

The Case for an Elected Senate

Duff Roblin

Throughout the greater part of its existence, the Senate has been subject to the attentions of a well-meaning series of constitutional improvers. Yet more than 115 years after its creation in 1867, the Senate is still in place, practically unchanged from the original form that the founding fathers gave it.

In spite of that impressive record of durability, it seems to me that the pressure for Senate reform has seldom been more intense than it has been in the last few years. There is a widely perceived need outside this house, if not in it, that a more effective instrument is required to incorporate the regional interests of Canadians within the decision-making process of the central federal organs of government. One can only speculate on how much longer the status quo in the Senate can resist change. I give you my opinion, which is perhaps not widely supported, that the Senate must change, or it will ultimately be changed by others. The agitation for Senate reform these days comes from all sides, and a mere list of the agitators tells a tale.

We start with the Confederation for Tomorrow Conference, sponsored by the Province of Ontario. There is a Beige Paper, produced by the Liberal Party in Quebec. There was the very important initiative of the Government of British Columbia with respect to a new form of Senate organization. There was the report of the Pepin-Robarts commission, which was an emanation of the federal government. We know that the Canadian Bar Association agonized long over what kind of new Senate they would like to see. We have heard from the Canada West Foundation with respect to Senate reform on two occasions, the last one of which was under the aegis of Senator Manning. Of course, the Senate considered the federal government Bill C-60, which occupied our attention in 1979. In a current report on Senate reform under the name of Senator Lamontagne, it is proposed to re-arrange the powers and functions of this body in an interesting fashion, but a fashion which, in my opinion, is inadequate to the needs of the case.

There is, however, a common theme that runs through all of these proposals, which is that a second chamber of some kind is favoured by almost all Canadians. We get the impression that these wide-ranging examinations of our Constitution are in agreement with the concept that the Canadian federal system requires a bicameral federal legislature. That, is the first point that I would like to establish.

The Need for a Second Chamber

In a federal state like Canada, governed by the parliamentary political process, peace, order and good government require an

effective second federal chamber. This proposition is based on the fundamentally regional characteristics of our country. The nation arose in 1867 from several distinctly articulated regional societies. Our current history must emphasize beyond all dispute, that the regions count, and that Canada is still a federation. I believe that Canadians share a common sense of nationhood and destiny, but I also believe that Canadians understand themselves as belonging to regions — regions which vary distinctly from one another in size, in population, in language, in history and in interests. It is this regional variation which must be accommodated within the central federal lawmaking process.

Today, all of the witnesses that I have called upon proclaim the pressing need to reconcile legitimate regional interests with the common good of the nation. Of course, there is absolutely nothing new about all of this. In Quebec, in 1864, the Fathers of Confederation faced up to exactly the same situation. They provided a solution to it. Their answer was that we were to have a federal House of Commons based on representation by population, and we were to have a federal Senate based on territorial representation. Representation by population satisfied the interests of Upper Canada, which was calling for "one man, one vote", regardless of location. The smaller regions, however had other aims in view. They saw a populous Upper Canada, by means of its own numbers or in special combination in central Canada, able to impose its will on regional minorities. Thus some counterbalance was sought.

In 1864, in Quebec City, out of the fourteen days of consideration that led up to the articles of Confederation, six days were devoted to this problem. The solution? The Senate as we have it today, a second federal chamber, was the solution that was agreed upon.

Thus the first great principle of democracy — representation by population — is embodied in the House of Commons. The second great principle of federalism — territorial representation — is enshrined in the Senate. This explains the Senate of 1867. Indeed, in 1867 I think it would not have been unfair to say, "No Senate, no Confederation!" It also explains the case for an effective second federal chamber in 1982.

What I have said so far is a common place of Canadian history. We ought to establish, though, in our own minds the compelling reasons that are behind the proposal that an effective second chamber is required in 1982, before we attempt to improve on the one we have. It is my submission that Canadian experience, both historically and currently, — and, indeed, the experience of similar federations elsewhere — shows that Canada needs an effective second federal chamber to represent regional interests. It may be said that we have a Senate which was designed especially for this purpose. Is it fulfilling that task? Why do you think that it needs to be improved?

The Hon. Duff Roblin was Premier of Manitoba from 1958-1967. He was appointed to the Senate in 1978. This article is an abridged version of a speech delivered in the Senate on February 24, 1982.



Of the fourteen days of consideration that led up to the articles of Confederation six were devoted to the question of the Senate
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The Lamontagne committee, whose report I have already referred to, made interesting comments on the current reform proposals. It isolated the defects of some of these proposals that were examined and, for good reason, they were set aside. At the same time, that committee underlined the good and useful things that the present unreformed Senate is able to do. I defend the diligence and the dedication of the members of the present Senate. I agree that its work as a revising chamber in examining and amending proposed laws is favourably known in many circles. Its balanced, non-partisan, thoughtful, and, Heaven be praised, sometimes original initiatives in the work of the committees that go into matters of public concern have often given the lead to the House of Commons and earned the praise of experts.

These are all very worthwhile activities and I defend them as a public service. I am glad that the Lamontagne committee has documented, in an incontrovertible and historical way, the facts of this matter for public consideration. I think this is a valuable consideration. It deserves our thanks — indeed, it deserves wider dissemination by the media than it has had so far. These functions to which I refer should be cherished and continued in any new Senate that might be developed in this country.

However, when one proceeds from there to examine the analysis of the committee and its conception of public dissatisfaction with the present Senate, when one looks at the curious arrangement it has for continuing senators by appointment, with a self-perpetuating continuation at that, it becomes clear that the Lamontagne report is not a reform proposal which the public of Canada is likely to approve. I say this because the one area in

which the public perceives the Senate to fail most conspicuously — the one area which all reformers examine and also the area of paramount concern in our affairs today, the area that goes to the heart of the matter — is the role of the Senate as part of the central federal legislative authority. In this role, the Senate does not adequately represent regional interests, although that is the purpose for which it was mainly constituted. I submit, therefore, that for any plan of Senate reform to succeed in the public arena, this responsibility of regional representation is the one which must be satisfied.

Origins of the Problem

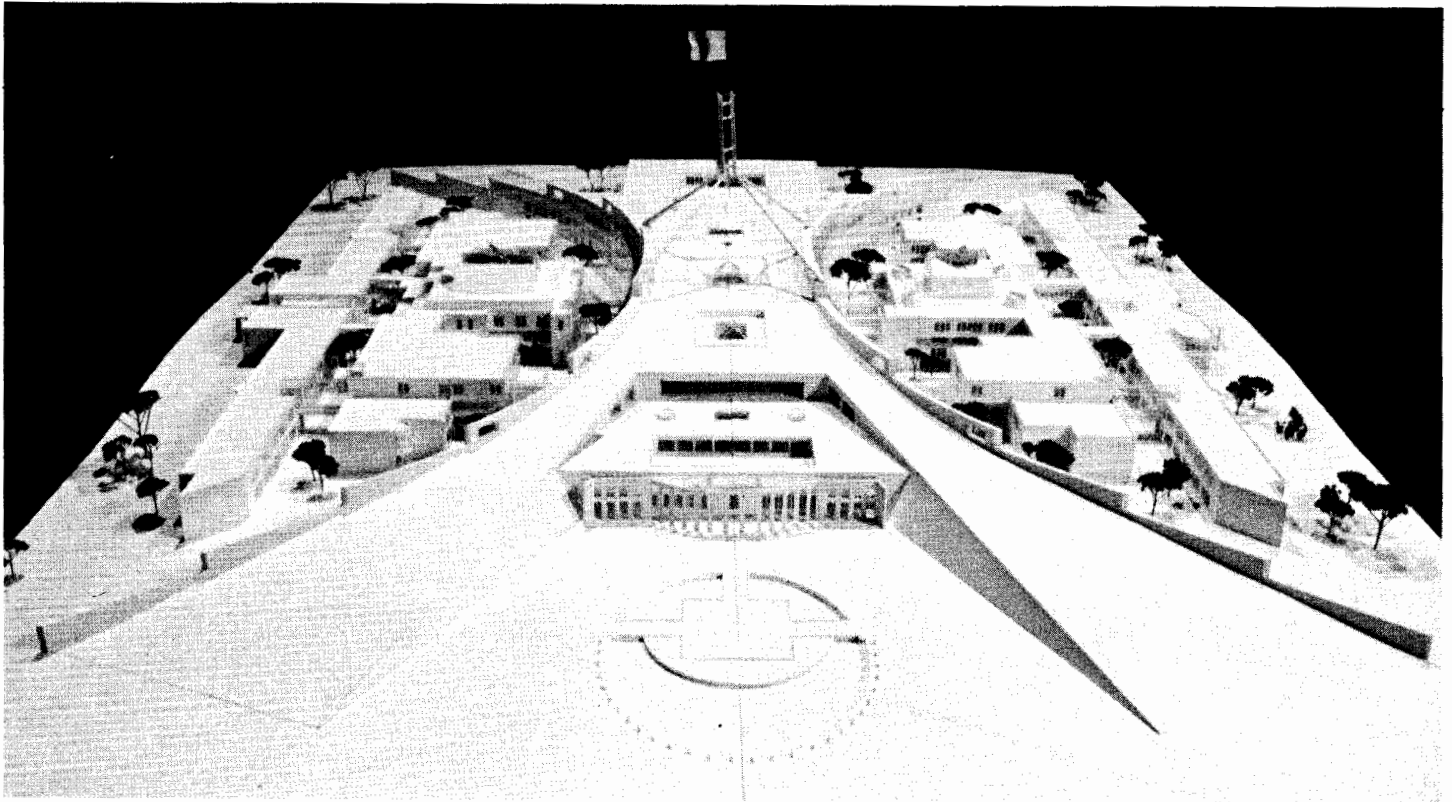
If this failure exists, how has it come about? Why is the Senate not that responsible and effective body of regional representation? Was the Senate of 1867 — or is, indeed, the Senate today — powerless? Was it impotent? Far from it. It was and still is vested with enormous power in terms of legislative authority, in terms of lawmaking capacity. It is fully the co-equal in power of the House of Commons. It is true that the House of Commons has always controlled the purse strings, in the sense that money bills can only originate there. It is true, as well, that no government need resign if defeated in the Senate. Only the House of Commons can make or unmake governments, or make and unmake prime ministers. Apart from those two exceptions, however, the Senate of 1867 was, and the Senate of today is, endowed with adequate power to fulfil its role as the territorial representative to act as the balance wheel, as the "make weight," in the federal system.

Therefore, we have, I submit, the present Senate made up of experienced and capable men and women. It does not represent provincial governments themselves, it is true, nor should it, but it is constituted to represent regions within the federal constitutional ambit and the federal constitutional prerogative, and is vested with extensive powers. Generally speaking, though, instead of functioning as the balance wheel of Confederation, it is regarded by most who look at it as being a fifth wheel of the Constitution. The media, by and large, overlook our debates. Our credibility with the general public is undeniably low, and even we senators complain that we are ignored by the federal executive and are neglected by the provincial governments. At the same time the Senate declines to exercise the power it possesses which might either justify its existence or, alternatively, challenge its political legitimacy.

The defect in our arrangement in the Senate is quite simple to identify. It is to be found in the fact that senators are summoned to office by appointment of the federal prime minister, and in no other way. The fact that we have a Senate by appointment, in my opinion, undermines its whole position. It vitiates its capacity for independent action. An appointed senator — and let us be frank about this — is responsible constitutionally to no one. Politically, many senators, it is fair to say, recognize the claims of the power that appointed them. But it must be clear that in 1982 a system of political appointment of men and women who are vested with legislative functions and law-making authority is repugnant to modern perceptions of representative and parliamentary government.

The Senate is an instance where we have legislative authority without democratic responsibility, and thus it is clear that appointed senators lack the *imprimatur* of political legitimacy. An appointed Senate cannot be expected to use its power. Indeed, sensibly, it tries but seldom or almost never to exercise its undoubted constitutional authority. For all its theoretical power, the appointed Senate knows its place. The Senate declines to engage the elected House of Commons, even when legitimate regional interests may be at risk. Thus, the main purpose of the second chamber, if you follow my line of reasoning, the recognition of regional interests at the federal legislative centre, goes by default and is rendered nugatory.

The lack of political legitimacy, in the constitutional sense of that phrase, lies at the heart of the matter. The remedy, in a representative and parliamentary system, is obvious. You simply change the method of selecting senators. You change it from selection by appointment to selection by election. By this one move, by moving from the appointive system to the elective system, constitutional legitimacy is achieved and the Senate is then vested with the moral as well as the political authority to discharge its responsibilities. Political responsibility is then added to regional responsibility, and it offers at least the possibility, if you want to go no farther than that, that an elected Senate could function as it should, within the federal parliamentary system on matters within the federal ambit and the federal authority.



Australia is an example of a federal state having an elected Senate. By 1988, a new Parliament House will be opened. A model of the winning design is shown above. On the left is the House of Representatives; on the right the Senate. (Michael Jensen, Australian Information Service)

How to Elect a Senate

Once the principle of election of senators is accepted, many important election options present themselves for consideration. On what system of voting would senators be chosen? We have an opportunity here to break away from the first-past-the-post system, which is now used to elect members of the House of Commons. I continue to think that the first-past-the-post system is well adapted to the House of Commons, where there is a need, under most circumstances, for a stable majority to support a government. The Senate, however, where the question of confidence does not arise, could be elected in another way. We have heard the proposal that it should be elected by proportional representation. This is often described as a system of voting on the party slate, where the candidates are listed in the order of the party preference.

Some objections are raised that there is far too much party influence in this system and the voter has not sufficient choice. But proportional representation of that kind is not the only way. There is the transferable vote. Here voters may select any candidate they choose and list any number of names, up to the total to be elected, in the order of the voter's choice in order to fill the number of seats available. This system enables the voter's preference to supersede the party choice, and some may think it has much to commend it.

I am sure there are other methods, apart from the ones I have mentioned and the first-past-the-post system in the House of Commons, that would be considered when laying down the rules for election to the new Senate of Canada. Such a system, I think, would be quite compatible with senatorial interests in the representation of minorities.

However, I am not attempting today to put before honourable senators any strict set of rules about many of the complications that arise. My concern is to get recognition of the elective principle. Once that proposition is conceded, then we have to sit down and decide just how to put it into action. I offer some suggestions. I do not say that they are exhaustive.

Let us turn to the question of the territorial electoral units that might be used. Our present system consists of a series of senatorial divisions. There were originally three divisions, each one providing an equal number of senators, 24 apiece. We now have four divisions, the Maritimes, Quebec, Ontario and the west: and we have some adjustments for Newfoundland and the Northwest Territories. But the principle behind the divisional system is that they should be, to all intents and purposes, equal and that the territorial extent of the country should be represented equally through these senatorial divisions.

There are some who would say that if you are going to elect a Senate you should have the same number of senators for each province, just as in the United States: and that is a proposition worth considering. If you were to ask my opinion, I would say that for historical and practical reasons, perhaps some modification of the present divisional system is best suited as the next step in Canada, where each province could elect its own senators. In the case of Manitoba, for example, we would elect six on a provincial basis, and larger areas like Ontario might be divided into regions which would also elect six senators apiece. These are matters which could be reasoned and discussed as the matter proceeds.

As I have said, the present divisional system could perhaps be modified to take into account recent developments, and this to me is a reasonable basis to start from.

When should the senator be elected and for what term of office? There are at least three possibilities that occur to me: elections could be held independently, for the Senate alone: elections could be held in conjunction with elections for the House of Commons: or, indeed, elections could be held in conjunction with each provincial election. If you are anxious to underline the regional character of the Senate, this last proposition has something to be said for it. All these different proposals are ones which could be the subject of further study, if the Senate so chose. The term could be six years. That seems to be a popular number. Possibly, the election could be arranged on a staggered basis, with one half elected at each election. There are several possibilities with respect to how the Senate should be elected and how the vote should be counted.

A question that is equally important and to which we ought to apply our minds is: How would such an elected Senate work in a parliamentary system such as ours, and what power should this Senate have to discharge these regional responsibilities to which I have referred? I say the Senate should have exactly the same powers when it is elective as it has today. The House of Commons must remain the primary body. The government should only be responsible to the House of Commons. Only the House of Commons should have the authority to empower governments or prime ministers, and only the House of Commons should originate money bills.

However, an elected Senate could retain the present powers of an appointed Senate. Indeed, as an elected body it is appropriate that it should do so. In fact, I would add to the duties. I would say that when the federal government appoints officers to regional or national bodies and the like, a list of them could be compiled, and those appointments could be subject to ratification by an elected Senate.

But if powers such as these are conferred upon an elected Senate, the question of harmonizing the work of the Senate and the House of Commons assumes capital importance. It is a critical consideration for any elected Senate that we should not be automatically providing for a stalemate or for an unlimited legislative deadlock with the House of Commons itself. The federal system should not be stultified by an elected Senate, and the solution of differences between the two chambers must be regulated and workable, with the primacy of the House of Commons recognized.

A number of possible arrangements suggest themselves. Obviously, we would seek to strengthen the joint Senate-House of Commons system of consultation and management, the system of consultation and communication, and perhaps the establishment of a joint management committee would be in order. This would enable us to seek mutually acceptable compromises which are clearly possible on many issues.

If the House of Commons proposes a measure which does not meet with the approval of the Senate, it might be stipulated that the House must muster a two-thirds majority in order to firm up its views. Another variation of the same idea is that if the Senate rejects a proposal from the House of Commons on the first occa-

sion by a simple majority, and if it is re-presented by the House of Commons a second time, then at that stage the two-thirds majority might be required in order to deal with the matter. Alternatively, differences could be settled by joint sittings of the Senate and the House of Commons when a simple majority would decide. As a last resort, the federal Prime Minister should perhaps be given the power of a double dissolution. Then both the House of Commons and the Senate would go back to the people and let the people, in a new Parliament, decide what course should be taken.

These are only a few ideas on the vital and critical question of reconciling the operation of an elected Senate with the parliamentary system as we know it. I suggest that either alone or in combination — or with the addition of ideas which other senators may be able to suggest — we can ensure that an elected Senate would conform with the requirements of representative and responsible government in Canada. Both houses must ultimately recognize the sovereignty of the people.

I see merit in turning to an elected Senate as a significant improvement in harmonizing the interests of our regions within the central legislative apparatus and within the federal ambit and authority. But I do not propose it as a sovereign remedy to all that ails Canadian federalism. There will always be a federal prime minister, provincial premiers and federal-provincial conferences with direct contact between the governments. In no way would an elected Senate do away with all the regional discomforts we experience. How could it? Its main role is to be played with respect to federal legislation within the federal constitutional ambit and within the federal power. The federal-provincial division of powers remains undisturbed. This new Senate would not represent provinces; it would represent people in regions of Canada. In that respect, I think its role would be clear and unambiguous.

I must warn this chamber that in Australia, a federal state much like ours, there is an elected Senate, whose performance

has been criticized as being too heavily influenced by party manipulation and offering perhaps only a pale reflection of the political struggles in the House of Representatives. I would suggest that, if we in this country are to reform our Senate, we should take note of the problems that have arisen in Australia. If an elected Senate were subject to party manipulations, as some suggest the Australian Senate is, or if it were merely a pale reflection of the House of Commons, one would have to be concerned. If the Senate is elected by transferable vote at the time of provincial elections, we may find that we have gone a long way towards dealing with the problems perceived in Australia.

Our elected Senate can be designed to minimize any disadvantages that may be discovered. It should be deliberately modeled to take into account the experience of other second chambers in other parliamentary systems and particularly shaped to answer to Canadian needs and requirements.

The question of Senate reform is now pretty close to the top of the constitutional agenda. Senators by election, as opposed to Senators by appointment, is clearly a leading option. It is my opinion that public sentiment and expert opinion alike support at least the consideration and investigation of a proposition of the kind I set before you.

If the Senate is to continue to have legislative power of the type it has now, it most certainly ought to be elected. If it is to relapse into an advisory body whose word does not count, it really does not matter what you do.

I think, however, that the present Senate is well qualified to take the lead in the consideration of this question. Indeed, I suggest that our self respect would urge us on such a course. If we fail to propose a timely and effective change ourselves, then undoubtedly others will do it for us. I want to see the Senate take the lead. We owe it to ourselves; we owe it to the nation.