SENATE REFORM AND REGIONAL REPRESENTATION IN CANADA

A PRESENTATION BY

THE BUSINESS COUNCIL ON NATIONAL ISSUES

TO THE

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AND THE HOUSE OF COMMONS

ON REFORM OF THE SENATE

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APPEARING ON BEHALF OF

THE BUSINESS COUNCIL ON NATIONAL ISSUES*

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INTRODUCTION

In recent years, there has been growing concern about the capacity of Canada's political institutions to respond adequately to the multiplicity of challenges facing them. Many proposals to reform existing institutions have been put forward by a wide variety of groups and individuals, including the Business Council on National Issues.[1] The Special Joint Committee of the Senate and the House of Commons is currently examining what is undoubtedly one of Canada's least satisfactory and effective political institutions, the Senate. Dissatisfaction with the Senate is so widespread that there is a virtual national consensus in favour of some type of Senate reform, up to and including abolition. As one eminent student of Canadian public affairs recently wrote: "If there is one thing in this much-divided country on which there has been near unanimity, for a hundred years or more, it is that the kind of Senate the Fathers of Confederation devised in 1864-67 was a mistake."[2] In some respects this is unfair to the Senate's record of achievement and does not acknowledge the efforts and hard work of many individual Senators; but it is largely true nonetheless.

The question of Senate reform takes on a special significance because of the growth of regional tensions and alienation in the country. A federal system such as Canada's is bound to witness disputes between the central government and the governments of the sub-national units of the system, as well as conflicts of interest between various regions as national policies are developed and implemented. But the extent to which such regional discontent has increased over the past decade is alarming, and suggests that special urgency should attach to the task of improving regional representation and input in Canada's national institutions.

Broadly speaking, there are two major approaches that could be taken to deal with the growth of regional tensions and alienation in Canadian politics. The first would involve a significant decentralization of powers and governmental responsibilities from the central government to the provinces. This strategy would probably lead to a lessening of regional tensions, for the simple reason that the national government would become less important in the lives of Canadians, including those who live in areas of the country which are least happy with existing national institutions. Decentralization undoubtedly appeals to some Canadians, particularly in Quebec and the Western provinces. But it is essential to recognize the dangers inherent in a conscious attempt to reduce the national government's relevance and responsibilities. Management of the country's economic affairs - - already an extremely difficult task - - would undoubtedly become more problematic if the central government's influence were weakened. As Ottawa became less important in more and more policy areas, Canadians' already fragile sense of national identity would be undermined. Further, it must be noted that Canada is already one of the most decentralized federations in the world. The provinces' share of total government spending, for example, has increased sharply since the 1950s, while that of the federal government has declined.[3]

A second and, in our view, preferable way to address the problems posed by growing regional alienation is to strengthen the role of the regions in national institutions. And it is here that we believe the Senate can play an important part.

THE SENATE'S ROLE: THEORY AND PRACTICE

The Senate is the main federal institution in which a form of representation by region or district has been constitutionally recognized. The British North America Act initially provided for a Senate composed of three divisions. These were increased to four in 1915. Each division was entitled to equal representation by 24 Senators appointed by the Governor in Council. Newfoundland and the two Territories were given additional Senators.

The creation of the Senate was a basic part of the Confederation bargain. The Senate was used to compensate the Maritime region for its small influence in the House of Commons. Another of its purposes was to provide protection for Canada's French-speaking minority. The principle of equal regional representation in the Senate helped to persuade Lower Canada to accept the demand by Upper Canada that the House of Commons be constituted on the basis of representation by population.[4] Moreover, the Senate was vested with considerable legal powers in order to permit it to defend regional interests within the national government. Senators were appointed for life; and in theory the Senate was granted extensive powers over legislation, except as to the initiation of money bills. According to Professor Mackay, a well-known expert on parliamentary matters, the powers allocated to the Senate to represent regional interests "were deemed essential; indeed, they seem to have been quite as fundamental to the scheme of federation as was the distribution of legislative powers."[5] This view is shared by Professors

Jackson and Atkinson, who comment in a recent textbook that: "The powers of the central government appeared awesome, but when the provinces were granted representation in an assembly whose announced purpose was to exert a conservative, protective influence, Confederation become a more palatable prospect."[6]

In addition to providing a forum for provincial representation in Parliament, it is well known that the Fathers of Confederation hoped the Senate would also act to check the "excesses" which they feared might follow from the operation of unqualified democracy in the House of Commons. As a body of "sober second thought," it was hoped that the Senate would carefully review and amend legislative initiatives issuing from the democratically elected House. During the early decades of Confederation, the Senate frequently exercised its right to amend and even reject legislation proposed in the House. In more recent times it has been much less active in this respect.

Most appraisals of the Senate agree that it has failed to perform adequately its allotted functions. Few would dispute the contention that the Senate wholly lacks legitimacy as a vehicle for the expression of regional views at the centre. Nor has it played a significant role in defending francophone rights in Canada. The Senate's record in legislative review and policy investigation, on the other hand, is quite commendable. But Canadians are generally unaware of its contribution in these areas. A number of major criticisms can be made of Canada's upper chamber. Perhaps its most serious defect is that it actually serves to <u>reinforce</u> rather than to <u>balance</u> the representation by population that prevails in the House of Commons. Ontario

and Quebec, which together hold some 60% of the seats in the House, are granted no less than 46% of those in the Senate as well. As a study on regional representation undertaken by the Canada West Foundation in 1981 rightly observes, "Canada is the only democratic federal system in the world in which the regions with the largest populations dominate both houses of the national legislature."[7] This point deserves considerable emphasis in light of growing concern over the inadequacy of regional representation in national institutions. Upper chambers in other federations are constituted in ways designed to balance significantly the dominance of lower chambers by more populous regions. It is true that some provinces, particularly those from the Atlantic region, now enjoy Senate representation substantially disproportionate to their populations, but the fact remains that just two out of ten provinces account for almost half of all Senate seats. This alone indicates that the Senate, as presently consitituted, does damage to the principle that upper chambers should balance the representation by population that prevails in lower chambers.

An additional defect, often commented upon, is that Senators are not elected, and thus lack the legitimacy which they require if they are to be effective in the policymaking process and in putting forth regional perspectives. A long history of appointments on the basis of political patronage has unquestionably done considerable harm to the public's perception of the Senate as a whole. The fact that these appointments are typically made with little, if any, consultation with provincial leaders compounds the problem of lack of legitimacy, especially in terms of regional

representation. Many proposals for Senate reform advanced in recent years would continue to depend on appointments, with either the federal or provincial governments--or in some cases both--involved in the process.[8] We believe that adoption of any scheme for Senate reform that retains the appointment mechanism would be an error. The time is long past when Canadians will accept the exercise of political authority by an appointed parliamentary institution. As Gordon Robertson recently wrote, "Appointment, however devised, would convey no authority and no representative capacity."[9]

Finally, it has also been suggested that because of its lack of legitimacy, the substantial legal powers conferred on the Senate by the Fathers of Confederation have been so greatly reduced in practice that it has been relegated to a position of only minor influence in national policymaking. In short, it is difficult to disagree with this recent assessment of the Senate by the Canada West Foundation:

> The existing Senate is thrice flawed--flawed in its representation, skewed heavily away from equal representation toward the dominance of those very central provinces whose large populations allow them to dominate the lower chamber as well; flawed in an appointment process that robs even its competent members of audience and credibility; flawed in an evolution of practice that has reduced its colossal legal power to political marginality. For all three reasons, the existing Senate is part of the problem rather than part of the solution.[10]

Having determined that substantial changes are needed in order for Canada's second chamber to perform properly its chief functions of regional representation and legislative review, the questions that must be addressed concern how reform might best proceed.

REFORM OF THE SENATE

Numerous proposals to reform the Senate have been advanced over the past few years. The Government of Canada's Constitutional Amendment Bill introduced in 1978 (Bill C-60) called for an appointed but also a more representative Senate. It proposed a new upper house, to be called the House of Federation. The allocation of members to the new upper house was to have a provincial basis. Equal representation by province was rejected, but the Ontario and Quebec portion of seats was to be reduced and that of Western Canada significantly increased. Fifty-nine members (half of the total of 118 members) would represent the provincial political parties in proportion to each party's share of the popular vote in the most recent provincial election. The other half would represent national political parties on a similar basis relative to federal elections. Although the members of this body would be indirectly "elected" according to national and provincial election results, the individual Senators would be appointed by party leaders. There would thus be no direct connection between Senators and voters.

Federal thinking envisaged reduced and more focussed powers for the new upper house compared to those possessed by the existing Senate. The House of Federation could delay legislation for 60 to 120 days, but the House of Commons could overcome this with a two-thirds vote on urgent matters. Proposed in the wake of the election of a separatist Parti Québecois Government in Quebec, the federal initiative would also have given the upper house powers over "measures of special linguistic significance", requiring a double majority of French and English-speaking members of the new House of Federation. This could only be overturned by the House of Commons with an unusual majority vote. The new House of Federation would also have the power to ratify federal nominations to the Supreme Court and nominations for ambassadors and heads of some agencies and Crown corporations.

Some provinces have advocated a new type of appointed Senate, but one in which they alone would have the power of appointment. In 1978 the Government of British Columbia proposed that a Senate comprised solely of provincial appointees be constituted. Under this system, Senators would become little more than provincial delegates whose chief role would be to express the views of the provincial governments on issues of federalism and intergovernmental relations. The Senate would have an absolute veto on a restricted range of federal-provincial matters, and a suspensive veto in respect of all other legislation passed by the House. A similar reform proposal was suggested by the Government of Alberta in 1982 and also by the Report of the Pepin-Robarts Task Force in 1979.

A Senate appointed by provincial governments would undoubtedly provide for extensive regional input into national decision-making, but how representative and legitimate it would be is open to serious question. Its major focus would be intergovernmental relations, and a Senate constructed along these lines would be "less a legislative chamber than a semi-permanent intergovernmental conference."[13] In effect, the provincial governments would be given veto powers over the elected federal legislature. Jurisdictions would become blurred, and conflict between the upper and lower chambers would probably increase. Nor is it clear that the Senate would effectively perform its legislative review function under this kind of arrangement, except perhaps with respect to issues of major federal-provincial concern.

It is our view that in order to acquire the legitimacy needed to assure it a prominent and respected place among Canada's national institutions, a reconstituted upper chamber must be directly elected by the Canadian people. Thus we reject the models of appointment and indirect election contained in the proposals advanced by the federal government in Bill C-60 and by certain provinces. We further believe that an elected Senate should be constructed according to the following basic principles:[14]

-the election results for the Senate must not replicate those for the House of Commons; we favour equal representation for each province as the best way to ensure this;

-an element of protection for French-Canada in respect of certain linguistic and cultural matters should be included;

-the method by which Senators are elected should ideally reduce the control of the political parties.

The argument that an elected Senate should accord equal representation to each province has been made most forcefully and persuasively by the Canada West Foundation. In a recent submission to the Macdonald Commission, a committee working under the auspices of the Foundation spelled out the rationale for equal representation:

> We believe it is essential for the purpose of Senate reform to equate 'region' with 'province', and to defend the principle of the equality of provinces. What is critical is provincial status, not population. In a federal system, for some purposes, there is something special about that group of citizens that happens to constitute the population of a province, and there is a special priority, an additional weighting, to their interests. For those purposes, the egalitarian implications of a simple national majority are not enough, and to that extent, democratic principles must be appropriately modified, as (Canada's) new constitutional amending formula acknowledges. The appropriate way to recognize this critical fact on an ongoing basis is to create an elected Senate that contains an equal number of members from each province.[15]

The Canada West Foundation recognizes that many will find its recommendation for equal provincial representation unrealistic, and on the surface it does indeed seem questionable that Prince Edward Island should be

allocated the same number of Senate seats as Ontario. No doubt Canada's larger provinces, particularly Ontario and Quebec, would find such a formula difficult to accept. However, what opponents of equal representation seem only too willing to overlook is the rather striking fact that other federations have accepted, as a matter of principle, the notion that the upper chamber of the national legislature should treat all states or provinces as equals. Both the United States and Australia, which are similar to Canada in that they are large, diverse federal systems, grant each state an equal number of Senate seats. Surely it is incumbent on those opposed to equal provincial representation to suggest why it is that a formula accepted by the two federations most similar to our own should be rejected by this country.

One possible way to blunt the criticism that equal provincial representation is not feasible while still striving to achieve a result not wholly at variance with the equality principle would be to create an elected Senate based on equal regional representation. Senator Royce Frith has suggested that "A new Canadian Senate sould be elected, and elected from senatorial regions rather than from provinces." The regions chosen "should be based on a sense of community and a sense of belonging, rather than on representation by population." He goes on to identify five such regions: Altantic Canada, Quebec, Ontario, the Prairies, and a Pacific region.[16] Although this scheme merits close scrutiny and further elaboration, we remain convinced that the provinces are the most suitable units on which to base a new Senate. Provinces enjoy a strong legal, political and historical identity and legitimacy; whereas, region is a considerably more nebulous concept.

The question of how to protect francophone rights and the constitutional interests of Quebec in an elected Senate based on equal provincial representation must be addressed. Gordon Robertson has recently argued that "provincial equality for Senate representation ignores a fundamental reality of Canada: the reality that our second chamber must effectively protect the interests of Quebec and French Canada and not just the interests of the less populous provinces."[17] Although the Senate has not really played a significant role in protecting or promoting the rights and interests of Canada's French-speaking minority, Quebec is likely to be uneasy about a major reduction in the proportion of Senators coming from that province. In order to address this problem, we suggest that, with respect to a carefully prescribed class of matters having special cultural or linguistic significance, Quebec Senators in effect be granted a veto. A measure falling under this heading thus would have to be approved by a majority of Quebec and non-Quebec Senators, a "double-majority." Something very similar to this was envisaged in Bill C-60 in 1978, although in this case Senators would not have been directly elected. It is important to emphasize that it would not be the Quebec government that would possess a veto power over certain matters under our proposal, but rather a group of national representatives elected directly by the voters of that province.

We are also persuaded that in designing a new elected Senate, one objective should be to diminish party control. The Canada West Foundation recommends that Senators be elected at large on the basis of a single, province-wide constituency, and by the transferrable vote.[18] Party control would be reduced under this system because Senators would not be elected on

the basis of a small plurality in a particular constituency, as now occurs in the House of Commons, and because voters would be able to rank candidates according to their preferences. There would be no need for voters to support monolithically a single political party when they cast their ballots. This should render an elected Senate a less partisan body than would otherwise be the case. Other ways to lessen party influence in the election and operation of an elected Senate should also be considered.[19]

We recognize that our proposal for an elected Senate is not without problems and ambiguities. It will be argued by some that there is no need for any upper chamber in contemporary Canadian politics, and that reconstituting the Senate will only make the functioning of efficient parliamentary government more difficult. According to one critic, "an elected second chamber would present a serious obstacle to the smooth operation of the parliamentary system."[20] Many commentators have called for the abolition of the Senate, pointing out that the provinces seem to get by without an upper chamber. However, this argument overlooks the compelling need to give expression to the federal principle in Canada's national institutions and national government. Provincial governments, by contrast, are under no obligation to reflect the country's federal character in the structure of their institutions. Moreover, those who have criticized the existing Senate because its members are appointed should find the proposal for an elected Senate worthy of support since their major criticism will have been met.

A major problem raised by an elected Senate would be the precise powers and responsibilities to be conferred upon it. We concur with Senator Frith's view that a". . . new Canadian Senate should not have the power to refuse supply or directly defeat the government."[21] The House of Commons must remain the focus of responsible, government. The national government should be required to sustain the confidence of the House only, and thus there should be no requirement that the government resign or call an election because a vote is lost in the elected Senate. The Senate would hopefully function on the basis of free votes. The House is the appropriate place for partisanship and party discipline and the focal point for confidence. An elected Senate should not aim to duplicate the House in this respect, but instead strive to reflect and debate regional concerns and help to resolve them.

Two further issues follow from the above. The Senate should not have the power to initiate money bills but should, as it does now, have a role in scrutinizing public taxing and spending decisions. Moreover, Senators should not be permitted to become Cabinet ministers unless they resign from the Senate and secure an elected seat in the Commons at the next or at an early electoral opportunity.

The federal government proposed in 1978 that the Senate should have the power to ratify appointments to the Supreme Court of Canada and to designated federal boards, agencies and corporations. Senate ratification of Supreme Court appointments would have the advantage of involving regional (and provincial) viewpoints and concerns in the selection process; however, on balance, we believe that the disincentives of such a proposal are persuasive.

Subjecting candidates for appointment to the Supreme Court of Canada, the highest judicial office in the land, to a political review by the Senate may blur the historical separation between the legislative and judicial branches of government. Further, the consequences of a Senate rejection may be perceived as so serious, that qualified candidates would be reluctant to allow their names to stand. The risk is that a rejection may reflect poorly on the candidate's continued credibility and competence whether he is already a judge in a lower court or in private practice as a lawyer. We thus concur with the Canada West Foundation's conclusion that "public scrutiny before a political forum of candidates for judicial appointments is not part of the Canadian tradition and could discourage some competent candidates from accepting nomination."[22] A more appropriate way to address the concerns expressed by provinces about the federal government's exclusive right to make high judicial appointments would be to establish an improved and more formal federal-provincial consultative process.

Somewhat different considerations apply in the case of appointments to federal boards, agencies and corporations. Here we feel the scale tips in favour of Senate review. Such a process would provide a measure of accountability and interaction between institutions that are the creation of Parliament and yet, at present, are beyond the reach of effective parliamentary scrutiny.

CONCLUSION

The precise powers to be granted to a new, elected upper chamber are less important than the principle that there should be an elected Canadian Senate and that it should play a positive and vigorous role in helping to resolve this country's growing regional tensions. An elected Senate would enjoy a legitimacy and public profile now denied to the upper chamber. As it performed its legislative review function, it would thus be able to exercise more influence than is now the case and to provide in a credible way for the expression of regional viewpoints on important national issues. We are strongly persuaded that Senate reform along the lines proposed in this paper would enjoy the support of most Canadians and that, once established, an elected Senate would add an important regional dimension to Canada's national institutions. We recognize that our preference for equal provincial representation may be criticized as impractical, but the principle is well established in other federal systems and there is no reason why it should be inapplicable to Canada. Those charged with making the difficult decisions involved in reforming the Senate have an opportunity to make a major contribution to the task of reinvigorating and restoring public confidence in this country's political institutions. We hope that they are able to agree on the need for Senate reform.

NOTES

1. Thomas d'Aquino, G. Bruce Doern, and Cassandra Blair, Parliamentary Democracy in Canada: Issues for Reform (Toronto: Methuen, for the Business Council on National Issues, 1983).

1. Gordon Robertson, "Election to Cure Federal Ills," Policy Options, Vol. 4, No. 5 (September-October 1983), p. 8.

3. Richard Bird, Financing Canadian Government: A Quantitative Overview (Toronto: Canadian Tax Foundation, 1979), pp. 14-16, 68.

4. J.R. Mallory, The Structure of Canadian Government (Toronto: Macmillan, 1971), p. 224.

5. R.A. Mackay, The Unreformed Senate of Canada (Toronto: McClelland and Stewart, 1967), p. 174.

6. Robert Jackson and Michael Atkinson, The Canadian Legislative System (Toronto: Macmillan, 1980), p. 109

7. Canada West Foundation, Regional Representation: The Canadian Partnership (Calgary: The Canada West Foundation, 1981), p. 29.

8. Government of Canada, Reform of the Senate: A Discussion Paper (Ottawa, 1983), pp. 15-16 discusses previous reform proposals.

9. Robertson, "Election to Cure Federal Ills," p. 9.

10. "The Senate, The House of Commons, and the Future of Canada," A Report on Institutuional Reform by a Committee of the Canada West Foundation, presented to the Royal Commission on the Economic Union and Development Prospects for Canada, Vancouver, September 8, 1983, p. 2.

11. Ibid, p. 4

12. Government of Canada, Reform of the Senate, pp. 16-17.

13. Ibid, p. 16.

14. Robertson, "Election to Cure Federal Ills," p. 9, offers a similar set of principles, although unlike us he opposes equal provincial representation.

15. Canada West Foundation, "The Senate, the House of Commons, and the Future of Canada," pp. 4-5.

16. Senator Royce Frith, "Senators by Election," Policy Options, Vol. 4, No. 3 (May-June 1983), pp. 26-29.

17. Robertson, "Election to Cure Federal Ills," p. 10.

18. Canada West Foundation, Regional Representation, pp. 114-116; and Government of Canada, Reform of the Senate, pp. 43-4.

19. Canada West Foundation, Regional Representation, pp. 139-42, offers several suggestions to reduce party control.

20. Colin Campbell, The Canadian Senate: A Lobby from Within (Toronto: Macmillan, 1978), pp. 2-3.

21. Senator Royce Frith, "Senators by Election," p. 28

22. Canada West Foundation, Regional Representation, p. 119