issue capable of causing lasting damage. The Senate, if so minded, has the legal capacity to act as a backstop of last resort. (It is true that with the entrenchment of the Charter, the importance of this theoretical backstop function has been diminished but it still exists.)

2 But see the two famous counterexamples described below.

Overall, the above cited failings or weak achievements do not flow from the constitution of the Senate. In legal terms, it is a much empowered body. Nor is the root cause the roster of individual Senators: as noted above, there are some excellent people therein and, as for the incompetent, there are plenty in the House of Commons as well. (Of course a Parliament made up of nothing but first-class achievers and geniuses would be wildly unrepresentative and completely unworkable in any event.) No, to repeat, the problems flow directly from the manner of appointing Senators, namely at the unilateral and unaccountable behest of the Prime Minster of the day. This procedure creates a terrible conflict of interest, totally undermines credibility, and effectively destroys the Senate as a serious body.

Was this the intent of the framers of our constitution? Not quite. They did not want the Senate to be an ongoing competitor of the House of Commons but rather a complementary body. In that sense, their scheme succeeded. But according to most scholars, they also expected rather greater things of the Upper House, and a greater public respect, than has in fact turned out to be the case. As said the Canadian historian, MacGregor Dawson, "it would be idle to deny that the Senate has not fulfilled the hopes of its founders, and it is well to remember that the hopes of its founders were not excessively high" (Dawson, 1970: 282). It is to the original intent that I now briefly turn, not because the Framers were necessarily right in what they sought to achieve, but rather to understand, as a starting point, what they were trying to do.

The intent of the founders

A study of the intent of the Fathers of Confederation[3] and the advice that they received from the sceptics of their time makes it clear that they should not be overly surprised were they reincarnated to examine the Senate of today. They would be disappointed that it has not lived up to their stated expectations, but satisfied that it has at least not challenged the primacy of the Commons.

According to Moore, "The argument over the Senate was the longest of the conference[4] and the one which brought it closest to breakdown" (1997: 104). But, he points out two things should be noted about this. First, this matter was taken up near the beginning and much of the time was used in delegations testing each other to work out the negotiating balance of power for the conference as a whole. Secondly, the conference in fact ended with a strong consensus among what were to become the federated entities as to the shape of the Senate. That Senate was not to be a House representing the provinces and those parties, Prince Edward Island and Newfoundland, that had rather different views would in fact not join the union in 1867. By the time they did join, this matter was fully resolved.

There were reservations, some of them cited below, raised during debates on the Confederation proposal in the various legislative assemblies. The legislatures were not so harmonious as the conferences that did the drafting, but (rather like intergovernmental agreements of today[5] by the time they reach legislatures) the agreement by that stage was essentially a done deal.

Most fundamental to the views of the Fathers was the desirability of emulating the British constitution, a much venerated system. That constitution, of course, embodies the tripartite scheme of the Crown, the Lords, and the Commoners in Parliament, it being agreed that the House of Commons is the only locus of real power. As John Stuart Mill explained, "An assembly that does not rest on the basis of some great power in the country will be ineffectual against one that does." Mill was speaking of the declining influence of the House of Lords. The Fathers fully understood this concept, and were not about to allow the Canadian Senate to represent a "great power" such as that of the people (via election to the Senate) or that of the provinces (via provincial control of appointment to the Senate, as was then the case in the United States). The famous English constitutionalist (and editor of *The Economist*), Walter Bagehot, understood and approved this arrangement. The scheme which unfolded was no unconsidered accident.

The Senate was to be the Canadian analogue to the House of Lords. How was this to be achieved? As John A. Macdonald noted, the new country had no hereditary class. Thus, "[t]he only mode of adapting the British system to the upper house is by conferring the power of appointment on the crown (as the English peers are appointed), but that the appointment should be for life."[6] That fine salesman, John A., went on to say that these Senate worthies would surely be representative of the best of the colonies, "men of the people, from the people"

3 See, in particular, Ajzenstat et al., 1997/2003 and Moore, 1997.

4 The Quebec conference, October, 1864

5 And to be fair, as Moore points out, the Confederation deal was in fact of a more legitimate provenance than intergovernmental agreements of today, because opposition members were a part of the drafting process.

6 Legislative Assembly, Feb. 6, 1865, cited Ajzenstat et al., 2003: 78. That the appointment should be "for life" may emerge as an important issue in Senate reform. The intent was to confer absolute independence. That may be properly considered an essential characteristic of Senate architecture. The Supreme Court of Canada in a 1980 reference ([1980] 1 SCR, *In the matter*

and as the number in the Upper House would always be limited it would have "a legitimate and controlling influence in the legislation of the country."

He may actually have believed the "men of the people" part, though the property qualification certainly guaranteed they would not be men of the ordinary people. As to a "controlling influence," his colleague George Brown gave his view on that issue in opening his remarks on February 8, 1865 saying, "I have always been opposed to a second elective chamber" because, as he warned later, such a body could "bring to a stop the whole machinery of government" (cited Ajzenstat et al., 2003: 83). So much for "control". Then reverting to the salesman mode in justifying appointments, he argued that these people would be drawn from "the best men in the country" and that this was guaranteed because the lower house and the whole world would condemn the appointments otherwise. David Reesor, speaking on February 13, 1865 in the Legislative Council (the Upper House of the then Canada) thought he knew better and he turned out to be right. These appointments would be made having regard not on the basis of broad merit but having regard "rather to their political services at elections and otherwise before their nomination" (cited Ajzenstat et al., 2003: 88). And such, of course, has proven to be the case.[7]

Moore puts the issue of "control" succinctly: "The main body of reformers did not want the Senate elected because an elected Senate would be a legitimate and powerful body" (Moore, 1997:108). The appointive principle was adopted even though forecast by Christopher Dunkin in the Canadian Legislature to produce "just the worst body that could be contrived—ridiculously the worst." (cited Moore, 1997:107) So, the Senate was not to be elected—not to represent that "great power", the people. What about that other "great power," namely, the governments of the provinces?

The provinces were not intended to be important in the new Confederation. George Brown (who had pushed for provincial rights) described the intended role of the future provinces at the Quebec Conference: "Consider how insignificant the matters agreed at Charlottetown to be left to the local governments."[8] And Macdonald made no bones about his even more vigorous view that it would be better if there were no provinces at all:

> I have again and again stated in the house that, if practicable, I thought a legislative union would be preferable. I have always contended that if we could agree to have one government and one parliament, legislating for the whole of these peoples, it would be the best, the cheapest, the most vigorous and the strongest system of government we could adopt. (Legislative Assembly, February 6, 1865, cited Ajzenstat et al., 2003: 279)

That. however, was impossible, for at least two reasons. First, Lower Canada insisted upon its own local government, with sovereignty in those areas important to it. Secondly, some of Macdonald's most important colleagues—Brown, Mowat, Cartier, Tilley and Tupper—were advocates of provincial rights to a greater or lesser degree, at least as compared to Macdonald. In the end the provincial powers were to be carefully circumscribed to the purely local. (Ironically, the "local" matters of that day, health, education, and social policy, have become the three big issues of our time, with the central govern-

of a Reference by the Governor in Council concerning the legislative capacity of the Parliament of Canada in relation to the Upper House, as set out in Order in Council P.C. 1978-3581, dated the 23rd day of November, 1978) stated that Parliament cannot, acting alone, change any "essential characteristic." (Such change would require an amendment of the constitution.) Changing the tenure from "life" to "age 75" passed this test. Would a fixed term of six years, say? Almost certainly not, in the view of this author. Twelve years? Only the Supreme Court of Canada could tell us.

7 It is indeed interesting how desultory is the public comment on the quality of new Senatorial appointments. In part, this may be due to widespread cynicism about the process and, in part, to a (mistaken) belief that the composition of the Senate does not much matter. It might be a good thing if some appropriate organization or collection of organizations with the requisite credibility made a practice of awarding a Prime Minster a grade on the quality of each new appointment. It could help focus Prime Ministerial minds, which at the moment need hardly be troubled at all by such questions.

8 Cited in Smith, 2003: 95. Brown was using this argument to buttress his view that there was no need for bicameralism at the provincial level.

ment nowadays constantly trying to find ways to wield influence in these "local" matters.) Even after circumscription of legislative powers however, the provinces had another theoretical route to influence at the central level, via the Senate. That route, too, had to be circumscribed by the Fathers.

One means was to have the Senate represent "sections" rather than provinces. Conveniently, Upper and Lower Canada were each to be a "section" as befitted the two major deal makers. As said George Brown, "Our Lower Canada friends have agreed to give us representation by population in the lower house, on the express condition that they shall have equality in the upper house" (Legislative Assembly, February 6, 1865, cited Ajzenstat et al., 2003: 286). But the other provinces were to be lumped together conceptually. The Maritime divisional concept was continued by the later inclusion of Prince Edward Island. When Newfoundland eventually joined in 1949, the divisional equality number of 24 was breached by the addition of six more Senators for the new province. The eventual four western provinces also formed but one division. So provinces were not to be equal. Senate "divisions," as they came to be known, were notionally equal (with the Newfoundland exception) but, of course, "divisions" have no personality, no government, no voice, and, therefore, no influence.

The other means of ensuring that the Senate would not reflect a potential "great power," i.e., that of the provincial governments, was the manner of appointing Senators. This process left no role for the provinces and guaranteed a tame upper house, if that turned out to be what Prime Ministers wanted. The predictable result is no surprise.

But the Lower Canadians mentioned by Brown were skilled politicians too. They knew as well as anyone that the upper house was designed to have relatively little power. Why would they accept a worthless guarantee of the security of continuing influence that they sought, through equality as a "section" in the Upper House? In part, no doubt, they would have felt that in their case there was some actual worth in the Senate. This would have arisen from the special circumstance in Quebec whereby nationalistic feelings gave a reasonable guarantee that *in extremis* national loyalties would trump partisan urges and Quebeckers in the upper house really would act as a powerful bloc. And, in part, it was perhaps acceptance of a fudge in return for the "local" powers of Section 92.

In any event, if each of Upper and Lower Canada were to have their own "section" in the Senate, all the other provinces were to be lumped into but a single section. This was not accepted without protest. At the Quebec Conference, Andrew Macdonald of Prince Edward Island argued that "the upper house should be more representative of the smaller provinces, as it was to be the guardian of their rights and privileges" (cited Moore, 1997: 105). But that idea was rejected. The Newfoundlanders too saw clearly what was afoot here and this was undoubtedly a part of their reasoning in not taking part in the new union at that time. George Hogsett, House of Assembly, February 23, 1869: "These Senators would be elected for life, and would become, not the servants of the colony but of the dominion. On their appointment they would become independent of the colony" (cited Ajzenstat et al., 2003: 98). Joseph Little, March 2, 1869: "Distant from the land they are to legislate for, and irresponsible to those who first placed them in power, they would necessarily be subject to the influences of the central government and forgetful of those of this colony" (cited Ajzenstat et al., 2003: 98). James McLean, March 8, 1870: "In the Senate we would certainly have no representation because whoever might represent us there would be appointed by the governor general and not by us" (cited Ajzenstat et al., 2003: 101).

Earlier, in Canada, Christopher Dunkin had seen this perfectly well in the Legislative Assembly of February 27, 1865: "It is admitted that the provinces are not really represented to any federal intent in the Legislative Council [i.e. Senate]" (cited Ajzenstat et al., 2003: 307). (He went on to argue that the provinces could only be represented in the makeup of the federal cabinet and worried as to how this would accord with British constitutional practice.)

In the end, the Senate was to represent neither the people, nor the provinces, nor any "great power." And to put a cap on it, to prevent any possible misunderstanding, the main change the British insisted upon when passing into law the British North America Act as proposed by the participating colonies was a further weakening of the Senate by inserting a provision allowing the central government (based in the House of Commons) to appoint

additional Senators in case of a deadlock. Foresight indeed: Brian Mulroney was to use exactly this power to get the GST legislation through the Senate more than 100 years later.

In summary then, we have inherited the constitutional concept of the Senate that the Fathers wanted: a Canadian analogue to the House of Lords, a trading point in the original confederal deal, a place of some pomp and circumstance, and a place of potential authority. That it has instead worked out as a convenient locus of patronage and a place of little real power comes back to the flaw of the appointment process.

Of course, just because the Fathers in 1867 wanted an upper house of a certain kind does not make it right in 2004. The Fathers also denied women the vote (as was the custom of the day) and singled out Indians by race in section 91(24) of the constitution, which allowed the passage of the Indian act and all that has followed. They failed to foresee how some of the assignments of jurisdictions would cause problems as the country and technology evolved and, in the case of the Senate, they did not do the kind of original thinking that the Australians were to develop and implement for their Upper House (also wedded to a Westminster system) just a bit more than 20 years later. The Fathers made mistakes back then as we are surely doing in our time. But, times change and, all in all, their design has worked tolerably well.

What this brief review demonstrates is that the idea of the Senate was a well-considered one and, therefore, one that we should not reject out of hand as the abolitionists do today simply because of a current perception that the Senate has underachieved. Bicameralism, to repeat an earlier observation, is a very well-established feature of every major federation. To maintain this, we might rather think of ways to better exploit the possibilities of the Senate we have or to reform it in this or that fundamental manner.

I now turn to what (if anything) should be done—or even can be done. As with all constitutional questions in a settled society, the starting place must be the actual law.

The legal foundation of the Canadian Senate

The essential law of the Canadian Senate is set out in the Constitution Acts of 1867 and 1982. In the Act of 1867, as amended over the years as new provinces were admitted, sections 17 through 36 describe the qualifications of Senators, the number to come from each Province or Territory, and the powers of the body (essentially co-equal with the House save the power to originate money Bills; see Section 53).

Most important for our current purposes is the manner of appointment, Section 24:

> The Governor General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon qualified persons to the Senate; and, subject to the Provisions of this Act, every Person so summoned shall become and be a Member of the Senate and a Senator.

The convention is that the Governor General in this matter acts only on the advice of the Prime Minister, and this is consistent indeed with this excerpt from the Quebec Resolutions of October 10, 1864: "The Members of the Legislative Council shall be appointed by the Crown under the Great Seal *of the General Government* and shall hold office during life" [emphasis supplied].

However, this is only persuasive, not binding, and some students of the Senate have argued that the Governor General might look further afield in seeking advice on Senate appointments. Section 12 of the Constitution Act, 1867 provides that the powers of the central government are vested in the Governor General, to be exercised "with the Advice or with the Advice and Consent of or in conjunction with the Queen's Privy Council for Canada, *or any Member thereof, or by the Governor General individually*, as the case requires" [emphasis supplied]. Those making this case argue that the Senate was certainly intended to represent regions at the very least, if not the actual provinces, and therefore surely the Governor General, being at times allowed to act "individually," should seek advice from governments in the regions for this purpose. Or—another notion—perhaps she could consult some non-governmental member of the Privy Council (many of whom are not in the current Cabinet, and including some former Premiers) under the authority of this section. The argument has some common sense and charm, except for a fatal legal flaw: Senators are to be appointed under the Great Seal of Canada. This Great Seal, as it turns out, is controlled by the central government of the day and not by the Governor General in her personal capacity.[9] The control of the Prime Minister over Senate appointments is legally secure.

Later law affecting the Senate

Part V of the Constitution Act, 1982, which sets forth the manner of making constitutional amendments, has four sections of importance for our purposes. Section 41, under which any change requires unanimity of Ottawa and all the provinces, mentions the Senate and Senators, and also the Governor General. One of her powers is summoning Senators. This suggests a criterion of unanimity for abolition.

Section 42, in subsections (b) and (c), sets out the manner of changing the powers of the Senate or the representation of the provinces therein. Such an amendment must have the assent of Parliament and of the Legislatures of at least two thirds of the Provinces (i.e. of 7 at the moment) containing at least 50% of the population of Canada.

9 Except, interestingly, for 15 or 20 minutes at the time of the swearing in of a new Prime Minister, during which period the Great Seal is briefly returned to Rideau Hall.

Section 44 refers to Parliament, and Parliament is the House and the Senate, and to change Section 44 requires action under Section 41(e), again implying unanimity.

Section 47 makes it clear that the Senate may only delay, not veto, a constitutional amendment affecting the Senate itself.

These are high enough hurdles but there is more. While this provision is not in the Constitution *per se*, the Parliament of Canada has by statute bound itself not to agree to an amendment of the Constitution without the consent of each *region*.[10] In other words, British Columbia, for example, could by itself veto an amendment affecting the powers of the Senate. In addition, both British Columbia and Alberta must by their own law gain popular assent by way of a referendum before agreeing to a constitutional amendment, and that practice may have also become entrenched in Quebec by convention.

Mention should also be made at this point of an opinion of the Supreme Court of Canada in 1980 in response to a "Reference by the Governor in Council concerning the legislative authority of Parliament in relation to the Upper House." Some of the findings are superseded by the Constitution Act, 1982, but some are likely still binding. In particular, the Court held that "it is not open to Parliament to make alterations which would alter the fundamental features, or essential characteristics, given to the Senate as a means of ensuring regional and provincial representation in the federal legislative process." The Court did not give an exhaustive list of "essential characteristics" but shortening the term of office for Senators, for example, at some point of proposed modification would certainly be challenged on this ground, since the independence conferred by very long-term appointment was clearly an "essential characteristic" to the Fathers (see footnote 10).

The law of the Senate in summary

- The manner of appointment is unilateral and arbitrary.
- The wielder of that power of appointment, the Prime Minister from time to time, could agree to voluntarily follow a method other than the current unilateral prerogative but to give this the force of law a constitutional amendment would be required.
- Changes in provincial representation and powers of the Senate require constitutional amendment.
- Abolition would require constitutional amendment.
- Constitutional amendments of this sort face high hurdles.

In other words, the fundamentals of the Senate are difficult to change.

The inherent conflict of interest for Prime Ministers

It is seldom noted but, upon a moment's thought, obviously true that the task of appointing Senators on his or her own, unilateral impulse, puts the Prime Minister in an unavoidable and impossible conflict of interest. Recall the two major functions (in theory) of the Upper House: regional representation and the checking and balancing of the actions of the Lower House and its Executive. The sort of person that would do such work effectively would have the following characteristics:

- strongly tied to their province, quite possibly with an inclination to put the "folks back home" ahead of national issues;[11]
- knowledgeable on issues and forceful in pursuing viewpoints;
- caring but little for the politics of the Lower House, save that cooperation necessary to maximize the ability of the Upper House to do its job and serve the public interest;
- respectful of, but not beholden to, the Executive Branch (including the Prime Minister) with a strong commitment to investigative oversight.

Is such a paragon not just about the *last* sort of person most Prime Ministers would wish to appoint? Potential trouble-makers for the Prime Minister, trimmers of Prime Ministerial power? Persons caring more about the public interest than that of the party? Persons able to credibly question the things the government wished to do, the spin the government wished to place, and with the routine readiness and power to stop the government in its tracks? Oh, no. No, no, no. We have not seen how

10 Those being, for this purpose, the Atlantic, Quebec, Ontario, the Prairie Provinces and British Columbia.

11 This is an accepted role of American Congressmen, though most would claim to put the country first.

our new Prime Minster, Paul Martin, will exercise his selection prerogative but we may learn from the past about actual behaviour.

In his first term,[12] Prime Minister Trudeau appointed 60 Senators.[13] At that time, he was the most non-partisan of the recent era, appointing a full nine Senators who were not Liberals. Joe Clark had 11 opportunities; all were Tories. In his second incarnation, Mr. Trudeau had 21 slots to fill and the old idealism vanished; 19 were Liberals. Brian Mulroney had 57 chances and named 55 Tories. Jean Chretien chose 67 Liberals for 70 positions. In other words, the way Prime Ministers resolve their conflict is to look after their personal and partisan interests. Service of the public interest may be a by-product, but seldom the main game. The cynical David Reesor had it right in 1865.

Indeed, there are built-in reasons for Prime Ministers to go beyond an insistence on partisan support and require, as well, that appointees should not be persons of too much ambition or too rigid principle.[14] Persons of the former type can be dangerous; persons of the latter sort are not always reliable in the crunch. As Sir John A. famously said, "I need people who will support me not when I am right … but when I am wrong!" Let us not be too hard on the listed past Prime Ministers and their predecessors who acted in the same way. It is difficult enough running Canada, dealing with the press and with all of the opposition in the House of Commons, without having a troublesome, uncontrollable Upper House to make things worse, perhaps impossible. Prime Ministers are generally persons of sufficient ego to believe they are doing the right thing. Why set up obstacles to such progress?

The built-in conflict of interest in this system is so immense that it guarantees a servile, potentially mediocre, Upper House for a Prime Minister with a majority there and a toothless tiger for a new Prime Minister who has not yet had the opportunity to stuff the place properly. The Senate has not often caused real trouble and never for long.

Given all of the above, even if one disapproves of a bicameral Parliament it is hardly necessary to be a Senate abolitionist. As it has worked out (and as was forecast by some at the time of Confederation), the current Senate matters mostly at the margins and, given the built-in conflict of Prime Ministers, is unlikely to act otherwise without systemic change. Why go to the (considerable) trouble of trying to abolish such a minor mixed blessing?

12 March, 1968 to June, 1979; figures from mapleleafweb.com, University of Lethbridge.

13 As Mr. Trudeau's Executive Assistant at the time, and being from British Columbia, I was present in the Prime Minister's office when he phoned two Senators-to-be to offer the job. He had been assured by two of his Ministers (and there was dissent on this matter among the British Columbian Ministers and the third and senior Minister was out of town) in advance that the persons being called would not accept, that the call was just good politics. They accepted. Mr Trudeau was a bit surprised. But the main point is this: at least these two appointments to the Senate were not the main, or even a very important, part of the business of the Prime Ministerial day.

14 This is not intended by implication or otherwise to be a criticism of current Senators. Persons of too rigid principle can be very dangerous in politics, which almost invariably involves trade-offs between many principles that not only conflict but are of uncertain hierarchy. Persons of too rigid principle, in control of the coercive apparatus of government, are tyrants almost by definition.

Should anything be done?

Just leaving the Senate alone avoids the pain of a constitutional amendment; and what matters the cost of about $2.25 per Canadian per year, after all? Many people find that a very unsatisfactory answer. According to the Centre for Research and Information on Canada (CRIC), in a series of large polls (3000+ persons in each of four years since 1998), of those Canadians with views, about half want to abolish the Senate and about half want reform. (The reformers are staying constant around 36%, the abolitionists have dropped from 39% to 29%, and the "leave as is" group has grown from 23% to 26%.)[15]

It should be noted that data from the Canada West Foundation (2004) in another large survey which included 3,200 persons in the West and 800 in Ontario showed much higher support for Senate reform, including in Ontario (Berdahl, 2004). The difference appears to lie in the questions asked. CRIC asked, "In your opinion, should the Senate of Canada be reformed, abolished, or left as it is?" Canada West asked for agreement with the statement, "Canada should replace the existing Senate with an elected Senate with equal representation from each province." The CRIC's question is more neutral, with a full range of options. Canada West's question asks for agreement with a proposition containing two popular words: "elected" and "equal."

Perhaps, in the end the distinction is not too important. The level of knowledge and involvement of citizens in this issue is mostly not very high—at least, outside Alberta. Questions of this sort are a bit like asking the man in the street whether the space shuttle should use liquid hydrogen or solid fuel. In the opinion of this writer, what the surveys really show is one more indication that for the average citizen all is not well in our system of governance. Proposed change therefore has a built in attraction.

The abolitionists are, in my view, mostly just irritated, but unnecessarily so. As noted above, on the basis of actual exercise of power there is not much of major substance to abolish in any case, and the Senate we have is better than no Senate at all.

Assessing the case of the reformers is more complex. The first question, and it must be asked seriously, is, would we want an effective Senate—using "effective" as the reformers use of the word, to describe a body routinely using its great constitutional power to modify what otherwise would be legislation from Parliament dictated by the House of Commons and usually by the government of the day? Would that be a good thing for Canada? The considered answer of the Fathers of Confederation, at least as things have worked out, was "No."

This was not an idle conclusion. The Fathers believed that a strong Senate that would routinely differ with the Commons and modify its work in important ways was totally inconsistent with the British system they revered, and as reflected in the sectional American Senate, responsible for many of the worrisome developments south of the border, not least being the regionalism that led to the then just concluded and horrific Civil War. And yet today, looking around the world, we see a United

15 The Centre for Research and and Information on Canada [CRIC] (2003). The CRIC data give other fascinating insights into the opinions of Canadians in respect of their central government. There is a strong agreement (over 80%) that "the Canadian federal system is too slow at making needed changes;" 34% agree or strongly agree that "the federal government has become virtually irrelevant to me". As to "Trust in government to protect important programs," the central government is the lowest (15%), the provinces second (24%), "both equally" ranks at 27% and, as in most years, "Neither" heads the list at 32%. Not surprisingly, only Ontario, at a massive 74%, believes by a majority that the province is "treated with the respect it deserves." Food for thought.

States that, either in spite of, or because of, its Senate, is the most powerful democracy in the world.

We see Australia with a powerful and active Senate co-existing nicely, if not always comfortably, with a Lower House and party system and political culture much like our own. Of course, we should not see Australia as necessarily an answer for us. For example, our reformers want regional representation. But, according to David Smith, the Australian Senate is "not now, nor ever has been, the state's house so dear to federal theorists" (Smith, 2003: 27). It is a bicameral but not a provincial body and thus arguably makes the central government even more powerful, a paradox that will be discussed below.

The special interest of the West

Should we take another look at this question of the Senate's effectiveness in the Canada of the 21st century? There seems an active public appetite to do just that, particularly in Western Canada. This is understandable. The West[16] arguably has the most to gain. But—and this must not be overlooked—the West also arguably has the most to lose. Conventional wisdom is on the "gain" side. There is both much belief and also supporting evidence that the West does not get its fair share of federal cash, grants, procurement, employment in the federal public service[17] and so on. And this never seems to change. The West often votes against the governing party, usually the Liberals over the past century, in sending MPs to Ottawa, so in that highly partisan legislature we Westerners "make our own beds" in that sense. However, even when Conservative governments have held sway, with large contingents of western MPs, nothing much has seemed to change. The conventional wisdom is that central Canada has the votes in the House of Commons under all circumstances and will therefore always have the power and the spoils of power. The natural conclusion? If the West can never get its just recognition through the Commons, might not the Senate be an alternate route, especially if the West had a higher voting power there? This is the *regional representation* argument for Senate reform.

The other argument from the West relates to checking the power of the executive branch. While it is true that the West does not have as many MPs as central Canada, it still has a lot—92 Members, as compared to 106 from Ontario and 75 from Quebec. Quebec, with its 75 Members, seems to be able to wield a very great deal of influence even, at times, when most of those MPs are in opposition. Why does this not work for western MPs? There are, of course, many reasons. For one thing, MPs from Canada's West are divided among four provinces and Quebec is one province. The members from Quebec are, therefore, more likely to speak with one voice on Quebec's issues and, indeed, they often do. This makes them more effective. In addition as noted above, Westerners, for whatever reason, have tended to elect more MPs to the Opposition side of the House of Commons for the past 50 years (excluding about 14 years of Conservative government). Opposition Members are almost completely powerless in our system.

But a further reason—and the second argument for a reformed Senate—is that the real master of the House of Commons is the executive branch, with party discipline overwhelming the representational urges of individual MPs. Since the executive branch itself is typically dominated by central Canada, even the significant representation of the West in the Commons means little.[18] A reformed Senate, it is argued—a Senate not beholden to, and not dominated, by the executive branch—could exercise the checks and balances on that branch that Westerners (and many other Canadians) so desire.

16 It is important always to bear in mind that "the West" does not exist in law except, ironically, as a Senate division and that there are in fact different viewpoints on many matters among the four western provinces. On the Senate, Alberta is by far the most enthusiastic proponent of reform. However, British Columbians, according to CRIC, "Portraits of Canada, 2003" shows nearly the same enthusiasm in survey responses. This is not evident in the public discourse, however. I will use "the West" as sometimes convenient shorthand, noting important internal divergences as appropriate.

17 Though this is more an unavoidable consequence of central government bilingualism policies.

18 What if the Prime Minister was a westerner? There is a probably apocryphal story of John Diefenbaker, the Prime Minister from Saskatchewan, being asked by one of his constituents to raise pensions: "They won't let me do it," he is said to have replied.

Thus, schemes for reforming the Senate usually try to build in machinery that will minimize partisan incentives for Senators (central Canada tends to dominate most parties and all government parties) and maximize regional incentives, in order that the control techniques of the executive branch will be of no effect in the Upper House. In return, and thus set free, the Upper House should be able to exercise some control over the Executive Branch itself!

That is the vision. There is a wealth of literature on this point of view. One of the earliest expositions from a western source came in *Regional Representation* (McCormick, Manning, and Gibson, 1981).[19] That book, which became an intellectual wellspring for the widespread "Triple E" Senate movement ("Elected, Effective, and Equal"), gave particular attention to regional representation and control of the executive branch as justifications for, and objectives of, reforming the Senate. The "Triple E" approach, and many variations thereof, poses three questions that must be answered.

(1) Can the ends sought be achieved by other, simpler means?
(2) Might reform of the Senate lead to unintended consequences for the federation?
(3) Might the "Triple E" concept itself need fine tuning?

I will discuss the first two questions below and leave the latter to a discussion of the details of proposed reforms.

Can the ends sought be achieved by other, simpler means?

To re-iterate, the "ends sought" are more effective regional representation and better control of the executive branch. In theory, both of these improvements could be obtained by appropriate reform of the House of Commons. Turning first to representation, it is obvious that the House contains MPs from all parts of Canada, in rough proportion to population.[20] In theory, if all MPs were free agents and if each MP balanced his or her actions across a variety of incentives, including a balance of the general good and the sectional good, a rough regional justice would obtain. On any given case, one part of the country or another might come out on top but that would usually be because the given issue, whatever it might be, was of greatest importance to that region. Other regions would accommodate such views and obtain redress at another time, on another issue. This is in fact a variation of the "logrolling" (trading favours) so prevalent in the US Congress, even in the "rep.-by-pop." lower house. In theory too, the prospect for oversight and control of the executive branch is even simpler. Parliament is supreme, in theory. It holds the power of legislation, the power of the purse, the power of investigation, and the ultimate power of deciding who will be Prime Minister and form the government.

In our system, however, MPs are not free agents. They are in fact very tightly tied to their parties by a variety of devices too numerous to list here (see Gibson, 2003: ch. 1) that result in *de facto* control of the Ministry in particular, but of backbenchers as well to a remarkable degree, by the First Minister. Opposition Leaders being "Prime Ministers in waiting" have a considerable amount of disciplinary power as well, some by custom, some by law,[21] and much by the sheer force of the culture of the House of Commons, wherein politics is war and if the teams do not hang together they will certainly be hung separately. Thus, in general, MPs have incentives to work much more for their parties than for their constituents. It is in their interests to do so—while naturally always claiming otherwise.

19 The authors were Senator Ernest Manning, former Alberta Premier and father of Preston Manning, Professor Peter McCormick of the University of Lethbridge, and the writer of this paper, all ably advised by Dr. David Elton, then President of the Canada West Foundation.

20 The six smaller provinces are somewhat over-represented, Prince Edward Island most egregiously so, and the slow adjustment process lags in recognizing the increased importance of fast-growing provinces. These "defects" in full representation by population in their own way give an extra dimension of "regional representation" to those who need it most, namely the less powerful.

21 For example, the legal power to deny any MP a party re-nomination.

Given this circumstance, it becomes clear why the theory of the Commons being the agent of regional representation and control of the executive cannot become practice. If "Party *X*" has a majority government, it will control the House. In our system, "Party *X*" has 100% of the power, *pro tem*. "Party *X*" will in most Parliaments have a regional focus, with relatively few MPs from other regions. Thus, those "other regions" will lack power in the majority party. Of course, the MPs from such areas in parties *not* forming the government have no power at all, by definition in our system, save the power to make trouble.

The same difficulty arises with the theory of control over the executive branch. The power of "Party *X*" arises from the very fact that it is its members of the executive branch that wield the power, *pro tem*, and MPs from "Party *X*" are not going to attack their own. Indeed, parliamentary committees with a government majority that ought to have as their purpose the defence of the taxpayer soon adopt as their actual purpose not to defend the taxpayer at all. Rather, their purpose is to defend the government, "even when it is wrong," to echo Sir John A.

Must this necessarily be so? The current Prime Minister, Paul Martin, has introduced some reforms, and promised others, that would be valuable additions to the marginal independence of backbench MPs. However, it is clear in the nature of things that as long as we have a "Westminster system," although we can make it work better—a very valuable thing in itself—we cannot change its essential nature.

This paper is written as we enter a period of minority government in Canada following the election of June 28, 2004. In a minority government, the Prime Minister no longer has absolute control over the House of Commons. Might that change things fundamentally? Not likely. An important consequence of a minority government is that most Committees will be controlled by the opposition parties. As noted above, when Committees are controlled by the government they adopt as their purpose the defence of the government from embarrassing questions and issues. Where the opposition parties can find common cause (and this will be not be automatic nor on every issue by any means) they will more effectively be able to embarrass the government than is the case in a majority House.

The Prime Minister, however, continues to have absolute control—and this is the important thing—over the government. Control over the government means most of the control that matters. In any showdown, if the opposition parties want to turf out the government, they may do so but at the likely cost of an immediate election.[22] Virtually all politicians hate elections just as virtually all business people would rather have no competition. Every election raises the distinct possibility for all MPs (but those in "safe seats") of losing one's job, perquisites, pension time, the position and standing required to serve one's fellow man in Parliament, and so on. And, even for those holding "safe seats," elections are a very significant nuisance. Thus, most politicians seek to avoid an early election. At any given time, one party may sense it has an upper hand in the polls—but not enough votes by itself to do anything about it. A hard-nosed Prime Minister with a good sense of the power of calling an election on an issue of his choice and an ability to avoid losing issues can maintain very effective control even without a majority.[23]

22 It is quite true that, in theory, the Governor General can call upon another party leader to attempt to form a government in order to avoid an immediate election but this is very rare. It occurred in 1926, precipitating the so-called "King-Byng" crisis (Byng being then Governor General) and the new government lasted only two months.

23 The limits to this have never been thoroughly tested. For example, in theory the opposition parties could get together to make such significant changes in the Standing Orders—the rules of the House of Commons—that they could exert much more control over House business. They could change some laws to give them a voice in the appointment of high officials and so on. It might be difficult for a Prime Minister to convert this kind of thing into an election issue. But then, he might find some other issue. There are in any event limits to this kind of imaginative experimentation. The most important is Section 54 of the Constitution, which provides that only the government may introduce measures to spend money or raise revenues. Those two things are most of the work of governments. So far at least, and notwithstanding the posturing of the opposition parties, the position of the current minority Prime Minister looks fairly comfortable and, within the past 50 years, Lester Pearson in two administrations and Pierre Trudeau in one showed that they could control things perfectly well in a minority situation. Prime Minister Joe Clark made a simple, fatal miscalculation that lost the situation for him, but that was an anomaly.

Given the above, and absent the imaginative guerrilla tactics possibly available to opposition parties (see note 23), things will not change much. To change the essential nature of the Westminster system would require a change to a system of a separation of powers, and a separation of power base, as between the legislative and executive branches. Canadians have never shown much interest in such a radical reform.[24] Thus, in first answer to the first question, that is, could the ends sought be achieved by other means, the answer so far as the means of parliamentary reform is concerned is, "Yes, but only partially."

The answer is not so clear if we add the possibility of electoral reform to the mix. Several of the provinces are thinking about introducing some variant of proportional representation. Were this to happen, minority governments would become the routine rather than the exception and, in such a situation, one could safely assume that the Westminster system as practised in Canada would indeed be amended—because it would have to be, in practice—to give substantial powers to parties other than the largest (and presumably government) party, either by way of formal coalitions or informal understandings. This would be real change.

Finally, there is another area of reform that could offer great promise, at least in the matter of inadequate regional representation in the federation. This problem only arises with respect to powers exercised by the central government.[25] To the extent that such powers can be devolved to the provinces (or, better yet, via the provinces to municipalities or the private sector), the problem of regional representation in Ottawa simply disappears. In other words, every reduction, every decentralization, of Ottawa's power automatically improves regional sensitivity. This is one of the great arguments for decentralization.[26]

This philosophical question of the dispersal of power is one that ought to be of greater concern to Canadians. It was certainly one of the concerns of the Fathers of Confederation—and that in a time when the office of Prime Minister did not concentrate the powers of a four-year elected dictatorship as it does now. One of the philosophical justifications for federalism itself is the idea of the dispersal of power and, thus, the greater opportunity for citizens to have freedom by playing the dispersed powers against each other, by moving to a more congenial local government area, and by dealing overall with smaller governments.

Decentralization also has a benign influence on the issue of control of the executive because governments that are smaller and closer to home are easier to watch and understand. For example, if the fishery or aboriginal policies as they apply to British Columbia are very badly done, in an enduring fashion, from Ottawa, it matters little to Ottawa. Those in charge there are too far away, too comfortable, too insulated from the problems. On the other hand, if the fishery and aboriginal policies were controlled here, where British Columbians have to live with the actual on-the-ground results day after day, it is unthinkable these two policy areas would continue to be such problems.

To be most useful, however, decentralization should go along with another sort of institutional reform, namely permanent and official machinery for cooperation among the provinces, to such ends as the harmonization of standards, the exchange of information and best practices, and so on. Certainly the Fathers had something like this in mind for the "general government" in their thinking. For example, while not central to their current motivations as there was relatively little trade among the colonies, the idea of "free trade" in the new nation was

24 Why should this be? Perhaps in part because of our tendency to reject many American ways: the doctrine of the "separation of powers" is central to their system. But also, it has never been clear to me that Canadians understand our governance system. They tend to speak as if MPs are "somebodies," ignoring Pierre Trudeau's trenchant epigram to the contrary, that MPs were "nobodies" 50 feet away from Parliament Hill. (This was before he gave us the metric system.) Given the fact that most constituents do have some respect for their MP, he might more accurately have called them "nobodies" *on* Parliament Hill.

25 This is not to dismiss inadequate regional representation felt within provinces but that is beyond the scope of this paper.

26 Technically the argument is for "subsidiarity," that doctrine that argues that the powers of the state ought to be exercised at the lowest possible level consistent with the availability of knowledge and necessary resources, as weighed against economies of scale, externalities, and so on. Thus in Canada some powers—the power to prohibit interference with internal trade, for example—should clearly be moved into Ottawa's toolkit. In general though, many more should be moved out.

very important in terms of the future. The central government has been far too tolerant of restrictions on interprovincial trade, even fostering such restrictions itself through legislation creating, for example, national marketing boards. The central government has looked after its own interests rather than being a major instrument of intergovernmental cooperation. Exactly such an instrument is currently under development in the "Council of the Federation." This agency, if it matures, will make decentralization far more efficient by the development of national standards (not "federal standards", which we have now).

The argument here is not that Ottawa should do nothing. As long as we have a country, it will have important tasks. But it could and should do much less, and every bit "less" improves chances of good government. In short then, decentralization is a viable "fix" for regional representation and control of the executive that does not rely at all on Senate reform and could mostly be done without opening up the constitution. More attention should be paid to this.

Unfortunately, Canadian political discourse tends to focus on exactly the converse idea—the concentration of power. We hear continued cries for "national strategies" for what are local problems better dealt with locally. All of the cities of Canada have parking problems. Should we have a National Parking Strategy?

The idea of subsidiarity is, in fact, one of the most powerful available to the genuine reformer concerned with maximizing liberty, prosperity, and sensitive approaches to individual needs. Indeed, I would go so far as to argue that this line of inquiry is the most important currently available to the democratic reformer in Canada.

But to return to Senate reform …

Might reform of the Senate lead to unintended consequences for the federation?

The law of unintended consequences is one of the most mighty and least understood in public affairs. Political systems are highly complex—far more so than appears in a first reading of constitutions or most political science texts. The observed consequence of reform of anything in such a system is that when you change one thing in order to achieve a certain objective, you are likely to find you have unintentionally changed other things as well. Fortunately, thought and experience can allow us to peer some distance into these mysteries, in order to ensure as far as possible that the collateral consequences of change are not actually pernicious.

Such an investigation of the consequences of enabling a genuinely powerful Senate, designed to produce far better regional representation and oversight of the executive, reveals at least two such consequences. Each of them may be advantageous or pernicious depending upon your point of view. One of them was quite apparent to the Fathers of Confederation. The other was not.

The reasonably predictable "unintended consequence" of a legitimate, powerful Senate is that the work of government would become far slower and more complicated and, arguably, less accountable. Having to secure the approval of two powerful houses is far more difficult than simply notionally doubling the difficulty of keeping one in line, especially if the existing house with power (the Commons) is dominated by the executive. In effect, the government would have routinely to make deals with the Senate, in a way that is quite unknown today in the partisan-controlled Commons. That takes time and the deals that come out of the other end of the process may be not at all what the government had in mind going in.

That this would slow the work of government is obvious. But why would it make it less accountable? Because under our existing system, governments that achieve a majority can and are expected to carry out their promises and, if they do a bad job in that or any other way, the public knows exactly who to blame. But if the government is unable to carry out a promise because of objections from the Senate or if they make mistakes by following a course insisted upon by the Senate, who then is the public to blame? The business of accountability thus becomes very murky.

Are these prices—slower, more complex government and murky accountability—prices that most Canadians would care to pay? Perhaps conservatives, believing in less government, would find this more acceptable than those in the centre and on the left. In any event, the Fathers foresaw this problem and decided to avoid it by making the Senate a place without real power.

This is not a small problem. It is in fact a very significant problem. As said George Brown, speaking of the Senate,

> but what is to prevent the councillors (especially if they feel that in the dispute of the hour they have the country at their back) from exercising practically all the powers that belong to us? They might amend our money bills, they might throw out all our bills if they liked, and bring to a stop the whole machinery of government. And what could be done to prevent them? (Legislative Assembly, Feb. 8, 1865, cited in Ajzenstat et al., 2003: 85)

On the other hand, we can see a strong Senate working in a Westminster system in Australia, and Mr. Brown's worst fears have not been realized. The Australian Senate even has the power to block Supply,[27] unusual in Upper Houses. It is very rarely used but Supply was refused by the Senate in 1975 and precipitated a constitutional crisis, forcing an election. But the system works. Australia is proof that you can wed a powerful Upper House to the Westminster system, if that is what one wants.

Is it what one should want for Canada? In the first place, Australia is different from Canada. We are arguably a more diverse and complex federation. But more importantly, in the Canadian context we need to consider a second "unintended consequence", little discussed but also predictable, and perhaps even more fraught with danger than the first.

To understand what this might be, let us cast our eyes to the south. Washington, the national capital of the United States, has immense legitimacy in the view of most Americans. Much of the reason for this is a sense of direct ownership. This comes about in two ways. The first is the ability of every American citizen to cast a vote, directly, for or against candidates for the chief executive officer, the President. That gives a sense of ownership entirely unavailable in Canada where, because of our system, the CEO is chosen only indirectly. We count partisan noses in the Commons after an election and then select as Prime Minister the person who has been previously chosen as leader by the majority party. To emphasize how "indirect" this is, note that this leader has been previously chosen by a process in any given party that is not participated in by over 99% of Canadians. Certainly "ownership" of Ottawa, such as it is, does not come through direct involvement with the CEO.[28]

The other route to ownership of Washington is through the Congress and, in particular, through the directly elected United States Senate—roughly the sort of thing many reformers want here. This is an immensely powerful body. It makes the laws that it wants, not those desired by the President. It has veto power over most of the President's most important appointments. And while the Senate is a partisan body, it is first and foremost a representative body. Senators (and Congressmen) work for the folks back home, not for the party or its leader.

If the essential interests of the state of (say) Pennsylvania require the Senators from that state to vote one way or another, they will do that, whatever the party line might be, and will do all in their power to bring along other Senators to whom the issue matters less, in exchange for future favours. The people of Pennsylvania know this well and it gives them one more degree of comfort with the national government.

Now, suppose this kind of system were transferred to Canada: a powerful, legitimate, elected Senate, wherein the rules and incentives made it quite clear that Senators would act not at the behest of the national parties but in favour of the folks back home. What would be the result? Clearly one result would be that the folks back home would have a lot more trust in the national capital, Ottawa, because they would have more direct ownership of it and influence over it via their powerful Senators. And what would be the natural result of this newfound legitimacy for at least the upper house of the national Parliament? Why, exactly what has happened in America over the years since the Seventeenth Amendment (pro-

27 The funding for government activity.

28 That is not to say that such involvement is impossible in the Westminster system. There is no reason in principle why we could not, in Canada, have a system similar to the "primary" system in the United States for the selection of party leaders and, indeed, the Conservative Party of Canada proposed an embryonic version during the most recent election campaign.

viding for direct election of Senators) was adopted in 1913. Washington has become hugely, irreversibly, more powerful vis-à-vis the state and local governments. The same thing would happen in Canada.

Ottawa has always sought to expand its powers at the expense of the provinces; such is the very nature of governments. The constitutional tools exist, particularly through the so-called Spending Power.[29] The check and balance has always been that the provinces—especially the three richer provinces plus Quebec—would always protest invasion of their fields of jurisdiction and push back against attempts to influence their policies by federal money, which, of course, originates with the common taxpayer. Since provincial governments have always been able to claim the legitimacy of a closer connection with their voters, this balance has worked, after a fashion. But Ottawa nowadays has an ever-growing incentive to invade provincial fields. Governments like to be relevant and the things that more and more concern people—health, education, and social services—are all in the provincial sphere of jurisdiction. Ottawa has become increasingly irrelevant to the lives of ordinary people, as far as discretionary policy is concerned.[30]

Were the central government to achieve the legitimacy of genuine, directly elected regional representation in a reformed Senate, the balance would be upset. Power would follow the new legitimacy and flow again to the centre, probably massively. Many would welcome this. There is a curious attraction, especially for those favouring big government, for "national programs" to solve every problem. To expand government programs using the central authority, activists need convince only one government, not ten.

Thus, when one considers this argument, the need for reform is no longer so obvious, at least for conservatives and westerners. For conservatives, the reasoning is clear: a reformed Senate would surely lead to more centralized government, and probably bigger government as well. For westerners who are not conservatives, the reasoning is more subtle, but it turns on the increase in power for the poor provinces[31] under almost any significant Senate reform, to be considered in the following section.

29 A doctrine that says that the central government may expend money on any purpose, even if that purpose is not within its constitutional responsibilities. Hence the Canada Health Act, for example, has given the central government great (and inappropriate) control in a matter constitutionally reserved to the provinces.

30 The huge federal transfer payments such as pensions and child tax credits are of course very important to people but they are remote, anonymous, and, once established, not discretionary. There is no ongoing "news" or "credit" to be had from such things.

31 Manitoba and Saskatchewan are part of the West but also receive minor amounts of equalization. Even British Columbia receives minor equalization, for now. It is likely that British Columbia will soon again be a net contributor to equalization but Saskatchewan and Manitoba may remain in conflict as provinces concerned about their jurisdiction but still needing and seeking federal largesse.

If anything should be done, what should it be?

There are those—indeed there are many—who say in effect, "Never mind all that. I want a strong central government, perhaps even a larger one, but I also want it to work better and that means better regional representation and control of the executive branch, and that in turn means Senate reform." So how might that be done? What should be the goals? What are the potential strategies to achieve these goals?

Among Senate reformers, there are two major camps. One group accepts that comprehensive Senate reform requires opening up the constitution, agrees that there is just about zero public appetite for constitutional tinkering,[32] and therefore asks what may be done through non-constitutional means and an incremental approach. The second group says that a partially reformed Senate would be much worse than what we have today and that therefore we must wait and plan for the day when the time will be right for the global constitutional solution.

The incremental approach

The essence of this approach is to agree that indeed, the Senate's powers and representation from each province cannot be changed except by constitutional amendment, but—with the cooperation of the Prime Minster—the method of appointing Senators can be changed. All that is required, according to this theory, is that the Prime Minister of the day bind himself or herself to accepting advice on appointments from each of the provinces (chosen by plebiscitory election, in the standard version) and—presto!—a newly representative, "elected" Senate will appear in a relatively short number of years.

Some proponents stop there. However, the full-blown theory goes on to suggest that the anomalies, indeed the obvious very serious difficulties that would arise from such an appointment practice, would be so significant as to force the central government and the provinces into a constitutional amending process in due course, thereby achieving proper and complete Senate reform. Let us examine each of these positions in turn.

First of all, why should any Prime Minster bind himself or herself to a new method of appointing Senators, when the current method works so well (for the Prime Minister). Clearly this could only happen either under very heavy political pressure or as a result of an idealistic Prime Minister convinced that such was the right thing to do. Serious political pressure is not evident, at least outside of Alberta. The large survey by the Centre for Research and Information on Canada (CRIC, 2003) found that support for Senate reform has changed little since 1998, standing at about 36% of Canadians, while the other 64% are divided (as of 2003) for abolition (29%), leaving it alone (26%), or "don't know" (9%). Of course, there are regional variations, with support for reform at about 50% in British Columbia and Alberta. However, the support in British Columbia is, in this writer's judgement, much more intellectual, much less visceral, and much less likely to swing votes than that in Alberta. And, notably and importantly, sentiment for reform in Quebec is only just over 20%.

Never mind, miracles can happen. Let us suppose we get a Prime Minister who, for reasons of politics (if, for example, said Prime Minister were from Alberta and accepted the currently popular view in that province) or as a matter of belief, decides to appoint Senators based on provincial advice. What then? First, the new policy, being voluntary, might not be long continued by the implementing Prime Minister; Brian Mulroney appointed only one "elected" Senator from Alberta. Or,

32 This is the current conventional wisdom. I am not certain it is correct in specific targeted areas.

the policy might be revoked by the next Prime Minister. The proponents of incrementalism argue that once such a process was begun, the clock could not be turned back. I am not so sure, for reasons that will become apparent.

Second, the only sort of "provincial advice" that any Prime Minister is likely to accept would be advice from the voter: Senators would have to be chosen in advisory plebiscites organized by either the federal or provincial governments. No Prime Minister would likely allow provincial governments to name Senators, even given the small flexibility of choosing from a provincial list. The classic example is the dilemma that would be posed by a sovereigntist government of Quebec proposing as candidates for Senate a list of persons, all of whom avowedly supported the separation of Quebec.

Even more common is the question, "Why should federal patronage be replaced by provincial patronage?" There is an answer, namely that at least there would be ten hands moving the patronage pen instead of one. This would confer greater diversity in the Senate in terms of philosophy and partisan affiliation and, inside each province at least, presumed greater legitimacy of the nominees in terms of their regional representativeness. But, again, why would any Prime Minister accept this, especially absent popular support, which is not at all apparent?

A more fundamental question is the constitutional propriety of ceding control of Senate appointments to the provinces since this would, given the immense constitutional power of the Senate, be tantamount to ceding much of the central authority to the provinces. Notions of accountability would become quite impossible. A Senate that was in effect provincially appointed would likely be an activist one (because the Senators would be more likely to feel that they had the credibility of representing their provinces) and governed by different partisan and ideological urges than those current in the Commons. To the extent that such a new Senate made a significant difference to the actions of the democratically elected lower house, the government, based in that lower house, could no longer be held accountable.

It is true that such arrangements are not unknown. The best example is the German upper house, the Bundesrat, whose members are appointed by the "Land" (state) governments. It is estimated that the Bundesrat now has a co-equal voice in something like 60% of federal legislation. The German system is very different from ours however. Most importantly, the division of powers is much less clear. There are deliberate massive overlaps, the overall scheme being that most matters of policy are to be decided by the central government and most matters of administration by the states. The administrators should therefore have a role in the policy they are to implement.

Whether that system works as well as it should for the Germans is not for us to say but in the relatively plain and jealously guarded demarcation of jurisdictional areas set out by the Canadian constitution, such a co-mingling of power would not seem promising. In addition, some students of the German system claim another "unintended consequence" of state power in the Bundesrat, namely an effective co-option of the states by the central government, as a majority of state votes can bind minority states on any given issue, however strongly they may be opposed.

So, while a Bundesrat type of "House of the Provinces" has been seriously proposed (e.g. by British Columbia in 1978) and was for a time even almost the fashion, we may be quite certain in our times that the only authority a Prime Minister would accept from the provinces in naming Senators would be the advice of the people, in an "election." That would erase the problem of mixed federal and provincial accountability (though not of governmental accountability to the Commons and Senate jointly, of which more later.)

Let us assume, again to further the argument, that some future Prime Minister agreed to this "election" process. Who would hold the "elections"? For reasons to be more fully discussed below, many Premiers would be utterly disinclined to provide for a process that identified new, directly elected, spokespersons for the entire province, persons directly competitive with Premiers themselves in terms of legitimately representing the views of that province. To get around this, the central government could hold its own "elections" from time to time in provinces with Senate vacancies.[33] Again to further the

33 Tom Kent (2003) has proposed an annual "Senate Day" when Ottawa would hold an election for all existing Senate vacancies.

argument, let us assume that some such process would be adopted, thus delivering in fairly short order an upper house that was mostly "elected" and fully so within 20 or so years. What would we have then?

We would have a horror show. Unlike the Australian Senate where Senators must face election at regular intervals, Canadian Senators originally served for life and today cannot be discharged before they are 75.[34] These men and women being totally independent and never having to face an electorate again, there would effectively be no party discipline in the upper house.[35] There would be no means of public sanction of a Senate that chose to block the actions of a democratically elected government in the House of Commons. Accountability in the upper house would effectively not exist. And yet, the new Senate would be entitled to consider itself democratically legitimate, being elected, after all, by entire provincial electorates.

If that is not worry enough, consider the following. The Senate powers would be undiminished. Now consider the regional balance, remembering that "electing" Senators does not change provincial entitlements. The rich provinces—those that pay far more into Ottawa than they get back, Ontario and Alberta—would have only 30 Senators out of 105. Add in British Columbia, which may return to paying instead of receiving equalization one day and you have 36 out of 105. In other words, the Senate would contain a permanent majority consistently voting in favour of programs draining wealth from the rich provinces to the poorer ones and a permanent majority in favour of big government in Ottawa. This is a recipe for serious national discord.

The economic effects must be considered as well. Canada is already a country that takes considerable wealth from more productive areas to prop up less productive areas in the name of "regional development." This policy is already at a level where it is controversial and, indeed, according to many economists, actually detrimental to the very regions it is supposed to assist by virtue of fostering a culture of dependency. The addition of a far more powerful engine to this transfer process—namely a Senate overwhelmingly dominated by the poorer provinces—would on the face of it seem to be counterproductive. This is true not only in the sense of the size of the "national pie" for division, which would otherwise be larger, but also in the sense of the perverse dependency incentives referred to above.

Of course, the chances of getting to such an unfortunate stage are really quite remote, as successive Prime Ministers would likely have long since seen the looming dangers and reverted to the old, controllable appointment system. But suppose they did not. Well then, at this point we move on to the "full-blown" incrementalist argument, which says, "Exactly—things will be so unbalanced that it will become absolutely necessary to have a constitutional amendment reforming the powers of the Senate and provincial representation." This is the "Stop me before I kill again" argument for overall Senate reform.

Sometimes those making this argument invoke the "Oregon precedent." Until 1903, United States Senators were appointed by the State Legislatures. While views among the Framers of the American constitution were mixed as to the desirable balance of power, the prevailing majority did not want the central government to grow too powerful vis-à-vis the "sovereign states." As one of the checks on the central government, the appointed Senate was to be the states' overseer of Washington. In this, the Framers were prescient but their wisdom was

34 In theory. Parliament acting alone might possibly be able to change this age limit under Section 44 of the Constitution Act, 1982. However, "Parliament" includes the Senate and why should Senators agree? (Section 47, allowing the Senate to be bypassed in certain instances, does not apply to Section 44.) Moreover, if Parliament acting alone sought to change the retirement dates of Senators from reference to a specific age (now 75) to a term (say, 6 years), which would be the preferable for elected Senators, it is not clear whether such a fundamental change might be made without reference to the more complex procedure involving the Provinces under Section 42. The founding debates of the country make it quite clear that the Fathers had in mind a Senatorial independence conferred by an indefinite term without short term threat of arbitrary removal. See also earlier comments on the 1980 SCC decision.

35 Some argue this might be cured by having prospective Senators sign a resignation in advance to take effect after six or ten years, say. This might well not be legally enforceable and it is questionable whether such a person might actually be debarred from taking his or her seat on the grounds of not meeting one of the "essential characteristics" of the Senate.

overturned by events. As Barbara Sinclair writes: "Yet state legislatures never had an effective means of controlling the senators they chose, and so senators were never really just agents of the state legislature" (Patterson and Mugham, 1999:34). She notes that Senators in practice had considerable latitude to act on their own, and this tendency grew with the years. Then, at the beginning of the twentieth century a populist movement swept what was left of the initial theory entirely away. In 1903, the voters of Oregon, by virtue of an "initiative" ballot, forced the State Legislature to provide for the direct election of American Senators. The measure proved so popular—people do like to vote on topics of interest—that by 1913 a constitutional amendment had been adopted in the United States providing for direct election of all Senators.

Some such constitutional workout would happen in Canada, say the incrementalists. But the conditions are very different. In the United States, the constitutional amendment was very simple. It only changed one thing: the manner of selecting Senators. In Canada, a constitutional amendment with respect to the Senate would be very controversial, dealing with both powers (presumably trimming them) and with numerical representation of provinces. Would Prince Edward island keep four seats? Why should the Atlantic, with 10% of the population, keep anything like 28% of the seats? But, why would they agree to change this? Would Quebec accept fewer seats than Ontario? Alberta fewer than British Columbia? Intractable questions of particular status would arise: gender equality in the Senate? Special seats for aboriginals? The issues go on and on.

For reasons to be canvassed in the next section, which examines the direct constitutional approach, these are very tough issues. In the "horror show" scenario of a fully elected and legitimate Senate with full powers and existing provincial representation, there would indeed be pressure for a fast constitutional amendment to ease the pain—and the one most likely to be agreeable to everyone as the least bad option to get rid of the "horror show" as quickly as possible would be simple abolition This, of course, is not the incrementalist intent but it is the very likely "unintended consequence."

The worst outcome of all would be if the probable unanimity requirement for abolition was frustrated by just a few smaller provinces profiting from the unacceptable situation, as could well happen. Then what?

Reform by constitutional amendment

The alternative approach is to work towards a complete reform of the Senate, to be done as a piece, via constitutional amendment. While there would presumably be general agreement on the election of Senators, there would be much debate on powers, term of office, size of representation of each province, and so on. And, curiously, this would be the relatively easy part. This is not the place to go into a discussion of an "ideal Senate" but there has been enough academic consideration of this topic that one can set out a number of reasonable proposals turning on regional equality (but what is a region? British Columbia?), elected members and slightly trimmed powers, perhaps a special role in approving appointments, and so on.

The tough part would be getting agreement to any reformed version. Recall which entities must approve any constitutional amendment. The Prime Minister must agree, assuming he or she controls the Commons. What Prime Minister would really want to hobble his options, his effectiveness, his room to manoeuvre? What Prime Minister would want yet another potential opponent in the spectral form of an entire legitimate Chamber, added to the Opposition, the Media, and the Premiers? In a time of national crisis, a Prime Minister might agree. Or—and this is much more likely—as a last legacy a Prime Minister might agree to saddle his successor with such new checks and balances.

But the Commons, too, must agree. And there are limits to the powers of the Whip to force compliance. Elected Senators in a legitimate Senate, being fewer in number and elected by an entire province, would immediately be far more consequential persons than mere MPs. Why would MPs vote for that?

Fortunately, the existing Senate is not a hurdle.[36] It can be bypassed by virtue of Section 47. Pierre Trudeau made

36 At least not directly, but see below.

sure of that in his 1982 amendments to the Constitution. However, seven out of 10 provinces, containing at least 50% of the population must also agree to any changes not requiring full unanimity. In two provinces, British Columbia and Alberta, the voters would also have to approve the plan in a referendum and it is almost certain that Quebec would also put such a matter to referendum.

For the provinces to agree, in general the Premiers would have to agree. Why should they? At the moment they speak for their provinces on national issues, as a practical matter. Directly elected Senators would completely replace them in this task. Indeed, they could claim a far stronger mandate than any Premier to speak for the province on many things, even local things, having been directly elected across an entire province rather than indirectly elected (as are the Premiers). Why would Premiers want to see themselves reduced to the status of mere Governors in the United States, where US Senators are the big names in any State?

Then there are the regional considerations. Why would the Atlantic provinces buy into the certain drastic reduction in their fraction of the Senate? Why would Quebec agree to do anything at all to increase the legitimacy and power of Ottawa? Why would British Columbia? And recall, under existing law (which, though it could be changed by simple vote of Parliament, such change could easily be blocked by a concerned Senate anxious to continue its status-quo existence), each region—and Quebec and British Columbia are each "regions" for this purpose—must approve any constitutional amendment.

So a constitutional amendment in respect of the Senate is no easy thing. That is not to say such an amendment is impossible. A determined Prime Minister, Pierre Trudeau, decided to devote his final years in office to securing the constitutional amendments of 1982. The result was mixed: the Charter, mostly good on the one hand but with judge-made law, the ongoing tragedy in Indian policy, and the still enduring constitutional estrangement of Quebec[37] weighing on the negative side. In any event, he got it done. A determined Prime Minister might be able do the same for the Senate. Prime Ministers have many trading cards—money, powers, tax points, appointments, and so on—that, carefully deployed in a long term plan, could bring about reform of the Senate as well.

In conventional terms it is difficult to see any other route—always excepting some kind of national emergency, Quebec secession or the like—which might open up the entire constitution.

Internal reform

While making no attempt to describe more modest internal and non-constitutional reforms in detail in this paper, it should be recognized that many proposals exist. The interested reader is directed to *Protecting Canadian Democracy* (Joyal, 2003) in general for various proposals and, for a particularly succinct listing, to the penultimate chapter by David Smith.

For example, the Senate might establish a Regional Affairs Committee. Such a group might develop and monitor indices of fairness—economic, social, federal expenditure activity, and so on—across the federation to measure a rough justice (if that is what obtains; a westerner suspects it might be found otherwise) of federal largesse and response to local needs. Or, Senate Committees might well travel more and consider even more issues of policy than at present. There are proposals for the development of particular expertise in the examination of Orders-in-Council (laws made by Cabinet order under delegated powers) and the pre-scrutiny of treaties. More "cross-benchers" (independents) and better rules as to ethics and attendance are recommended by some. There is a proposal for fixed terms of, say, 12 years or six years, though I question the constitutionality of much further shrinking the "essential characteristic" of independence to be achieved through (originally) lifetime appointment.

There are some suggestions, none of them too satisfactory, on improving the appointment process. These include a voluntary transparency achieved by each new Prime Minister making a statement at the time of his or her first Senate appointment setting out the criteria to be used. There are other suggestions for committees

37 And all provincial political parties in Quebec agree on this.

of selection, though such bodies would almost certainly become "establishment-captured" [38] in a way that Prime Ministers personally are not.

Since the real question here is to find a means of checking the judgment of a Prime Minister in his or her selections, instead of a proposals committee I would suggest the idea of an approvals process. For example, it might be agreed that in making any appointment to the Senate the Prime Minster would seek the concurrence of at least two out of the three of the Leader of the Opposition and of the Premier and Leader of the Opposition in the province concerned. This balance of forces would give some guarantee that some Opposition Senators would be appointed from time to time and that provincial views were respected.

The process might leave the Prime Minister free to proceed without such endorsement—but with the proviso that the Senator so appointed would be subject to a one-time "approval vote" in the province concerned (at the next federal or provincial election, whichever came first) where the Senator would have to achieve more "Yes" than "No" votes, failing which the office would become vacant.

Some or many of these changes might produce a much better Senate—even a generally satisfactory one—and we should not become too constitutionally adventuresome without thinking very carefully as to whether this very simple, non-constitutional process might be all we need. Some however—perhaps many—will not agree that this would be enough. For those so inclined, there is another, brand-new, route to consider.

38 Like the selection process for the Order of Canada, say.

Another way—ask the citizens of Canada

There may be another way to a constitutional reform of the Senate. This would involve an application of a process developed in British Columbia to deal effectively with electoral reform, namely a Citizens' Assembly. While this year-long process has not yet reached its conclusion, at which time the Assembly will recommend either no change in the existing system or a specific and detailed new system to be put to referendum, progress to date is very encouraging.

This randomly selected group of ordinary citizens[39] has gone through the educational and public-hearing phases of its mandate in a most impressive way, demonstrating a very considerable acquired grasp of the basic questions and options of electoral reform and an impressive capacity to represent the underlying electorate. The challenging deliberation phase remains before the Assembly at this writing—they must report by December 15, 2004—but it is already clear that the process commands enormous respect and legitimacy among the citizens of the province.

The underlying premise of British Columbia's government and Legislature in proposing and unanimously adopting this initiative is that politicians themselves are in an insoluble conflict of interest when it comes to designing an electoral system. It is, therefore, a good idea to arrange instead for the ultimate beneficiaries of the system to consider a redesign. Such a generosity of spirit and a sharing of power with very ordinary people is unusual in political affairs—indeed, since it has real power this Assembly seems to be unprecedented in the world—but, once the usefulness of the approach has been validated, there may be other places it might be used.

Consideration of Senate reform might be just such an assignment for a national Assembly. Granted, as compared to electoral reform, Senate reform involves a more complex interplay of political questions with fewer directly applicable case examples from around the world. It is a more difficult topic. But the Assembly members would not be asked for expertise of their own but rather to understand and weigh a great deal of expert advice (no doubt in the case of the Senate this would be from both political scientists and political practitioners) on the many aspects of a possible Senate reform—including whether reform is a good idea in the first place. The British Columbians studying electoral reform are finding no difficulty in that sort of task.

The details of how the process in British Columbia might be adapted to the national scene are for another day but the overall outline is clear:

- random selection, as per British Columbia's model, with stratification for gender and age
- membership proportional to provincial populations
- education, public hearing, and deliberation phases
- total transparency
- Chair and support staff of great importance
- provision for regional majorities as well as an overall majority in decision making
- provision for a guaranteed submission of any proposal for reform (if any such reform were in the end deemed wise by the Assembly) to a national referendum again, with provision for regional majorities.

If such an Assembly did make any recommendation for change and that recommendation were put to a referen-

39 For details see <http://www.citizensassembly.ca>, including the report commissioned from this writer by the British Columbian government to design the constitution of the Assembly.

dum and passed, especially if passed with majorities in every region, then the lawful constitutional players—the central government and the provinces—would have to deal with a new reality. The credibility and legitimacy of an Assembly and a referendum vote would require that. The matter of Senate reform would move to a new level and no election would be complete without questions as to why governments were not moving on this issue.

If the Assembly recommended no change or if it failed to obtain the required regional majorities (a hurdle that does not exist in the British Columbia but which is unavoidable nationally), then the country would be no worse off and, indeed, would have learned a great deal. There would be no danger to national unity in any such failure, as Senate reform is not a sufficiently emotional issue for most, especially if a fair-minded, objective, group of citizen peers had simply agreed not to agree or not to recommend change.

Who would empower such an Assembly?

Logically it would be the central government. The Senate is a central government institution. But the Senate is also a federal institution and, as such, of proper concern to the provinces. Should the central government fail to act and if the provinces thought the Assembly a wise idea, there is no reason why the Council of the Federation could not empower and finance such an exercise. The central government could not in the end ignore the result.

And, of course, if a national referendum with regional majorities supported a specific proposal for Senate reform, any of the constitutional players could start the ball rolling by proposing a constitutional amendment to enact the referendum advice.[40] For those who would stir the Senate embers, this is one way to do it. But, in dealing with the Senate, reformers and members of any assembly should remember the wise adage: "Be careful what you ask for. You may get it."

40 See "Reference re Secession of Quebec," Supreme Court of Canada, 1998, and for example this extract from Paragraph 150: "Our democratic institutions necessarily accommodate a continuous process of discussion and evolution, which is reflected in the constitutional right of each participant in the federation to initiate constitutional change. This right implies a reciprocal duty on the other participants to engage in discussions to address any legitimate initiative to change the constitutional order."

Conclusion

The Senate is in one sense a great missed opportunity but in another generally harmless, sometimes useful and potentially essential in its current state. There is no urgency for change here and that fact works against change.

In appointing Senators, there is a severe conflict of interest for a Prime Minister, who will almost always seek his or her own advantage in making such choices.

The main goals of Senate reformers—regional representation and checks and balances on the executive branch—are very worthy and important. However, the best hope for some short-term progress in these areas lies in reform of the House of Commons, electoral reform, and decentralization, all of which are which are relatively simple in constitutional terms.

Current world trends in globalization, technology, and decentralization, reflected in Canada by empowerment of individuals and decentralization to the provinces, municipalities, and the private sector may even further reduce the relevance of the central government and thus make Senate reform less important.

The incremental approach to Senate reform will not work. Direct constitutional amendment is fraught with difficulty. Senate reform itself should be seriously questioned by those concerned with further empowering the central government and reversing decentralist trends.

The new Council of the Federation has promise in terms of both regional representation and intergovernmental cooperation, though it is a very different route than a federal Senate.

For those seeking Senate reform, the indispensable key—short of a national emergency—is a Prime Minister absolutely dedicated to this difficult task. Internal reform could be quite promising.

A Citizens' Assembly could constitute a way around the difficulties of constitutional politics. But, for anything to happen at all, some sort of national consensus will have to be built out of this decidedly mixed situation.

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About the Author & Acknowledgments

Gordon Gibson

Gordon Gibson was born in Vancouver in 1937. He attended the University of British Columbia (BA Honours Mathematics and Physics, 1959) and Harvard Business School (MBA—Distinction, 1961) and subsequently did research in political science at the London School of Economics. He has been involved in a number of businesses including prefabricated buildings, hotel and real estate development, and has served on the boards of several public companies. He has served as Assistant to the Minister of Northern Affairs (1963–1968), Executive and later Special Assistant to the Prime Minister (1968–1972), and ran in three federal elections. Mr Gibson was first elected to the Legislature of British Columbia in a by-election in 1974, was re-elected in 1975, and served from then until 1979 as leader of the Liberal party in the province.

Mr Gibson has been active in both business and public affairs in Western Canada, including 12 years on the Canada West Council. Over the years, he has been a regular columnist with, successively, *The Financial Post*, *The Vancouver Sun*, and *The Globe and Mail* and *The National Post*. He joined The Fraser Institute in 1994 as Senior Fellow in Canadian Studies, specializing in the research on federalism. While at the Institute, he has published *Plan B: The Future of the Rest of Canada* (1994); *Thirty Million Musketeers: One Canada for All Canadians* (1995); and (as editor and contributor) *Fixing Canadian Democracy* (2003); numerous Public Policy Sources on aboriginal issues; and many articles for *Fraser Forum*.

Mr Gibson has produced a major public discussion document about British Columbia's position on the restructuring of federalism and other issues, commissioned by the province of British Columbia and released in the summer of 1997. In 2003, he was commissioned by British Columbia's government to develop guidelines for the creation of a Citizens' Assembly on Electoral Reform.

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As it is usual to note, any mistakes are my own.