THE SENATE

ON SENATE REFORM

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Since Canada's first intergovernmental conference in 1887, Canadians have considered modifying the Senate. Now in our second century of considering the issue of what to do about the Senate, those who want to keep a second chamber in one form or another clearly outnumber the abolitionists. The first part of this essay outlines why I believe this wastes whatever energy we have left to devote to constitutional politics. The second part of the essay assumes that, since I do not belong to the Senate reform club, my counsel will fall on deaf ears and Senate reform will remain on the constitutional table. It therefore offers a critical appraisal of the Senate reform provisions found in *Shaping Canada's Future Together: Proposals*.

The energy devoted to the Senate is misplaced for at least three reasons. First, and most importantly, there is the myth that inadequate federal representation is at the root of the West's contemporary difficulties. Western MPs have held some of the most important cabinet positions in the federal government since 1984. Portfolios of particular significance to Westerners — Energy, Agriculture, Regional Industrial Expansion — have been held by MPs from the four western provinces. Arguably the two most powerful cabinet positions in Ottawa today — Finance and Constitutional Affairs — are held by Alberta MPs.

Why do many deny that the West is well-represented in the national government? This denial probably is a response to Ottawa's failure to deliver economic prosperity to Western Canada, a circumstance attributable to events in the international economy — not to the number of Senators we send to points east. The collapse of international commodity prices, for example, has been the ruin of the Prairie agricultural and petroleum sectors thoughout the 1980s. Furthermore, the reluctance of deficit-conscious governments, federal *and* provincial alike, to increase their levels of support to victims of recession has magnified the impact of events in the global economy.

Western Canadians deceive themselves if they believe that political representation ever guarantees economic well-being. The "overrepresentation" of Québec in the national government has not solved that province's problem of chronically high unemployment. Nor did Ontario's "overrepresentation" in Ottawa protect the 139,000 manufacturing, construction, and retail/wholesale trade jobs which disappeared from that province during 1991 alone. An equal number of Senators from every province will not raise grain or petroleum prices, nor will it guarantee more successful economic adjustment policies.

My second point questions the intensity of the public's commitment to Senate reform. Do Canadians care deeply about Senate reform? Even in Alberta, the birthplace of Triple E, public support for Senate reform may be weaker than many assume. Many Senate polls are context-free — they don't invite respondents to rank the importance of the Senate as a constitutional issue or to evaluate Senate reform relative to other possible institutional reforms. When the Senate is presented in these two contexts public support appears quite soft. In 1983, as an Alberta legislative committee began the quest for a Triple E Senate, Albertans were asked which change — Senate reform, electoral reform, looser party discipline, or a change in the party in power — would make the national government more sensitive to the province's interests. Senate reform finished a distant fourth.

In the midst of today's constitutional crisis the public's insistence on Senate reform remains tepid. In December, the Angus Reid Group polled Albertans for the Select Special Committee on Constitutional Reform. When asked to identify the most pressing issue in any upcoming constitutional negotiations only five percent of the sample picked Senate reform (only two percent mentioned Triple E specifically). Far larger percentages of Albertans identified Québec Separation Issues (31%), Economic Issues (23%), and Aboriginal Issues (14%). If past rounds of constitutional discussions teach us anything, it is that lengthy constitutional agendas kill the prospects for agreement. We should not expect the intergovernmental bargaining dynamic to be any different in 1992. Items such as Senate reform (equality rights, language issues, and the social charter are others) which the Reid survey did not find to be pressing ones from the public's perspective do not, according to this lesson, belong among the constitutional proposals of the government of Alberta.

My third reason for opposing Senate reform is based in the conviction that, if a representational problem exists, it may be addressed without formal change to the constitution. For example, changing the operations of the House of Commons is an alternative way to address representational grievances. I agree completely with the federal government's observation in its current proposals that modifying the convention for non-confidence votes

would represent a very significant reform. More free votes in the House of Commons might increase MPs' propensity to serve as a conduit for constituents' opinions (assuming these opinions are detectable).

Federal electoral reform is another non-constitutional alternative meriting attention. The introduction of a limited version of proportional representation to our "first-past-the-post" electoral system could increase the extent to which provinces, as well as underrepresented groups such as women, are represented in the national legislature.[1] In the past, more Albertans placed their faith in these two reform suggestions than they did in Senate reform.[2] It is unfortunate that the disturbing tendency to view the constitution as *the* vehicle for political change may be blinding Canadians to the plausibility of non-constitutional alternatives.

THE FEDERAL PROPOSALS

What type of second chamber is envisaged by the federal proposals? It would be a directly elected body — possibly through a system of proportional representation — and its elections would coincide with House of Commons campaigns. Its current powers would be reduced significantly. In terms of representation, the proposals would ensure more equitable, not equal, provincial representation and guarantee aboriginal representation. Also, whatever method of election is selected, it should promote the representation of women and ethnic groups.

The Special Joint Committee is invited to consider the Macdonald Commission's recommendations on using a system of proportional representation to elect Senators.[3] If adopted, proportional representation would probably alter the legislative composition of political parties and encourage a re-thinking of Canadian regionalism. Short of constitutionalizing representational quotas for groups, proportional representation will encourage parties to include "political minorities" (women, aboriginals, ethnic groups) among their Senatorial candidates. One of the very interesting components of the Macdonald Commission's version of proportional representation is the suggestion that Senate constituencies in southern Canada should be based, except in Prince Edward Island, upon regions within provinces. In practice, this seems likely to challenge the notion of homogeneous provincial interests. This type of institutional change may facilitate the expression of the intraprovincial variations in political attitudes discovered in individual provinces.[4] It also opens up the possibility of cross-provincial alliances forming between those who represent similar regions in different provinces.

Proportional representation may also temper the homogenizing impact of the coincidental Senate and House of Commons elections proposed in *Shaping Canada's Future Together*. Without proportional representation, coincident elections promote the possibility that the Senate's composition will simply mirror that of the House of Commons. The goal of increasing the accountability of the House of Commons to provincial/minority interests also may be promoted through abandoning the coincident election proposal in favour of fixed terms (i.e. 3 or 5 years or perhaps two years after the last House of Commons election). If the Senate retained significant powers to modify or block Commons legislation, Senate campaigns waged under this alternative format would pressure the governing party in the House of Commons to ensure a measure of provincial/minority sensitivity throughout its mandate.

When it comes to evaluating the representational aspects of the Senate proposals, I was struck by their resemblance to an archaeological excavation. In regard to the logic of representing interests in the second chamber, the federal proposals, like an archaeological dig, document the historical record of the hopes and demands left behind by successive generations of would-be constitutional reformers. The oldest concern, increasing the voice of provinces and territories in the national government, is the primary representational logic in Ottawa's proposals. To the chagrin of those who favour Triple E, the representation of provinces and territories would become more equitable, not equal. But, Ottawa proposes to temper this representational basis for a reformed second chamber with a host of other representational concerns, some of very recent vintage. One very significant concern — representing political minorities — has already been noted. In addition, Canada's linguistic duality and the method of election in the House of Commons should also be taken into consideration when formulating the Senate's representational mandate.

An important uncertainty accompanies the offer of this collection as a single proposal. This uncertainty results from the failure to ask how the formal recognition of a variety of representational logics in a single political institution will affect its operations. One of the distinguishing features of the *Constitution Act, 1982* is its incorporation of competing views of the constitution — a contributing characteristic to the Meech Lake conflict.[5] If the second chamber is asked to respect a potpourri of representational logics we may repeat that mistake. More thought should be given to the issue of the relationship Canadians want to establish between this political institution and their society.

The powers given to the Senate are crucial not only for its ability to voice effectively its various representational logics but also for its relationship with the House of Commons. Without sufficient legislative

powers, the groups/territories that may have their representation enhanced in the Senate will enjoy only symbolic, not effective, representation. On the other hand, the retention of significant legislative powers in a reformed Senate promises to frustrate the governing party in the Commons and lead to deadlock between the two legislative chambers. Participants in the Senate reform debate must recognize that the types of powers assigned to a reconstituted Senate will be crucial to the effectiveness of not only provincial/minority representation but also to the operation of the House of Commons.

Generally speaking, if the federal proposals were implemented, the Senate's formal powers would be reduced. The federal proposals limit the Senate's powers and reaffirm the Commons as the primary legislative body in Canada. This position is animated, on the one hand, by the difficulties which the incumbent government has had in securing Senate passage of legislation (ie. drug patent legislation, borrowing bills, the free trade agreement, the GST). As well, though, this position reflects a concern that Canada must avoid the Australian experience where a powerful Senate occasionally has frustrated the ability of the governing party in the House of Commons to pursue its legislative agenda.

Three proposals promise to reduce the Senate's formal power. First, the second chamber would not be allowed to play any role in regards to appropriation bills and borrowing authority legislation. The Alberta Premier's wish that the Senate would have the authority to stop National Energy Programme II, therefore, is unfulfilled by Ottawa's proposals. Second, only the House of Commons would be a confidence chamber — a defeat in the Senate would not force a general election. Third, in matters of "particular national importance" — defined for the time being only as national defence and international issues — the Senate would only have a six-month suspensive veto. The strong similarities between the current federal proposals and those made by the Special Joint Committee on Senate Reform (1984) suggest that a more specific list of matters of particular national importance is likely to be lengthy.

The Senate would only definitely retain an absolute veto over matters pertaining to language and culture where a double majority voting rule would be in effect. This category of parliamentary business would require support from a majority of Senators as well as from a majority of francophone members. As Smiley and Watts noted in 1985, however, this provision's limited value would be primarily symbolic.[6] The only new power that the federal proposals offer to a reformed Senate would be to ratify appointments to many (but not all) national institutions. While the head of the National Library would be subject to Senate ratification (by an unspecified ratification rule) a new appointment to the Supreme Court would not be! Clearly, the section on Senate powers should concern those who hope that a new Senate will represent more effectively a particular constituency.

Before concluding, it should be noted that the ability of a new generation of Senators to speak out for provincial/minority interests depends in large measure upon the extent to which party discipline is relaxed. While the federal proposals mention relaxing party discipline in the House of Commons they are silent on how this principle should operate in the Senate. Advocates of change correctly assume that party discipline will inhibit the Senate's ability to serve as a forum for the expression of regional preferences. This certainly has happened in Australia. Party discipline has transformed Australia's Triple E Senate into an institution where party, not regional, interests dominate. While reformers may be correct in predicting that innovative measures will weaken the influence of party,[7] I doubt very much that partisan politics will be kept out of an elected Senate. The internalized norms of party ideology, as well as formal sanctions, are important foundations of party discipline and will remain beyond the reach of institutional tinkering. Moreover, some versions of proportional representation may actually strengthen the ties between party and candidate.

By now Canadians are exhausted by the daily barrage of constitutional news and views. It will probably not be popular then to recommend further debate on the issue of what to do about the Senate. It may nonetheless be sound advice since up until now the question "what does effective mean?" has been addressed too infrequently in the debate surrounding Senate reform. Much careful thought must still be given to the implications for governing which will accompany any effort to satisfy an evergrowing list of representational demands. Are these demands competing? What powers must a Senate have in order to represent a multitude of constituencies effectively? Finally, if effective means a Senate with strong formal powers then are we prepared to live with the possibilities of deadlock between two popularly elected bodies? Perhaps the best advice to Canadians is: debate Senate reform for another hundred years before deciding what to do about the second chamber.

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1. Frederick C. Engelmann, "A Prologue to Structural Reform of the Government of Canada," *Canadian Journal of Political Science*, Vol. 19, no. 4 (December 1986) at 667-678.

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that the objecting province would be subject to the federal authority whether it liked it or not unless it had previously exercised its right to declare the amendment non-applicable. Those who accepted the amendment will have waived that right by accepting it.

If the federal government expects the clause to be accepted it will need to make at least two modifications to the proposal. First, allow for provinces to opt out for a fixed period and agree that opting out can be renewed an indefinite number of times. Second, require the federal legislative authority to be renewed periodically, say every five years. Why? One reason is that it will allow those provinces which have agreed to a transfer to change their minds — particularly after a change in government. It will also allow for fine-tuning of the federal legislative authority. It also means that there is clear recognition that the provincial legislative authority is only temporarily borrowed. There are some strong parallels here to fiscal arrangements which have been the subject of five-year reviews over the past fifty years. Unless changes along the lines I have suggested are added, section 91A has no chance of being adopted. Few, if any, provinces will be prepared to write a blank cheque.

Assuming good intentions on the part of the federal government, I am gradually coming to the conclusion there is simply too much on the table at this time. Moreover, the agenda is expanding, with matters such as a social charter being added by Ontario and equalization and Established Programs Financing being added by Manitoba. There has been no mention of removing the federal government's powers over disallowance and reservation or of providing a provincial role in international affairs, all of which have been discussed before. It is difficult to see when agenda-building will end. Everything cannot be discussed at once and everything cannot, and should not, be in the constitution. We are better off leaving things out and leaving them to the political process than inserting them into the constitution. The constitution cannot solve all our problems.

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This text is excerpted from Professor Meekison's Belzberg Lecture, delivered at the University of Alberta, November 14, 1991. The full text of the Belzberg Lecture, "Canada's Constitutional Crisis" is forthcoming in *Constitutional Studies 1991* (1992) XXX Alberta Law Review. [ed.]

1. (Ottawa: Supply and Services Canada, 1991).
2. *Ibid.* at 50.
3. *Ibid.* at 18.

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2. Richard Johnston, *Public Opinion and Public Policy in Canada* (Toronto: University of Toronto Press, 1985).
3. Canada, Royal Commission on the Economic Union and Development Prospects for Canada, *Report, Volume Three*, (Ottawa: Minister of Supply and Services Canada, 1985) at 86-92.
4. R. H. MacDermid, "Regionalism in Ontario," in Alain G. Gagnon and James P. Bickerton, ed., *Canadian Politics: an introduction to the discipline* (Toronto: Broadview, 1990).
5. Alan C. Cairns, "Citizens (Outsiders) and Governments (Insiders) in Constitution-Making: The Case of Meech Lake" *Canadian Public Policy*, Vol. XIV, Supplement (1988).
6. Donald V. Smiley and Ronald L. Watts, *Intrastate Federalism in Canada*, (Toronto: University of Toronto Press, 1985).
7. See Alberta, Select Special Committee on Upper House Reform, *Strengthening Canada: Reform of Canada's Senate*, (Edmonton: 1985); Peter McCormick, Ernest C. Manning and Gordon Gibson, *Regional Representation: The Canadian Partnership*, (Calgary: Calgary West Foundation, 1981).

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