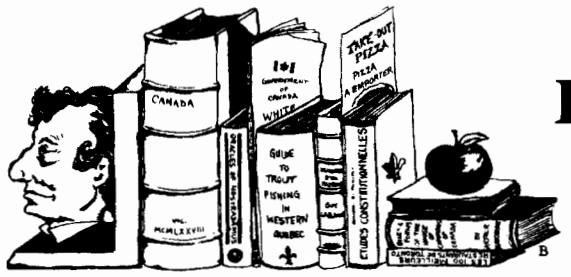

RECENT PUBLICATIONS AND DOCUMENTS

REPORT OF THE SUB-COMMITTEE ON CERTAIN ASPECTS OF THE CONSTITUTION, document presented to the Senate by the Standing Committee on Legal and Constitutional Affairs, November 26, 1980, 44 p.

Few ideas have proved more seductive to would-be constitution-makers than reform of the Upper House. From the House of the Provinces, in proposals by the B.C. government, the Ontario's Advisory Committee on Confederation and others, to the House of Federation in Ottawa's Bill C-60, to the Provincial Council, proposed by the provinces in September 1980, virtually every recent set of recommendations for constitutional change has focussed on the role of the Upper House as an institution of federalism.

The impetus for such proposals varies. Most common is the belief that in a renewed federal system, there must be far more effective representation of the regions "at the centre". Provincially representative Second Chambers are the classic institution for doing this in federal systems.

But beyond this general concern to build a greater element of "intra-state federalism" into the present system, the suggestions for a new Upper Chamber have varied widely in their underlying assumptions, and therefore in their ideas with respect to its composition, appointment procedures, powers and legal status. In general, the idea has evolved from conceptions which build provinces or regions directly into Parliament itself, to those which see a new body as a separate, intergovernmental institution in which the two orders of government are brought together for more limited purposes.

Among the most interested observers of this debate, of course, are the members of the present Senate. Their very existence is in question. Therefore, it is not surprising that a sub-committee of the Senate's Standing Committee on Legal and Constitutional Affairs, chaired by the Honourable Maurice Lamontagne, has carefully assessed the many proposals, and has developed a model which includes a new institution to meet the challenges of federalism, while retaining the existing Second Chamber virtually intact. The sub-committee's brief report, published in 1980, was virtually lost in the sound and fury of wider constitutional debate. That is a pity, since it provides a much needed clarification of a controversial idea.

The Lamontagne committee makes a basic distinction between two separate problems, which in most other proposals have been combined. The first problem is an *intergovernmental* one: the need to regulate relations between the two orders of government. To deal with that, it rejects the approach of Senate reform and instead recommends formalization of the federal-provincial conference as a "Federal-Provincial Council". The second problem is to assure that the central government itself is more representative and responsive to regional interests. This they address through moderate reform of the existing Senate.

The primary provincial constitutional grievance, the sub-committee argues, is the existence in the BNA Act of a number of broad, discretionary, federal powers which permit Ottawa to override the provinces and act in their jurisdiction. Reservation, disallowance, the declaratory power, the spending power and the emergency power are all instruments by which Ottawa can dominate or subordinate the provinces. All are inconsistent with the constitutional equality of the two orders of government, with the principle of "non-subordination," and with provincial sovereignty in their assigned areas of jurisdiction. These are usually considered the essential characteristics of genuine federalism. The sub-committee would abolish the reservation and disallowance powers as obsolete. But, it argues that the other powers are likely to be retained. "So the problem remains of harmonizing the exercise of these overriding powers with the principal of non-subordination". The committee believes that the answer lies in securing the consent of both orders of government before such powers can be used. Both "federal" and "provincial" agreement are required. Clearly the existing Senate does not meet the test of provincial consent, nor could one whose members were elected, or jointly appointed, as suggested in Ottawa's Bill C-60 of 1978.

But equally repugnant to the Committee are proposals for a provincially-appointed Upper Chamber within Parliament. That would meet the provincial test, but deny the federal one. It would introduce a "major confederal

element" into the system, and by making the members instructed delegates of provincial governments, it would introduce a provincial *executive* power into a *federal* legislative body. "It would make the federal Parliament a hybrid body amounting to a monstrosity".

The solution, the committee argues, lies in an intergovernmental rather than a parliamentary body. And there already exists an "old and unique Canadian mechanism that could easily provide a practical solution with a minimum of institutional disruption" — the federal-provincial conference. Hence, the sub-committee's central recommendation is that the conference be reconstituted as the Federal-Provincial Council with specific powers and formal rules for decision-making. Its members would be the First Ministers, or their delegates, assisted by a permanent secretariat and an advisory committee of officials.

The Council would have three roles. First, it would be the forum for negotiation of future constitutional amendments. Here the voting rule would be whatever amendment formula is eventually adopted. Second, it would ratify use of the remaining federal overriding powers — the declaratory power, the spending power, but only in reference to shared cost programmes, and the emergency power in peacetime. Federal initiatives in these areas would require approval of a majority of the provinces, representing a majority of the whole population. Third, the Council would play a broad coordinating role in areas like fiscal and economic policy. Here it would be a forum for discussion, and would not make binding decisions or take formal votes. In all cases where formal decisions were taken, they would have to be ratified by the various legislatures.

This formulation is a great improvement over earlier "House of Provinces" solutions, because it does not hopelessly blur legislative and executive roles, or greatly complicate the accountability of each government to its own electorate. The proposal is aimed squarely at a central issue in debate — the equality of the two orders of government — and does address the critical question of how federal and provincial governments can better harmonize their activities. It implies that in thinking of institutional change, we need to bear in mind three sets of institutions — those of the federal government, those of the provinces, and those of the federation itself. The last group includes the Constitution, the Supreme Court, the amendment procedure, and with this proposal, the Federal-Provincial Council. The Council could provide the vehicle for policy coordination, and the policing mechanism for federal intrusions into areas of provincial authority, and perhaps vice versa.

The Council as proposed by the Senate Sub-Committee, would be smaller and play a much more limited role than the Federal Council, based on the same principles proposed by the Quebec Liberal Party's Beige Paper. The provincial "common stand" of September 1980, also differed from the committee's proposal, in that it did not include formal federal representation, required a two-thirds majority of provinces for approval of federal initiatives and included ratification of major appointments. Undoubtedly, some provinces would feel that the sub-committee's majority rule would not provide sufficient protection of their interests against federal use of the declaratory or emergency powers. But both these proposals are based on the same logic as the sub-committee's.

Thus, within the broad conception of an intergovernmental body as proposed by the committee, a number of variants are possible. It offers considerable promise. But the Federal-Provincial Council, argues the committee, would be no substitute for the existing Senate. The Report presents a defence of its role, focussing on its effectiveness in revising complex, detailed legislation and investigating major social problems. It agrees that its role in representing regions, especially less populous ones has been "less significant than anticipated in 1867". It cites several examples of apparent defense of regional interests, but admits "it could have done more". Nor, the members agree, has it done much to protect linguistic minorities. But that, the committee argues, calls for improvement, not abolition.

But how? Radical change is rejected. The reformed Senate would continue to be appointed by Ottawa, but every second appointment would be from a list of provincial nominees. The political weight of an elected Senate, it is argued, would rival that of the Commons, and create insurmountable problems within the parliamentary system. The Senate would be enlarged to 126 members, giving greater weight to the West. Members would serve for 10 years, with an additional five years on the recommendation of a special committee. The Senate's present unlimited power to veto legislation, unwarranted in a democratic society would be dropped; its legislative role of sober second though would be met by a six-month suspensive veto. This might well increase the Senate's activity, since a suspensive veto is much less draconian than an absolute one. The Senate would also have an expanded role in examining regulations made under delegated legislation.

It would be made a more effective reflection of regional and linguistic interest by the establishment of all-party regional caucuses and by the creation of a Standing Committee on Regional Affairs and Official Languages. It would also continue to supply cabinet ministers for regions unfortunate enough to be unrepresented in the governing party in the Commons. The sub-committee ignores the flurry of debate about whether the Senate should continue to have a veto over constitutional change, since that argument developed after its work was completed. But its recommendation for only a six-month veto on legislation implies that the same would apply to constitutional changes.

A number of other reforms — an elected Speaker, a standing committee on human rights, regular conferences to resolve differences between Senate and Commons and the like are also proposed. While these changes would no doubt improve the Senate's effectiveness somewhat, they fall far short of a revitalization of the Federal Parlia-

ment's capacity to represent regional interests and act as the arena for compromise among them. The Achilles heel of federal appointment remains virtually intact. In no other federal system are the members of the Upper Chamber federally selected. Senators would still lack an effective political base. Nor are 10 to 15-year terms likely to lead to greater dynamism than the present tenure. Regional caucuses, and a regional affairs committee could be a useful sounding board, but it is unlikely provincial governments or private interests would see them as an effective new avenue for influencing Ottawa. While helpful as ameliorative steps, these devices would not solve the underlying problem.

Thus, the Committee is more effective in addressing the intergovernmental issue than it is addressing the broader questions of the representativeness of the central government. That must come primarily through changes in the institutions of popular representation — the parties, the Commons, and the cabinet.

It is easier to state the challenge than to meet it. It depends fundamentally on the re-establishment of country-wide political parties, on changes in the Committee system to provide a more concentrated focus on regional and federal-provincial issues, and perhaps on some modification of the rigidities of party discipline.

The Senators make a convincing defence of their utility. Their recommendations would make the Senate more useful, but they are only a tiny step towards restoration of the nation-wide legitimacy Ottawa must have if it is to wield effectively the authority it possesses, and to negotiate persuasively in a formalized Federal-Provincial Council. But we should be grateful to the subcommittee for clarifying a debate, which it correctly argues had become hopelessly confused.

Richard Simeon
Director
Institute of Intergovernmental Relations
Queen's University
Kingston

LETTERS

Sir

Mr. Randall Chan's article on "Pension Plans for Canadian Legislators: A Comparison" fails to mention one aspect of the Ontario plan which has a significant effect on the projected pension levels contained in tables 2 through 7 of his article.

In 1975 the Speaker was given responsibility for the administration of *The Legislative Assembly Retirement Allowances Act*. At that time a section was added to the statute (now section 26) which gives authority to the Speaker, subject to the approval of the Board of Internal Economy, to provide supplementary benefits to persons receiving allowances under the Act. This authority has been exercised on four occasions, twice before and twice since 1980.

During 1980, a thorough review of allowances was undertaken and as a result, the Board of Internal Economy approved increases in an effort to deal with the effect of inflationary economic changes which occurred prior to 1980. Adjustment levels were below the cost-of-living for the years under review. For example, an increase of 8% per year was granted for 1978 and 1979 at a time when the Consumer Price Index rose by 9% per year. A similar review and adjustment was made in 1981 to adjust for changes in the cost-of-living which took place during 1980.

It is the intention of the present Speaker and Board to review existing pensions on an annual basis and to adjust levels if warranted, based on an analysis of cost-of-living increases in the previous year.

Mr. Chan is correct in stating that Ontario is one of the jurisdictions which has no indexing provision in its pension plan, but it is misleading to imply that no adjustment will take place during the ten year period used in his tables.

Tom Mitchinson
Executive Assistant to the
Director of Administration
Ontario Legislative Assembly

* * * * * * *

The author replies

The comments made by Mr. Mitchinson in his letter are well taken. However, my article did not fail to mention the provision for the cost of living adjustments made to pension payments to legislators in Ontario.

In the summary table of the major provisions of legislative pension plans, under the heading "indexation" for Ontario, it is stated "ad hoc adjustments made periodically". Mr. Mitchinson appropriately points out the relevant section of the *Legislative Assembly Retirement Allowances Act* which authorizes the Speaker and the Board of Internal Economy to review and adjust pension payments. But the adjustments are not made *automatically at regular intervals* (a key feature of indexation). In any event, it was not the intent of the article to report the source of legislative power authorizing and the actual process by which ad hoc adjustments are made.

Mr. Mitchinson stated further in his letter that, "It is the intention of the present Speaker and the Board to review existing pension plans on an annual basis and to adjust levels if warranted,..." The fact that the review process must be initiated by the Speaker and the Board on each occasion and that adjustments are made on a judgmental basis confirms that they are ad hoc in nature. While the intention and adjustments may materialize in the future, I have no knowledge about the outcome of these periodic reviews. For me to have included some cost of living increases in the calculation on tables 2 through 7 would not only be presumptuous; but events in the future would likely prove them to be erroneous as well.

Randall Chan
Economics Division
Research Branch
Library of Parliament