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Beyond Scandal and Patronage

A RATIONALE AND STRATEGY FOR SERIOUS SENATE REFORM

Brian Lee Crowley

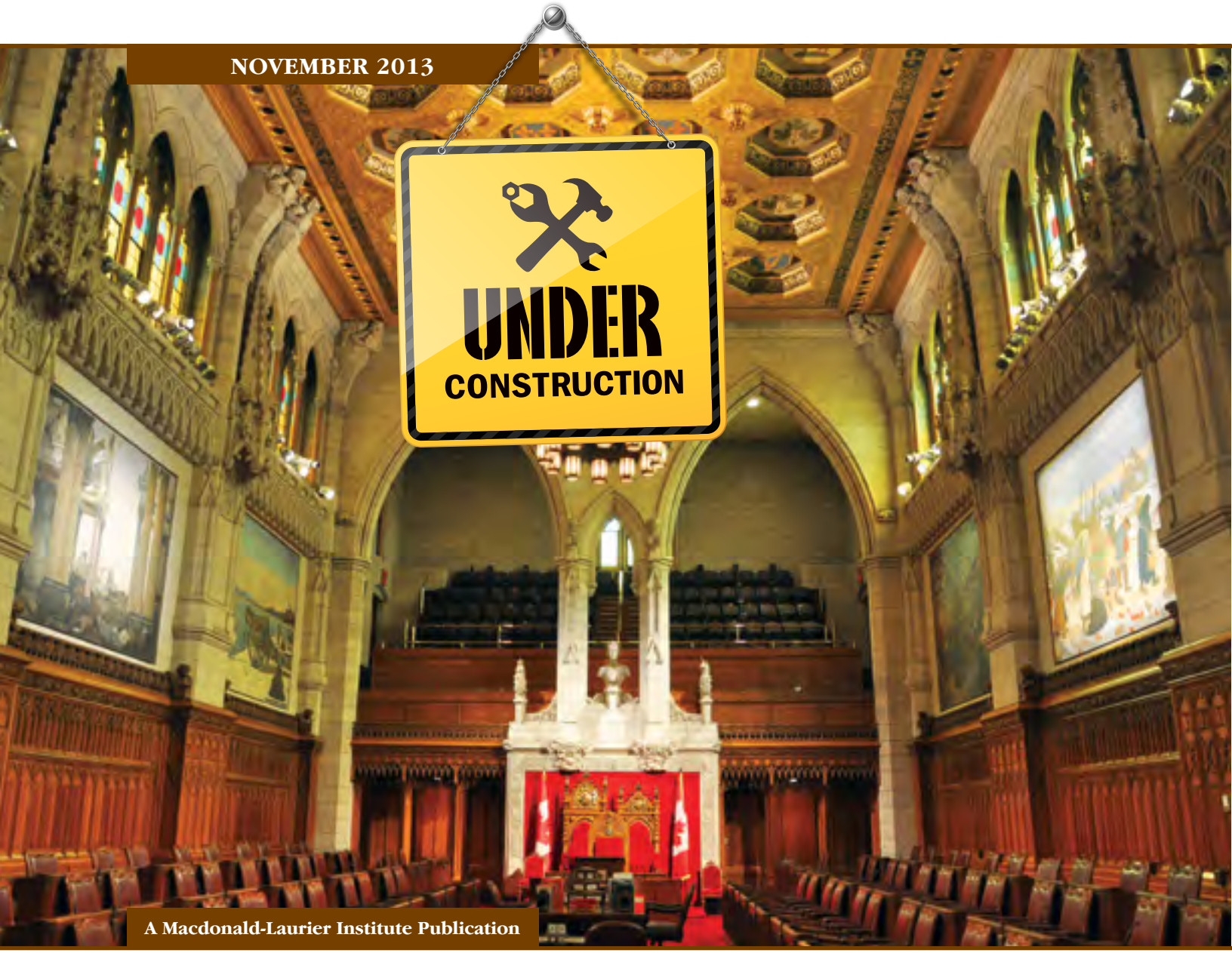

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Table of Contents

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Executive Summary

Today we have a Senate that is not only ineffective in playing its crucial role within our larger constitutional edifice, but has become an embarrassment and a laughing stock, in large part because no one knows what the Senate is for and the way senators get there is widely seen to be illegitimate. The result is that discussions around the Senate focus entirely too much on the peccadilloes of current senators whose shenanigans, however risible, should not blind us to the vital work the Senate can and indeed must do for Canadians.

This paper lays out for readers why Canada needs a Senate, why reform is necessary, and how it can be accomplished.

When properly designed, upper chambers can and should play two crucial functions. First, they can delay precipitate action by government, allowing more time for cooler heads to prevail. In extreme circumstances, it may even be justified to give an upper house a mechanism to veto some kinds of government actions. The idea here is, to use a phrase often applied to the Canadian Senate, to create a chamber of "sober second thought".

Second, in federal systems upper chambers confer greater democratic legitimacy on national decisions by ensuring that a double majority is needed, one majority of individuals in the lower house, and a second majority of constitutionally-recognized communities (in Canada's case, the provinces) in the upper house.

Both of these functions are highly desirable and it was to fulfill them that the Fathers of Confederation created the Senate. The way they chose to do so (an appointed chamber with lifetime tenure for Senators, later amended to require conpulsory retirement at age 75) is no longer appropriate to our democratic and egalitarian age, but abolishing the Senate to get rid of these flaws is like banning hockey to prevent fights on the ice.

Some would argue that the Senate is unnecessary and that the premiers can ably represent their provinces in national affairs, but the job of a premier is quite different. Premiers are elected to head provincial governments. Those governments are given a list of powers and responsibilities by the Constitution. Those powers do not include participating in Ottawa's decisions about the national interest. In fact the Constitution is quite explicit that provincial governments are supposed to look after "Generally all matters of a merely local or private Nature in the Province", whereas it is Ottawa's job to see to the "Peace, Order and Good Government of Canada". Not exactly equivalent jobs.

Provinces generally see themselves in a zero sum struggle with Ottawa for power. Premiers have an interest in strengthening provincial power and weakening Ottawa because those are two inseparable sides of the same coin. That set of interests and incentives hardly qualifies them to be disinterested representatives of their provincial community in national policy making, for which we require a Senate.

In designing a reformed Senate we should be guided by five principles:

An appointed Senate cannot have the democratic horsepower to do its job effectively. Twen-

ty-first century senators require the democratic legitimacy that only elections can deliver.

Second, our parliamentary system requires a Senate that has enough power to influence the government when it really matters, but not so much power that it becomes the government or prevents the government from acting when necessary.

Third, the Senate should not be merely a smaller Commons. The Senate is a separate institution and should have a different mandate, powers, electoral system, and terms of office than the lower house.

Fourth, we need to make sure that the Senate has every reason to focus on national issues and questions, and not be mistaken for representatives of the provincial governments in Ottawa. If the Senate is to be valuable it must be a voice for the members of provincial communities, but not of their provincial governments.

Fifth and finally we need to think about the distribution of Senate seats among provinces. There is nothing in logic or our history or the practice of federalism worldwide that says that all provinces should have equal representation. On the other hand, equality is a simple and intuitively appealing principle in that it treats all the constituent communities in a similar way.

The proposal, then, is a Senate of 66 members (6 each for the provinces, 2 each for the territories), with half the senators elected by preferential ballot at each federal election, thus giving senators a term equal to the life of two parliaments. The reformed upper house would have two key powers relative to the Commons and the government based there, namely a power to delay somewhat government legislation it thinks ill-advised and the power to veto such legislation when opposition in the Senate moves beyond narrow majorities to genuine cross-party consensus. All of these features taken together would make for a more deliberative, less partisan chamber than the Commons.

How do we get it done?

The government is surely correct that there is little appetite among the public for new rounds of constitutional negotiations à la Meech and Charlottetown. On the other hand, this paper argues that real Senate reform (which voters clearly do want) unavoidably requires constitutional change and the Supreme Court is likely to agree. How to square the circle? Ottawa should bypass the bad old approach to constitutional negotiations by tabling a specific reform proposal and appealing directly to the electorate for a referendum mandate to enact its proposals. Given the current mood of public opinion a thoughtful proposal properly explained and defended would stand a very high chance of being enthusiastically endorsed by voters. The provinces, faced with a federal government proposal endorsed in a national referendum, would find it very hard to resist. If, in addition, the federal proposal was carefully crafted to avoid any provisions requiring the unanimous consent of the provinces, the chances of getting the reforms through the formal amendment process increase dramatically.

Senate reform cannot be a hasty reaction to the scandal that is currently enveloping the Red Chamber and Prime Minister's Office. It will require careful deliberation and hard work. But the ultimate prize of a Senate that will serve all Canadians is worth it.

Sommaire

De nos jours, nous avons un Sénat qui non seulement n'arrive pas à remplir effi cacement le rôle crucial qui lui est dévolu au sein de notre édifice constitutionnel, mais qui est devenu une source d'embarras et de risée, en grande partie parce que personne ne sait à quoi il sert et qu'on ne considère pas comme légitime le moyen d'y accéder. C'est la raison pour laquelle les discussions entourant le Sénat insistent beaucoup trop sur les détails des fautes commises par les sénateurs actuels, dont les manigances, quoique ridicules, ne devraient pas nous faire oublier le travail vital qu'il peut et doit accomplir au profit des Canadiens.

Ce document démontre pourquoi le Canada a besoin d'un Sénat et présente le bien-fondé de procéder à sa réforme ainsi que la manière de la réaliser.

Les Chambres hautes qui sont adéquatement constituées peuvent et doivent exercer deux fonctions cruciales. La première est d'empêcher l'action précipitée du gouvernement grâce à un temps d'arrêt permettant d'examiner les questions à froid. Dans certaines circonstances extraordinaires, il serait même avisé que le Sénat ait recours à un mécanisme l'autorisant à bloquer certaines décisions gouvernementales. À la base de cette position se trouve la notion d'un Sénat comme « organisme indépendant de réflexion », pour reprendre le qualificatif souvent utilisé lorsqu'il est question du Sénat canadien.

La deuxième fonction est de conférer, à l'exemple des autres fédérations, une grande légitimité démocratique aux décisions nationales en garantissant l'application du critère de la double majorité, soit une majorité des citoyens à la Chambre basse et une majorité des communautés reconnues constitutionnellement à la Chambre haute (les provinces dans le cas du Canada).

Ces deux fonctions sont très souhaitables, car c'est pour les exercer que les Pères de la Confédération ont créé le Sénat. Le fonctionnement du Sénat à l'origine (sénateurs nommés à vie, mais dont le mandat a été modifié par la suite pour se terminer obligatoirement à l'âge de 75 ans) est devenu dépassé dans le contexte démocratique et égalitaire de notre époque, mais abolir le Sénat pour écarter ces défauts équivaudrait à interdire le hockey à cause des bagarres.

Certains diront que le Sénat n'est pas nécessaire et que les premiers ministres peuvent très bien représenter leur province dans les affaires nationales. Mais le travail d'un premier ministre est ailleurs. Les premiers ministres sont élus à la tête des gouvernements provinciaux. Ces gouvernements assument les responsabilités et exercent les pouvoirs qui leur sont conférés par la Constitution. Ces pouvoirs et responsabilités ne leur permettent pas de participer aux décisions d'Ottawa qui sont d'intérêt national. En fait, la Constitution dicte de façon tout à fait explicite les responsabilités des gouvernements provinciaux, soit « généralement toutes les matières d'une nature purement locale ou privée dans la province », alors que c'est le gouvernement d'Ottawa qui a pour tâche de voir à « La paix, l'ordre et le bon gouvernement du Canada ». Ces rôles ne sont pas exactement équivalents.

En outre, les provinces se retrouvent souvent au milieu de luttes de pouvoir contre Ottawa qui se soldent par un pointage nul. En effet, les premiers ministres ont intérêt à renforcer les pouvoirs des provinces et à affaiblir ceux d'Ottawa parce que les compétences provinciales et fédérales partagent les deux faces d'une même pièce. Cet ensemble d'intérêts et de motivations peut difficilement faire des représentants des communautés provinciales des intervenants désintéressés lorsqu'il est question d'élaborer des politiques nationales, pour lesquelles nous avons besoin d'un Sénat.

La conception d'un Sénat réformé devrait reposer sur les cinq énoncés suivants :

Un Sénat nommé ne bénéficie pas du pouvoir démocratique nécessaire pour faire son travail efficacement. Au vingt et unième siècle, seul un processus électoral peut procurer aux sénateurs la légitimité démocratique.

Deuxièmement, notre système parlementaire exige un Sénat assez puissant pour influencer le gouvernement dans les moments cruciaux, mais sans le remplacer ni l'empêcher d'agir lorsque cela est nécessaire.

Troisièmement, le Sénat ne devrait pas être simplement une petite Chambre des communes. Le Sénat est une institution distincte dont les attributions, les pouvoirs, le mode d'élection et le mandat doivent être différents de ceux d'une Chambre basse.

Quatrièmement, nous devons veiller à ce que le Sénat soit contraint de se concentrer sur les questions nationales; il ne doit pas devenir un autre représentant des gouvernements provinciaux à Ottawa. Si le Sénat doit être valorisé, c'est pour être l'écho des voix qui parviennent de l'intérieur des communautés provinciales, non pas de leur gouvernement provincial respectif.

Enfin, cinquièmement, nous avons besoin de réfléchir à la répartition entre les provinces des sièges au Sénat. Il n'y a aucune logique, aucun précédent historique, ni aucune expérience du fédéralisme ailleurs dans le monde qui exige que toutes les provinces aient la même représentation. Or, l'égalité est un principe simple et intuitivement attrayant, puisqu'il impose que toutes les communautés constitutives soient traitées d'une manière similaire.

La proposition présentée, par conséquent, suggère un Sénat composé de 66 membres (6 pour chaque province, 2 pour chaque territoire), avec la moitié des sénateurs élus par voie de scrutin à chaque élection fédérale, ce qui leur accorde ainsi un mandat dont la durée est de deux législatures. Une Chambre haute réformée aurait deux pouvoirs clés par rapport à la Chambre des communes et donc, au gouvernement qui y siège, soit le pouvoir de retarder quelque peu les législations qu'elle estime mal avisées et un droit de veto lorsque l'opposition au Sénat arrive à se rallier à un véritable consensus entre partis, allant bien au-delà d'une mince majorité. Toutes ces caractéristiques prises ensemble permettraient de créer une Chambre plus délibérative et moins partisane que la Chambre des communes.

Comment pouvons-nous y arriver?

Le gouvernement n'a probablement pas tort de croire que la population ne désire pas de nouvelles discussions constitutionnelles comme celles de Meech et de Charlottetown. Or, ce document fait valoir qu'une véritable réforme du Sénat (ce que les électeurs désirent nettement) nécessite inévitablement un changement constitutionnel, ce que la Cour suprême est susceptible de confirmer. Comment résoudre la quadrature du cercle? Ottawa devrait contourner les difficultés de l'approche traditionnelle en déposant une proposition de réforme spécifique et en s'adressant directement à l'électorat au moyen d'un référendum. Compte tenu de l'état d'esprit actuel de l'opinion publique, les électeurs soutiendraient probablement avec enthousiasme une proposition réfléchie et bien défendue. Les provinces, qui auraient alors à faire face à une proposition du gouvernement fédéral approuvée lors d'un référendum national, seraient moins enclines à résister. Si, en plus, la proposition du gouvernement fédéral est conçue de façon à éviter toutes les dispositions exigeant le consentement unanime des provinces, les chances d'obtenir les réformes par le moyen du processus d'amendement formel augmenteraient considérablement.

La réforme du Sénat ne peut pas être une réaction hâtive au scandale actuel éclaboussant la Chambre rouge et le Cabinet du Premier ministre. Elle exigera une réflexion approfondie et un travail acharné. Mais la récompense ultime d'un Sénat qui servira les intérêts de tous les Canadiens en vaut la peine.

Introduction

If Canada didn't have a Senate we would have to invent one. That's because the Sen ate is a vital piece of our founders' constitutional plan, intended to be an indispensable balancing mechanism between the interests of different communities and the national interest and a force for moderation and reason in national decision-making.

But the Fathers of Confederation were creatures of their time. They thought that an appointed body, explicitly modelled on the aristocratic British House of Lords, could enjoy the legitimacy necessary to carry real weight within Canada's national government. In this they were wrong.

If Canada didn't have a Senate we would have to invent one.

So here we are today, with a Senate that is prevented from playing its vital parliamentary and nation-building role and that therefore saps the ability of the federal government to act forcefully and energetically in the national interest. Not only is it ineffective in playing its crucial role within our larger constitutional edifice, it has become an embarrassment and a laughing stock, in large part because no one knows what the Senate is for and the way senators get there is widely seen to be illegitimate. The result is that discussions around the Senate focus entirely too much on the peccadilloes of current senators whose shenanigans, however risible, should not blind us to the vital work the Senate can and indeed must do for Canadians.

What's the Senate For Anyway?

When properly designed, upper chambers play two crucial functions.

First, such chambers can act as a brake on the excesses of which lower houses can sometimes be guilty. Chambers that are based on rep-by-pop and that are frequently called to submit themselves to election can sometimes find their better judgment overwhelmed by the short term fashions and fads that periodically sweep public opinion. Introducing a chamber that has a somewhat more distant relationship with the electorate can help moderate such excesses. In addition, within our parliamentary system there is little control between elections of the vast power that is conferred on governments, and especially majority governments. A well-designed upper house can play an important role here by delaying precipitate action by government, allowing more time for cooler heads to prevail. In extreme circumstances, it may even be justified to give an upper house a mechanism to veto some kinds of government actions. The idea here is, to use a phrase often applied to the Canadian Senate, to create a chamber of "sober second thought".

Second, in federal systems upper houses confer greater democratic legitimacy on national decisions by ensuring that a double majority is needed, one majority of individuals in the lower house, a second majority of communities in the upper house.

Democratic federations seek to balance two kinds of representation: individuals and communities. Canada, for example, is composed, primarily and fundamentally, of all individual Canadians, just as Australia is composed of all Australians, the United States (US) of all Americans and so forth. The lower house of the national legislature in such federations (in our case the Commons) is intended to represent all of these individuals on a basis of rough equality and hence is universally based on representation by population. Legislation cannot pass our parliament unless it has the consent of MPs representing a majority of Canadians.

But Canada, like all federations, is also composed of constitutionally-recognized communities, in our case the provinces. For national decision-making to be legitimate in a federation the virtually universal rule is that you need something more than the assent of the majority of individuals; you also need the assent of some important share of the communities that make up the country. The interests of the people who inhabit the provinces or states cannot be fully represented by representation by population ("rep-by-pop") alone.

Legitimacy in a federation requires the assent of the majority of individuals and communities.

Why? Just think about Canada: for a long time Ontario and Quebec have had enough inhabitants that they could impose their will on the rest of the country if they so wished if decisions were made on a pure rep-by-pop basis. I am not suggesting that Central Canada has always got its way, but if you consider that for the vast majority of the 20th century prime ministers and parliamentary majorities always came from Ontario or Quebec, or you look at policies like the old protectionist National Policy that favoured heartland manufacturing over western resources and agriculture, or the imposition of the National Energy Program under Pierre Trudeau that sought to transfer a lot of the west's natural resource wealth to Central Canadian consumers then you can see that Canadian history was littered with examples of the more populous provinces carrying the day in cases of conflict with smaller regions. Fear of dominance of a handful of large states was also a key factor in the design of the US and Australian federations.

In all cases the way that federations such as these squared the circle of rep-by-pop and sensitivity to regional concerns was through the upper chambers of their national legislatures: when properly designed, such chambers confer greater democratic legitimacy on national decisions by ensuring that a double majority is needed, one majority of individuals in the lower house, a second majority of communities in the upper house. If we didn't have this twin structure to our national institutions, the need to represent individuals and communities simultaneously, we might well be able to do without a Senate. Other democracies, like New Zealand, did away with theirs, but they don't have provinces or a federal system. In many other countries that are not federations, there are upper houses but they tend to be weak and ineffective, institutions in search of a reason to exist. On the other hand there is only one federal country in the world without an upper chamber, and that is Pakistan, an unlikely source of inspiration for democratic reform in Canada.

In Canada there is no such doubt about why a properly constituted and functioning Senate would contribute enormously to the success of the national government and the federation. Canada is constituted in part of powerful communities (think for instance of Alberta, Quebec, Newfoundland and Labrador) who have distinct personalities and interests, but don't have equal populations. If a community felt that its interests were consistently ignored or disregarded in national decision-making, it could easily breed a sense of grievance and resentment, as has happened all too often in Canada's history. In fact the Reform Party's battle cry of "The West wants in" manifested itself chiefly in a call for radical reform of the Senate, ostensibly to prevent Central Canada from consistently ignoring the wishes of the west (both the National Energy Program and the decision to award the CF-18 fighter jet programme to a Montreal firm rather than one in Winnipeg convinced Reformers that it was not enough to change the party in power and that the old domination of Central Canadian elites and voters had to be countered by institutional reform). The idea behind a Senate, then, is to provide a counterweight to pure rep-by-pop decision-making, conferring the seal of approval of the country's regions on federal decisions as well as that of the people's representatives in the Commons.

Because rep-by-pop is the bedrock principle of

democracy, the lower house is always the more powerful of the two. But in a federation it is also important that regionally concentrated electoral majorities cannot run roughshod over the interests of smaller communities. Upper houses play that role. Coalitions of small communities cannot rule over the majority of the population, because lawmaking also requires the agreement of the lower house. But in federations, agreement of the majority is not enough to achieve democratic legitimacy.

The Senate cannot provide a community counterweight to the rep-by-pop power of the Commons.

Perfect equality of provincial representation is not required in upper houses, but the unavoidable goal is to give smaller communities some counterweight to population's political power, ensuring that their interests are also taken into account. Look no further for the reason why Quebec and Ontario, despite having two thirds of the population, have fewer than half the seats in our Senate as presently constituted.

One of Canada's great political and constitutional weaknesses has been the inability of the Canadian Senate to play this vital role of providing a credible community counterweight to the rep-by-pop based power of the Commons. Appointed senators simply can never have the democratic horsepower to be a real counterweight to the Commons. Ottawa's legislation therefore lacks the legitimacy of the double-majority system that federations have found so indispensable, and this is at the root of many of the problems of regional alienation and suspicion of the national government that have plagued this country since 1867.

Both of these functions (sober second thought and enhanced legitimacy within a federal system through double majorities) are highly desirable and it was to fulfill these two functions that the Fathers of Confederation created the Senate. The way they chose to fulfill these functions (an appointed chamber with life tenure for Senators) is no longer appropriate to our democratic and egalitarian age, but abolishing the Senate to get rid of these flaws is like banning hockey to prevent fights on the ice.

Premiers Need Not Apply

Saskatchewan's Premier Brad Wall, to pick one example, thinks that the way around this is to abolish the Senate and rely on the premiers to represent community interests in national decisions. On November 6, 2013, Wall's government repealed legislation that enabled the province to elect senators and tabled a motion calling for the abolition of the Senate.[1]

No federation in the world has found this a satisfactory solution, for a variety of reasons. The most important is that premiers are elected to run their provinces. That is not the same thing as being chosen to be a national legislator, someone whose constitutional job it is to represent a provincial community in decisions about what is good for Canada. That last idea is absolutely vital. We must distinguish between those whom senators represent on the one hand and the role they are being asked to play in the federation on the other. The role of senators must be to pursue the national interest, and in those deliberations to be guided in part by what is good for the people who elected them to represent them in the nation's councils.

The job of a premier is quite different. Premiers are elected to head provincial governments. Those governments are given a list of powers and responsibilities by the Constitution. Those powers do not include participating in Ottawa's decision about the national interest. In fact the Constitution is quite explicit that provincial governments are supposed to look after "Generally all matters of a merely local or private Nature in the Province", whereas it is Ottawa's job to see to the "Peace, Order and Good Government of Canada". Not exactly equivalent jobs.

Sure, premiers may give themselves airs about being big players on the national stage and demand first ministers meetings and create councils of the federation, but this is largely posturing. Remember that provinces generally see themselves in a zero sum struggle with Ottawa for power. Premiers have an interest in strengthening provincial power and weakening Ottawa because those are two inseparable sides of the same coin. That set of interests and incentives hardly qualifies them to be disinterested representatives of their provincial community in national policy making.

Premiers have a provincial mandate, not a mandate to be national decision-makers.

It is worth noting in passing that two of our most powerful national institutions, the cabinet and the Supreme Court, both have extensive formal and informal rules to ensure the representation of provincial interests separate from provincial governments. This was the role that the Senate was intended to play by the Fathers of Confederation for the national parliament they were creating. Their intention was the right one, but the execution no longer fits the needs of a 21st century Canada.

If it helps in understanding the potential of Senate reform for Canada, think about the US example. There is a reason why governors are minor political players in Washington, while senators are second only to presidents. US states are well-represented within federal decision-making by senators who, while always attentive to the views of their constituents, understand they are there to be national policymakers. Governors have lots to do in their respective state capitals; they are fifth wheels in Washington.

We have only to look at the laughable efforts of our premiers to act as national decision-makers (think about removing internal barriers to trade, the search for a national securities regulator, or cross-province collaboration on energy) to see that they are slaves to their parochial interests.

That is not a criticism; it's their job. But it is also why their job cannot be to confer that vital missing element of regionally-representative legitimacy Ottawa lacks and needs. Abolishing the Senate would get rid of the institution that should be playing that role, no matter how badly its current version falls short. It would diminish Ottawa and empower provincial parochialism. Reform may be hard, but it is the only way. Canada deserves the effort.

In saying that premiers and federal/provincial/territorial meetings (in other words, the institutions of so-called "executive federalism") cannot substitute for a properly functioning Senate at the national level the intention is not to suggest that such collaboration does not have its place in Canada. Indeed it would be correct to say that Canada is widely regarded as a well-functioning and successful federal system in global terms, and these meetings are a key part of the reason why. But they are still not a substitute for a reformed Senate.

In my view, executive federalism is chiefly a way for Ottawa and the provinces to collaborate on areas of provincial jurisdiction. They have been vital, for example, in developing a national dimension to social programmes like health care and social welfare that largely fall under provincial jurisdiction. But because of the zero-sum nature of the power relationship between Ottawa and the provinces in areas of *federal* jurisdiction, I would argue that provincial premiers are in a conflict of interest as representatives of provincial interests in federal decision-making. Thus a good case can be made that the power of the premiers has been enhanced at Ottawa's expense over the years precisely because the only way to get credible provincial or regional input on national decisions was through discussions with the provinces. One of the reasons that Senate reform is desirable, therefore, is precisely to give Ottawa that credible provincial input from senators with a democratic mandate. A successful Senate reform would make premiers less important national figures, an outcome that many Canadians would welcome.

Guiding Principles

Even if this establishes why a properly functioning Senate is crucial to Canada and how our national government has been damaged by its absence, that doesn't answer the question about what reform can or should look like.

There are as many ideas on how to fix our Senate as there are Tim Hortons in Canada. Not all ideas are equally sensible and workable, however. Here are some of the factors that need to be accommodated in designing a Senate equal to Canada's need and potential.

While we want a chamber of sober second thought and a more important role for the voice of the provinces (not provincial governments) in national decision-making, that idea must be reconciled with how parliamentary government works. The key idea here is that Canadians' democratic interests are served by having the government of the day answerable to the majority in the House of Commons, otherwise known as "responsible government". Everybody knows that no one can serve two masters, and so a reformed Senate with a democratic mandate must be able to make its voice heard and be a powerful participant in national lawmaking without usurping the Commons' role as the chamber that makes and breaks governments.

This is not just a matter of respecting the Commons' prerogatives; much more importantly it is a democratic imperative. Since it is elections to the Commons that determine the relative strength of the parties and therefore who will form the government, a Senate that could too easily thwart the will of the government based in the Commons is thwarting the will of the electorate. A Senate that matters needs to be able to do that occasionally, but only rarely. In our system we want a Senate that has enough power to influence the government when it really matters, but not so much power that it becomes the government or prevents the government from acting when necessary. This balance can be struck quite successfully.

Some other countries, such as Australia, paid insufficient attention to this issue, and created the potential for conflict between the two chambers that has brought about the fall of at least one government. This outcome is to be avoided as much as possible, and Australia has made substantial reform to its Senate to do so.

A second piece of the design puzzle is that the Senate should not be merely a smaller Commons. The Senate is a separate institution from the Commons and should have a different mandate, different powers, different electoral systems, and different terms than the Commons.

Third, we need to make sure that the Senate has every reason to focus on national issues and questions, and not be mistaken for representatives of the provincial governments in Ottawa. If the Senate is to be valuable it must be a voice for the members of provincial communities, but not of their provincial governments.

For the Senate to be valuable it must be a voice for the members of provincial communities.

Fourth and finally we need to think about the distribution of Senate seats among provinces. There is nothing in logic or our history or the practice of federalism worldwide that says that all provinces should have equal representation. There are federations, like Germany, that use a weighting system that gives relatively more representation to smaller states than big ones, but not equal representation. In our own history the distribution of seats started from the equality of the two Canadas (Upper and Lower), both of whom got 24 seats. The other two original (and much smaller) provinces, New Brunswick and Nova Scotia, were together given equality vis-à-vis the Canadas: they shared 24 seats between them (they got 12 each). That explains most of the current distribution of seats in which the West, Ontario, Quebec, and the Maritimes get 24 seats each, Newfoundland and Labrador, a latecomer, got an additional six, and the territo-

ries got one each. So our system was based on regional equality marred by the awkward fact that some provinces (Quebec and Ontario) were counted as regions, whereas other regions were constituted of several provinces.

On the other hand all of these ways of attributing seats in upper houses are complicated and difficult to explain. Equality of provinces or states within federations has the virtue of simplicity and clarity: the Commons is based on equality of individuals, the Senate on equality of provincial communities. If you are a province in the Canadian federation, you are entitled to the same number of senators as any other province. Bigger provinces manifest their extra power in more seats in the Commons, not more seats in the Senate. As long as the powers and procedures of the Senate are properly designed, equality of provincial representation need not lead to undemocratic results, where minorities frustrate the will of the Commons.

To explain that problem more fully, here is the critical issue that can be created by equality of provincial representation. Suppose that every province gets, as I propose, six senators and the territories two each (66 senators in all) and that all decisions are taken by simple majority voting. Now suppose that all the senators from the smaller provinces and the territories formed a united front on a wide range of issues. Such a coalition (all the senators representing Yukon, Northwest Territories, Nunavut, Saskatchewan, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland and Labrador) would have a large permanent majority in the Senate in spite of representing less than 5 million of Canada's 34 million people. It cannot be the objective or the result of Senate reform to give minorities in Canada such disproportionate power or the ability to hold the nation to ransom unless they get their way. Even granting that party identification and other factors might make such regional coalitions hard to achieve, that is no reason to ignore the possibility and not to design the institution to avoid this obviously unacceptable outcome.

The Principles in Practice

So for the sake of argument let's say that we are going to have a Senate with equal provincial representation along the lines I have described, one with significant influence in Ottawa, but one that does not confer unreasonable or disproportionate power on minorities or destroy the principle of responsible government. How might it work?

Let's start by considering what "influence" can and should mean for the Senate. My starting point is that the Senate cannot be allowed to usurp the power of the Commons or the electorate. For reasons I've explained, in our parliamentary system the Commons is the chamber to which governments are answerable. That does not mean that the Senate can never be allowed to frustrate the will of a government enjoying the support of a Commons majority, but that it should only be able to do so rarely and only when there is a large consensus, not a narrow numerical majority, among senators. By making the Senate's veto power over government legislation real but difficult to exercise, we create an influential institution that the government must listen to and take account of, but we do not empower small minorities to hold the government and the country to ransom.

Similarly, in addition to that vital role of the Commons as the "confidence chamber" that can make or break governments between elections, it is the role of the voters, at election time, to choose governments and approve or reject party platforms. A party that wins a Commons majority at election time is entitled to put its programme to the Commons and, if the Commons approves, to see it adopted. It is then the electorate's job at the next election to pass judgment on the government's use of power over the life of the last parliament. It ought not to be possible for the Senate to usurp this job of the electorate's, namely to pick governments, approve their programme, and then pass judgment on them at the appropriate time, either re-electing them or rejecting them.

A Senate with the proper powers becomes a discipline on the government's power.

Saying that the Senate must not usurp the role of the Commons or the electorate, however, does not condemn the upper house to impotence. On the contrary, a Senate with the proper powers becomes a discipline on the government's power, a calmer, less excitable, less partisan chamber of sober second thought that can make the government revisit and more fully justify its decisions, and that can use the power of delay to engage the public more fully in political debates.

The most important power of the Senate may thus be its ability to slow down the legislative process when it judges the government has acted in a hasty or ill-advised manner, using the high-profile platform and democratic credibility of the Senate to appeal over the government's head to the public to see if Canadians agree with the Senate's concerns. If that agreement does exist, the Senate's ability to delay adoption of legislation is an important power because it allows more time for public opinion to be mobilized and for the government to reconsider.

The proposal, then, is that the Senate have two powers relative to the Commons and the government based there, namely a power to delay somewhat a government hell bent on passing its legislation and the power to veto such legislation when opposition in the Senate moves beyond narrow majorities to genuine consensus.

Ensuring that the Senate can slow down the legislative process to some modest degree as a matter of course, but only frustrate the will of a government supported by the Commons when a broad consensus exists among senators, is not difficult to do. To achieve this Senate decisions should be taken by simple majority votes with the following caveats:

If the Senate does not deal with a matter submitted to it by the Commons within some specified time period (such as 90–180 days), the Senate is deemed to have passed the proposal, thus avoiding an indirect Senate veto through inaction.

The Senate may not amend and may only delay budget (including tax) measures or supply by some period (a so-called "suspensive veto" of perhaps 60–90 days), after which it is deemed to have adopted them. The rationale behind this provision will be explained below in the section on the different roles of the two chambers.

If the Senate votes down or amends any other bill or business passed by the Commons, that starts the clock on a 60-day reconciliation period during which the two chambers try to negotiate a mutually acceptable solution. If negotiations are unsuccessful, the lower house may, within 30 days, pass a resolution refusing to accede to the Senate's veto or amendment (the "trigger" might also be the government declaring the matter one of confidence). In that case, the Senate must re-adopt its veto or amendment by a vote of, say, 70 percent of all senators (not just those present) and that 70 percent majority must include at least one senator from each of any seven provinces that together represent 50 percent of the population of Canada.[2] This re-adoption must occur within the next 10 sitting days. Failure to pass this super-majority threshold before the deadline means the Senate's proposed veto or amendment fails and the measure passes as adopted by the Commons. [3]

The higher you set the threshold, the closer Senate voting comes to rep-by-pop, thus reconciling equal provincial representation and democracy. This also means that a government with a majority in the Commons need only have 31 percent support in the Senate to be able to avoid a Senate veto or amendment.

Assuming a 66 seat Senate, even a united coalition of all the senators from the seven smallest provinces plus all the territories (48 senators) would be unable to impose its will against a determined Commons, but a united Senate would be able to thwart the Commons on anything except the budget, supply, or constitutional amendments, in which case the government would either have to accede to the Senate's po-

sition or call an election and let the electorate decide.

Under these reforms, broad Senate consensus could thwart the Commons on matters excluding the budget, supply, and constitutional amendments.

Given partisan and regional division, such a broad Senate consensus would necessarily be a rare event, but not an inconceivable one, which is precisely what would give democratic legitimacy to the veto senators would possess. Also, even though the Commons would clearly prevail in the vast majority of conflicts between the two houses, the government would doubtless want to avoid the political embarrassment of repeated recourse to the super-majority provision, which gives the Senate modest bargaining power, which in turn is part of what would make the reformed Senate effective. This reform thus makes for a powerful Senate that is also compatible with responsible government, the predominance of the Commons, and respect of the principle of representation by population.

It will also result in a Senate a third smaller and likely cheaper than today's.

A quick word about the role of political parties

Some Senate reform proponents advocate a non-partisan Senate. This is a pipe dream. In a free and democratic society we cannot prevent people from presenting themselves for election on the basis of party platforms, nor should we want to. Voters have lots of opportunities to vote for independent candidates at election time but they rarely do so.

Political parties are necessary instruments of democratic accountability. Without shared platforms giving voters a sense of what teams of candidates would do with power it is hard for voters to know how to use their vote to achieve the outcomes they desire. Without the discipline of party, politicians would simply be independent and relatively unpredictable actors, giving voters little guidance on how they will use power. Politics is also expensive, and parties are the best means we have for raising and spending the money necessary in an open and accountable way.

At the same time, political parties are in bad odour with Canadians, in part because they are seen to be hyper-partisan and devoted to their narrow interests rather than the good of the country. One benefit of the Senate reform proposed here is not that it does the impossible and tries to outlaw parties in a democratic Senate. Instead it proposes an institution in which the worst aspects of parties are tamed. Thanks to the super-majority requirement for Senate vetoes (see above) and the electoral system suggested below, the Senate as an institution would rarely if ever be dominated by a single party like the Commons. On the contrary, the Senate will only be able to exercise its greatest power in cases where senators achieve consensus beyond party and regional interests.

Non-partisan appointments

Having raised the issue of party, it is perhaps important as well to spend a moment considering the idea, popular in some circles, of continuing with an appointed Senate, but one where a better and non-partisan appointment process would result in a higher calibre of senator.

This approach appeals particularly to people who are rightly completely disgusted by both the behaviour of some of the senators currently in the news and by the behaviour of political parties more generally. There is a palpable yearning in the land for a body of virtuous Platonic guardians, above the political fray, interested only in the good of the country. There is much discussion of arm's length appointment processes, like those for Supreme Court judges and governors general, that would "get the politics out" of who makes it into the red chamber.

But as James Madison, one of the American founding fathers, once wisely remarked: "If men were angels, no government would be neces-

sary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." A Senate of disinterested angels is thus perhaps a delightful fantasy, but a fantasy nonetheless.

> *If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.*
>
> James Madison

The reality is that no matter how senators are chosen, be it appointment, election, or lottery, the resulting body will be composed of fallible human beings. If, therefore, we were to follow Madison's sound advice we would focus on crafting an institution that does not assume senators are improbably virtuous. Instead it would aim to reduce the scope for bad behaviour while ensuring the transparency and democratic accountability that help keep people honest and focused on the good of the country rather than their individual advantage.

Indeed while everyone's attention has been focused recently on the bad behaviour of a small minority of senators, the fact is that the Senate has been graced over the years with many members of the highest ethical, moral, and intellectual achievements including distinguished scientists, surgeons, athletes, public servants, and business leaders. Yes, there has been dross as well, but I think it is fair to say that the large majority of senators are distinguished people who take their job seriously, behave honourably, and try to do the best they can for the country.

An improved appointments process is, therefore, only likely to change the composition of the Senate on the margins. A few more good people and a few less scoundrels won't overcome the serious flaws that disfigure the institution today.

An improved appointments process would not overcome, for example, the absence of a democratic mandate for senators, who would still find themselves plunged into a legislative backwater. How could a chamber of appointed individuals, no matter how illustrious and distinguished, hope to resist successfully the will of the Commons based on the popular mandate? Any attempt to do so would quickly give rise to charges of a nascent and unaccountable aristocracy running roughshod over the popular will. And why would the best and the brightest respond to the call to serve the nation in the Senate unless they were to be given the power and authority to do the job?

We must not forget, moreover, that unless the Supreme Court of Canada gives an unexpected ruling on the federal government's reference on Senate reform, new appointees will continue to be named until age 75 and will never have to account to anyone for their use of the power granted them under the Constitution.

I, at any rate, have concluded that there is no appointment process that could rescue the Senate from its current disgrace and impotence. We are a modern 21st century democracy. Political institutions draw their power and authority from democratic mandates and parties are an indispensable instrument of democracy. A non-partisan appointed Senate, no matter how angelic its members, could never hope to be anything but an impotent anachronism. Appointing higher calibre individuals is a non-solution to the Senate's shortcomings.

> *An accountable institutional structure ensures that when fallible people are given power, the chance of abuse is reduced.*

Creating an accountable democratically-elected institution with appropriate checks and balances

ensures that when fallible people are given power, the chances of their abusing it are much reduced. That is the best we can hope for in a reformed Senate and it would be an achievement not to be belittled.

Different Roles for the Senate and the Commons

In addition to representing different aspects of Canada (communities versus individuals) than the Commons, it is sensible to think that each chamber should have unique powers suited to their separate characteristics. We've already talked about the main difference, namely the different central function of the Senate, to provide independent scrutiny of government policy together with the power to slow the passage of the government's agenda while using the Senate as a platform to inform the electorate about senators' objections to government policy, without destroying the principle of the government of the day resting on the confidence of the Commons.

Other differentiation of the two chambers is possible and even necessary.

It was mentioned above that the Senate should not have an absolute veto power over budgetary, supply, and tax matters, for example. This predominance of the Commons over all money matters reaches far back in our parliamentary tradition and is justified among other things by the close connection between the consent of individuals and the taxes they pay, as well as the centrality of the budget to the government's programme, and we have seen why the Commons must be the chamber that bestows confidence on or withdraws confidence from the government of the day. That necessitates a suspensive veto only for the Senate in these areas.[4]

On constitutional amendments the *Constitution Act, 1982* also grants the Senate a suspensive veto only. This was justified by the lack of a democratic mandate for the Senate as an institution. Otherwise an unelected Senate whose consent to amendments was mandatory could, theoretically at least, frustrate any proposals for Senate reform with which they disagreed. That possibility was clearly unacceptable.

In theory a reformed Senate with a real democratic mandate could be given a straightforward veto over constitutional amendments, but as we will see below from a strategic point of view we should do everything in our power to avoid including in our Senate reform plan any provision requiring unanimous consent of the provinces. Such a unanimous consent requirement would reduce very substantially the chances of success of any Senate reform and since changes to the amending formula, including the role of the Senate in amendments, requires such unanimity, we should just leave the status quo as is.[5]

The Senate's role should be more investigative in nature.

Next, the more deliberative and likely less partisan nature of the Senate would make it a suitable place to review major government appointments (such as Governor of the Bank of Canada, Governor General, and Supreme Court judges). Again on the grounds that a small minority should not be able to frustrate the will of the government proposing appointees for these posts, however, a 70 percent vote should be required to turn down a government nominee.

Finally because the Senate would not be the chamber that makes or breaks government but is a chamber of informed sober second thought, its role should be more investigative in nature. The Senate is already justly celebrated for the thoughtful reports it has produced over the years that have taken in-depth looks at complex policy issues and proposed many helpful solutions, including widely lauded reports on topics such as health care, retail price differences between Canada and the US, and the mass media. Such reports today, however, are given no special sta-

tus in Ottawa, and are merely part of the "noise" that surrounds government decision-making. It would be quite different were the Senate to enjoy a genuine democratic mandate, if its method of election produced a greater diversity of voices, if its power of delay were used judiciously and responsibly, and if the 70 percent threshold for a Senate veto required the Senate as a body to be less partisan and more collegial in its behaviour.

A Senate report that took issue with a government policy would have real authority, but the institutional differences I am proposing between the Senate and the Commons would help to keep the criticism reasoned rather than partisan and inflammatory, which would be an addition to our parliamentary institutions most Canadians would embrace.

Different Terms of Office and Electoral Systems

For a host of reasons, senators should be chosen by a different system and serve for different terms than members of the Commons.

Let's begin with the terms for senators, which end up being closely related to the timing of Senate elections. Recalling that the Senate is supposed to be a more deliberative body than the Commons, somewhat less partisan, and rather more collegial (senators have to work together across party lines if they are ever credibly to brandish the threat of a veto), we should want senators to be able to take a longer view of things than MPs, whose terms are at best 5 years long and frequently are much shorter, especially under minority government. Sober second thought is best achieved when senators are not burning with election fever quite as hot as that afflicting MPs. That suggests longer terms for senators than MPs.

Add to that the consideration that we need to underline the national nature of the Senate. Senate elections should not, therefore, take place under provincial rules or simultaneously with provincial elections, nor at a different time than elections to the Commons. Both chambers deal with the business of the nation and both MPs and senators must take part in the debate on the issues confronting the nation and take their guidance from an electorate that has participated in that same national political debate. Provincial elections focus on provincial issues and senators are not decision-makers on provincial issues; only federal elections focus on national issues and federal elections are the only appropriate time to elect senators who are national policy-makers.

Senators should be elected for terms equal to the life of two parliaments, with one half of Senate seats being filled at each federal election.

The way to reconcile these two indispensable features is for senators to be elected for terms equal to the life of two parliaments, with one half of Senate seats being filled at each federal election. Having half the Senate up for election at each dissolution guarantees that at every federal election, in every province and territory, half the senators must submit to the judgment of the voters. Unlike the Commons, however, which must be entirely renewed at each election, half of senators from the outgoing parliament will continue to serve in the next one without going before the electorate. That necessarily makes the Senate as a body less anxious to respond to the passions and fads sweeping the electorate at any one time, exactly what you want in a deliberative chamber of review. Senators' longer tenure will allow them to take a longer view than MPs.

This approach means that senators do not serve for fixed terms, but that is no objection, since neither do MPs. The system proposed here links the term of both senators and MPs to the life of parliament, which is as it should be. Under this system, a senator who had been elected in the federal election of 1984, for example, would

have had a term of roughly 9 years (1984–1993), whereas a senator elected in the 2006 election would have had a term of roughly 5 years (2006–2011).

As for the method of election, it should be tied to the different roles to be played by the different chambers. First-past-the-post elections to the Commons are preferable because Commons elections are first and foremost about choosing who will form the government and exercise power. Elections to the Commons are not, contrary to a widespread opinion, about numerically exact representation of currents of opinion in the electorate. It is a virtue, not a defect of our system that it tends to magnify the number of seats won by the largest party, allowing in most cases a clear victor and therefore a clear party to whom power can be given and, most importantly, who can be held unambiguously to account at the next election for the use they have made of that power.

Unlike the Commons, however, the Senate under this scheme is not where governments are made or broken. That means that we can afford to be more accommodating of a desire to see the diversity of currents of public opinion represented. Moreover, even though elections to the Commons and the Senate are to be held simultaneously, we do not want the Senate to be a mere mirror image of the Commons in terms of its party make-up. On the contrary, by ensuring that only rarely will one party dominate the Senate, and making the Senate's veto rest on consensus rather than narrow majorities, we ensure that the Senate's greatest power can only be exercised by cross-party and cross-regional co-operation, exactly what would be required to give democratic legitimacy to a Senate veto of a Commons-approved decision. Finally, part of the point of the exercise of Senate reform is to find more ways to make more voices heard effectively in the national parliament.

All of these arguments lead me to conclude that we should have some degree of proportional representation for Senate elections. On the other hand we should avoid a system based on lists of candidates prepared by political parties. Such systems tend to transfer power away from the electorate and to political parties, the exact opposite of the people we should be seeking to empower.

The easiest system – and the simplest one to explain – for achieving a certain degree of proportionality is to give each voter only one vote. That way, with three senators to be elected in each province at each election, but each elector only being able to cast one vote, the three candidates with the strongest followings will be elected, but no individual party is likely to be able to dominate.

If, however, it was felt that every elector needed to cast a separate vote for each of the three Senate seats to be filled, the next best system would be the Irish system for election to the Dail[6] (the Single Transferable Vote or STV), which is also similar to the system used at various levels for Australian elections (including the House of Representatives). It is a system that allows some proportionality while maintaining the ability for electors to vote for specific people and avoiding the transfer of power to political parties that list systems usually entail. Without going into too much detail, STV (and its close cousin, the Alternative Vote or AV) asks voters to rank the candidates in order of preference. Candidates who achieve a given high level of first preferences expressed are elected. Then, if there are seats left unfilled, the candidate with the smallest number of first preferences is eliminated and their second preferences distributed among the remaining candidates. Such elimination rounds continue until three candidates have passed the threshold to get elected.

Getting It Through

Everybody knows how hard it is to reform the Constitution in Canada. There are good reasons for this. Constitutions are supposed to be the basic rules of the games, and therefore to be stable and to enjoy broad support. We therefore make the threshold to change the constitution high.

The logic of the constitutional amendment process is quite close to the logic for Senate reform. A high threshold for amendment means that we

have to stop and reflect on proposed changes and work hard to achieve them, a kind of sober second thought. And just as we aim to achieve double representation of both the national electorate and the national constituent communities in parliament, the constitutional amendment formula ensures that for most constitutional change we have the agreement of the national parliament plus at least 7 provinces representing at least 50 percent of the population. Again we see the double majority so characteristic of federations. In addition there is a handful of constitutional provisions of such extreme sensitivity that we require the agreement of all the provinces (the "unanimity rule").

The history of constitutional reform post 1982, as seen in both the Meech Lake and Charlottetown Rounds, however, adds other complexities to our understanding of what is required to change the Constitution. Our experience then was that it is extremely difficult to get the provinces to agree to look at individual constitutional amendments (such as a proposal for Senate reform) on their merits. Instead they see amendments that are important to other governments as bargaining chips; they trade off their support on matters of little import to themselves in exchange for support on other, unrelated matters. Thus is every attempt to amend the constitution rapidly transformed into an ever-widening circle of trade-offs and deals with too little attention being paid to the national interest or even the simple coherence of the Constitution itself.

A sensible Senate reform proposal is likely to suffer the same fate. Quebec is likely to be hostile to any reform that reduces their representation in national institutions, but might be induced to accept it (as they did in Charlottetown) in exchange for movement on other issues, such as language, culture, the Supreme Court, and recognition of Quebec's distinctiveness or "specificity". BC might trade support for Senate reform for changes to the approval process for pipelines. Ontario might demand reform to EI and equalization, which in turn would be opposed by the Atlantic provinces. The whole thing ends up in a quagmire of conflicting demands and endless negotiations.

The question thus arises, is there a way to leapfrog the mass negotiation approach in which provinces withhold their approval of nationally vital reforms in the pursuit of short-term negotiating advantage on unrelated issues?

I believe there is, at least on the Senate reform file. The public level of disgust and disdain for the status quo is palpable. At the same time Canadians are clearly willing to be convinced that there is a vital role for a reformed Senate and that it can be made compatible with modern ideas of equality and democracy.

The federal government should create a Senate reform proposal and call a national referendum.

The way to proceed is for the federal government to take the lead and come up with a thoughtful Senate reform proposal, ideally along the lines I have laid out here. It should then call a national referendum and appeal directly to the nation for a mandate to enact that reform. A well-crafted and energetically sold proposal would attract wide public support, especially if presented to the voters as the solution to a problem that has plagued this country since its inception, and a major improvement to the workings of our national institutions. Well done, I believe such a referendum would receive a large national endorsement, and certainly a large majority in at least seven provinces representing 50 percent of the national population. (For an illustration of how the referendum might look and a sample ballot, see Appendix II: The referendum question.)

With that mandate in hand, Ottawa should adopt the constitutional amendment necessary to enact its proposed reforms, and then invite the provinces to do the same. By having a single proposal, submitting it to the electorate, and getting a clear national mandate, we can sweep aside the debilitating and unnecessary rounds of endless negotiations with the provinces on what reform might look like. There will be a single proposal, put forward on the authority of the national government and parliament, on which all attention will be focused. If it wins the refer-

endum vote, Ottawa will have a clear national mandate to promote its proposals. There will be no negotiations, only each provincial legislature weighing up the decision whether they will give their assent to a reform that their own electorate has already endorsed. After a period of sound and fury my view is that they will submit to the verdict of their own voters, perhaps spurred on by some gentle inducements from Ottawa.

There are three caveats. The first is that Senate reform should at all costs avoid any provision that triggers the unanimity rule. While I think a large majority of Canadians can be convinced to support Senate reform that does not mean one can guarantee that there will not be one or two provinces in which the proposal might fail to pass. If there were provisions that required unanimity[7] that would stiffen the resistance of provinces where the proposal was not endorsed and it would take only one such province to derail the whole thing. It will be vital to keep to provisions that require only the assent of seven provinces representing 50 percent of the population, because that means that no one province will be able to stop reform. We could afford to have up to three provinces fail to adopt the amendment and it could still succeed.

The second caveat has to do with whether or not Quebec might have a veto over changes to the number of senators because it alone, among all the provinces, has a constitutionally imposed list of 24 districts for which its senators are to be appointed. The reason this might matter is because Section 43 of the *Constitution Act, 1982* says that an amendment "in relation to any provision that applies to one or more, but not all provinces" requires the agreement of each province to which the amendment applies. Because Quebec is singled out in the districts for which its senators are named, some authorities have argued that Quebec has a veto over changes touching on the number of senators.

Only the Supreme Court can deal with this question definitively, but my view, for what it is worth, is that such a challenge by Quebec over the legality of the Senate reform laid out in this paper would fail. Without getting into the constitutional minutiae, note that the Constitution is explicit that the general amending formula (Parliament plus seven provinces representing 50 percent of the population) applies to amendments touching on "the powers of the Senate and the method of selecting Senators, [and] … the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators". The Constitution further gives Parliament alone acting power over amendments in relation to the House of Commons and the Senate. A general Senate amendment scheme such as is proposed here would, I believe, pass muster under this extensive and explicit constitutional authority.

Senate reform should at all costs avoid any provision that triggers the unanimity rule.

The third caveat has to do with the legislation passed by the government of Jean Chrétien in 1996 that in effect committed the federal government to a second layer of provincial approvals before it could put a constitutional reform proposal to the House of Commons. While this legislation was presented as a "regional veto" (it would require Ottawa to have the agreement of BC, two prairie provinces representing 50 percent of the region's population, Ontario, Quebec, and two Atlantic provinces also representing 50 percent of that region's population) in fact it was really a way for the federal government to grant a veto to Quebec over constitutional change.

This legislation was an abominable and unnecessary idea passed in the panicked atmosphere following the near victory of the Yes side in the 1995 referendum in Quebec. The law tries to undo the tremendous progress made when the 1982 constitutional reform discarded the idea of vetoes for individual provinces and brought in a general reform procedure that ensures broad national agreement on constitutional change but without a veto for any individual province (except for changes requiring unanimity on which every province has a veto). Since this legislation does not enjoy public support, and since no government can bind its successors, I suggest that

the way around this obstacle is for the enabling legislation for the Senate reform referendum to include a provision that the regional veto law does not apply on the ground that direct expression of national support for the proposal is the strongest authority possible and overrides the need for regional vetoes.[8] Alternatively, the law seems only to limit the ability of the government itself to introduce constitutional amendment resolutions in the Commons. The simplest way around this legal obstacle, therefore, would seem to be to have someone other than a government minister introduce the resolution enacting the constitutional change.

To return to the advisability of a referendum, it is certainly true that referenda are unpopular with the old guard of political analysts, in part because they have occasioned division in Canada in the past, over conscription and prohibition, for example. But Canada has matured as a nation since then and referenda are a legitimate instrument for determining the national will on vital matters that transcend region and party. Senate reform is one such issue. Furthermore we have the precedent of the 1992 referendum called by then Prime Minister Brian Mulroney on the Charlottetown Accord. That referendum, far from dividing the country, united it in rejecting our political élites and the misbegotten offspring of the Charlottetown Round of endless constitutional negotiations. Three provinces now require a referendum before approving a constitutional reform in any case, so a national referendum simplifies and accelerates the process.

Moreover, think how Canada would be different today if Pierre Trudeau had done what he originally planned to do in 1981, and he had submitted his constitutional reform package to the nation in a referendum. Opinion polls showed he would have won handily, including in Quebec. Had he done so the controversy over the 1982 constitution in Quebec would never have arisen. Instead of such a desirably unambiguous result, René Lévesque, frightened by what the polls were telling him and put in a corner by an unfavourable Supreme Court decision on patriation, agreed to open negotiations with Ottawa over its proposals and the rest, as they say, is history.

A referendum in 1981 would have been a master stroke of nation-building. A referendum today that broke the logjam over Senate reform and helped us achieve a new instrument of regional reconciliation and democratic legitimacy in Ottawa would be another such moment pregnant with national promise. It is a risk, of course. But a risk worth taking and one that I believe Canadians would embrace and endorse.

2017 is the 150th anniversary of Confederation. That's about the right timetable for the reform I am proposing. Senate reform could be the best gift Canadians could bestow upon themselves and their posterity, by courageously modernizing and completing the work of national institutional construction begun by our founders in 1867. They would be proud.

About the Author

Brian Lee Crowley

Brian Lee Crowley has headed up the Macdonald-Laurier Institute (MLI) in Ottawa since its inception in March of 2010, coming to the role after a long and distinguished record in the think tank world. He was the founder of the Atlantic Institute for Market Studies (AIMS) in Halifax, one of the country's leading regional think tanks. He is a former Salvatori Fellow at the Heritage Foundation in Washington, DC and is a Senior Fellow at the Galen Institute in Washington. In addition, he advises several think tanks in Canada, France, and Nigeria.

Crowley has published numerous books, most recently *Northern Light: Lessons for America from Canada's Fiscal Fix*, which he co-authored with Robert P. Murphy and Niels Veldhuis and two best-sellers: *Fearful Symmetry: the fall and rise of Canada's founding values* (2009) and MLI's first book, *The Canadian Century; Moving Out of America's Shadow*, which he co-authored with Jason Clemens and Niels Veldhuis.

Crowley twice won the Sir Antony Fisher Award for excellence in think tank publications for his heath care work and in 2011 accepted the award for a third time for MLI's book, *The Canadian Century*.

From 2006–08 Crowley was the Clifford Clark Visiting Economist with the federal Department of Finance. He has also headed the Atlantic Provinces Economic Council (APEC), and has taught politics, economics, and philosophy at various universities in Canada and Europe.

Crowley is a frequent commentator on political and economic issues across all media. He holds degrees from McGill and the London School of Economics, including a doctorate in political economy from the latter.

Appendix I

How not to reform the Senate: Ottawa's Reference to the Supreme Court

On February 1, 2013, the Government of Canada sent a series of constitutional questions (known as a "reference") to the Supreme Court seeking clarification on Ottawa's powers to act to reform the Senate.[9]

This move was intended to pre-empt challenges that Ottawa was facing from provinces and others to their piecemeal approach to Senate reform. While it is only tangential to the analysis I have made in the main body of this paper, it is perhaps worth while to spend a few moments examining both why the government's approach to Senate reform is wrong-headed and what the Supreme Court is likely to say in response to the most important reference questions.

The government has impaled itself on the horns of a dilemma. On the one hand they have made repeated promises to reform the Senate along democratic lines, including elections for senators. On the other hand, they have absolutely no desire to trigger a round of constitutional negotiations that would likely result in another Charlottetown Round for which there is simply no appetite among the electorate.

Their strategy has therefore been to propose reforms that do fall within Ottawa's powers while trying to push the envelope on what those powers are. For example, they have taken the view, properly in my opinion, that electing individual senators does not require constitutional amendment. While the Supreme Court may well disagree with me, my own view is that elections are not constitutionally significant as long as they are consultative only and the legislation makes no attempt to suggest that the Governor-in-Council is bound by law to appoint the winner of such an election to the Senate. Such a consultative vote in no way replaces or diminishes the central appointment mechanism that the Constitution now prescribes.

On the other hand in the main body of this paper I have given a series of reasons why the Senate cannot and should not be a body that can usurp the powers of the Commons or the electorate. The fact of the matter, however, is that under the current Constitution, the powers of the Senate and the Commons are essentially equal (the main exceptions: the Senate's suspensive veto only over constitutional amendments and the requirement that money bills be introduced in the Commons). With these few exceptions, the Senate has equal powers over all legislation, budgetary matters, and every other aspect of parliamentary decision-making. What has saved us from constant confrontations between the two chambers and deadlock in Ottawa has been the lack of any democratic legitimacy on the part of the Senate. With very few exceptions (the most egregious being the conflict over the GST in 1990) the Senate has had to yield before a determined Commons.

There is little reason to think the Senate would be so self-effacing if its members enjoyed a democratic mandate, as the government's proposals would produce. On the contrary, the chances are that a Senate with even a homeopathic dose of democratic legitimacy would be keen to flex its muscles and establish both its independence from the government and its power vis-à-vis the Commons.

Thus the government's proposals would create, in my opinion, the worst of all possible worlds, in that the Senate would enjoy real power (powers essentially equal to the Commons) but no responsibility. What I mean by "no responsibility" is that while the government based in the Commons enjoys considerable power under our Constitution, those who exercise that power are clear and unambiguous (our system tends properly to award power to one party for just such reasons of accountability) and must submit their record to the approval of the voters on a regular basis. Our system awards the government immense power, but holds the tenants of power to account regularly and thoroughly.

Not so our current Senate were its members to be elected. Under the current rules senators, once in the Senate, are there until age 75.[10] Senators who were elected and then appointed by the prime

minister (the process the government's reforms envisage and which it is already acting on in the case of Alberta senators) would therefore never be called upon to submit their use of power to the verdict of the voters. In this regard it is worth pointing out that from the point of view of democracy the election that really matters is not the one that puts an official in office. Rather it is the following one where the official is called upon to give an account of himself and his stewardship of power. Under the current rules regarding Senate tenure, senators would be able to skip this unpleasant part of democratic accountability.[11]

Under the government's approach to Senate reform, in other words, the powers and terms of senators will almost certainly remain as they are, but this powerful and unaccountable institution will now have at least a plausible claim to some democratic mandate, and the already weak deadlock-breaking mechanism that properly exists to resolve conflicts and ensure the predominance of the Commons (the ability of the prime minister to appoint extra senators) would widely be seen to be an undemocratic interference in the workings of an elected body.

Similarly, the government's reforms defer to the provinces on Senate elections by making such elections a matter of provincial government legislation. This implies that provincial governments are the key decision-makers on whether a provincial electorate should be entitled to elect its senators. As I have been at pains to explain in the body of this paper, there is a fundamental distinction to be drawn between representing provincial electorates' views on national issues rather than the views of provincial governments. Making provincial governments the instrument of Senate elections, determining the timing and rules of such elections, is a profound mistake that subtracts from the Senate's standing as a national institution.

The current appointed Senate would be preferable to such a misbegotten reform. Senate reform is a serious business. Our institutions are knitted together in a complex set of relationships and checks and balances that oblige us to look at the effects of changes we make across the whole institutional edifice, and not just in the Senate itself. Senate reform is desperately needed, but we are not so desperate that we should accept gridlock, power without responsibility, or the gutting of our institutions to achieve a simulacrum of democracy.

If, as I expect will be the case, the Supreme Court tells Ottawa that much and perhaps even all of its Senate reform programme requires formal constitutional amendment, I predict the government will quickly realize that it faces three choices: an unacceptable status quo that calls the entire political and institutional edifice into disrepute; an abolition that would damage our institutions and require constitutional amendment in any case; or a serious reform that strengthens our institutions and is endorsed by Canadians. Of these three choices, there is only one that is right for Canada.

Appendix II

The referendum question

Something as complex as the Senate reform package proposed in this paper is difficult to boil down to a simple question that can be put to Canadians in a referendum. My recommendation would be to include on the ballot paper a plain language statement of the principles on which the proposed reform is based. To be clear, this is not suggesting that the plain language statement take the place of the fully developed proposals. My only point is to underline that the proposals themselves are going to be far too long and complex to fit on the ballot paper. The statement of principles, then would in effect be a summary of the reform package's underlying logic. By voting yes on the referendum voters would be endorsing not merely the principles, but the detailed proposals on which they were based. The referendum campaign would doubtless be spent digging into every part of the reform package, so the statement on the ballot would simply serve to remind voters of what it is the proposed reforms are intended to accomplish.

That statement of principles should be followed by a question that asks voters to endorse both the content of the reform *and* the amending of the Constitution.

For illustrative purposes such a national referendum ballot might look as follows:

The Government of Canada proposes to Canadians a reform of the Senate based on the following five principles:

1. The Senate must be a national institution that strengthens the federation by ensuring regional and other views are more effectively heard in decision-making in Ottawa and ensuring reasoned and effective scrutiny of government policy;

2. In order to enhance the democratic representation of Canadians, senators must be elected by Canadians but by a different voting method than for MPs and for different terms;

3. The Senate and the Commons must have different and clearly defined powers;

4. Provinces will be entitled to six senators each, territories to two senators each;

5. There must be reasonable mechanisms to resolve conflicts between the Senate and the Commons, thus ensuring that deadlock does not prevent the federal government from acting in the interests of Canadians.

Do you agree to the Senate reform proposed by Ottawa and its inclusion in the Constitution of Canada? Yes ____ No ____

References

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Endnotes

1 For more details on what happened in Saskatchewan, see "Saskatchewan repeals elected Senate law, tables motion calling for abolition" by Jennifer Graham (November 6, 2013).

2 The composition of this super-majority intentionally mirrors the main formula for constitutional amendment on the grounds that Canadians have already found such a super-majority approach acceptable in that different context.

3 Every parliamentary federation has some such mechanism for breaking deadlocks between the two houses of the national legislature and they almost invariably favour the lower house out of respect for the more powerful democratic mandate conferred by rep-by-pop. We have such a deadlock-breaking mechanism in Canada, whereby the federal government is entitled to appoint either four or eight extra senators in the event of a conflict between the two houses. The Senate's non-existent democratic mandate has meant that only once in our history did the upper house defy the Commons to the extent that the government of the day needed to trigger that mechanism. This occurred in 1990 when the Liberal-dominated Senate threatened to derail Prime Minister Brian Mulroney's proposed GST.

4 The only exception should be that the Senate's budget should not be subject to arbitrary interference by the Commons through this power. A truly independent Senate cannot be placed in the position where its critical and thorough examination of government policy results in threats by the government to cut the upper chamber's funding in reprisal. Some constitutional formula that guarantees the Senate funding equal to the House of Commons or that requires the Senate's consent to having its budget reduced from that of the previous year would resolve this problem.

5 There is some room for dispute about which amending formula different constitutional amendments fall under (the rule of parliament-plus-seven-provinces-representing-50 percent-of-the-population, or parliament-plus-all-the-provinces), but this is one area where there is absolutely no room for doubt: a proposal to give a reformed Senate a new role in the constitutional amendment process would fall under the unanimity rule. There is no other interpretation possible, in my view, of Part V, Section 41, Sub-section (e) of the *Constitution Act, 1982*.

6 For more information on Irish electoral systems, see Gallagher (2013) "Ireland's PR-STV electoral system: a need for reform?".

7 I have already mentioned that changing the Senate's role in constitutional amendments would be one such unanimity-attracting proposal. Another would be a proposal to eliminate the Constitution's so-called Senate floor, a provision by which provinces are entitled to no fewer MPs in the Commons than they have senators in the upper chamber today. This floor is the reason why PEI has four MPs, but under strict rep-by-pop would only be entitled to one. No other province currently benefits from the Senate floor rule, but some may well do so in the future. Eliminating this rule requires unanimity.

8 Historically-minded readers will recall that the Liberal government of W.L.M. King escaped its own promise not to introduce conscription in the Second World War by means of a referendum.

9 Details of the reference are available here: http://www.democraticreform.gc.ca/eng/content/harper-government-advances-senate-reform.

10 I am quite confident that the Supreme Court will confirm that this tenure can only be changed by formal constitutional amendment, but I recognize that some other knowledgeable observers disagree. Only the Court's response to the reference will reveal the truth of the matter. But even if it is within the power of the federal government to impose term limits unilaterally (thus avoiding the necessity to formally amend the Constitution), I would be very surprised indeed if the Supreme Court would allow Ottawa to change the rules retroactively. That means that all current members of the Senate would be entitled to serve out their term until age 75. That together with Ottawa's plan to leave the choice whether to have Senate elections in the hands of each provincial legislature means that it could easily take us 30 years just to get all the appointed people out of the chamber, and perhaps longer again to get Senate elections in every province, given the resistance of many provinces to the idea of an energized and democratic Senate.

11 I recognize that it might be possible that the democratic process would in effect limit Senate terms in that a convention might emerge in which Senators would never be elected unless they promised their electorates that they would only serve for, say, six years, after which they would resign, trigger a new election, and run again. But as with most of the rest of the government's reform package this seems to me to depend on a whole series of decisions, actions, and behaviours all magically aligning themselves correctly in a way I find extremely implausible and that are in any case not worthy of a mature democracy that takes its institutions seriously.

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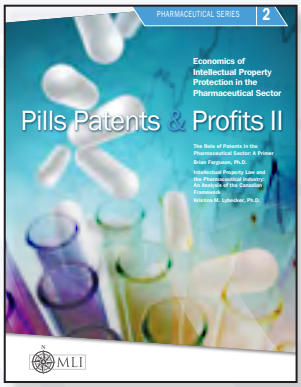

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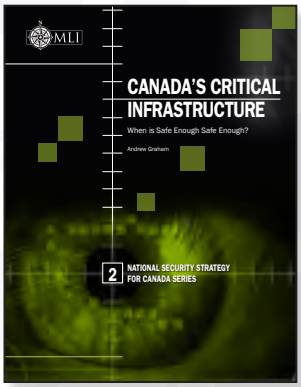

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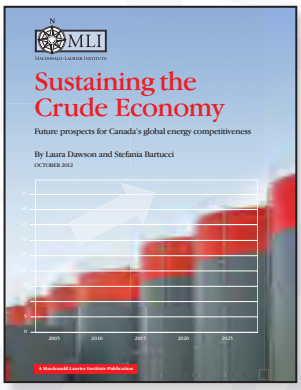

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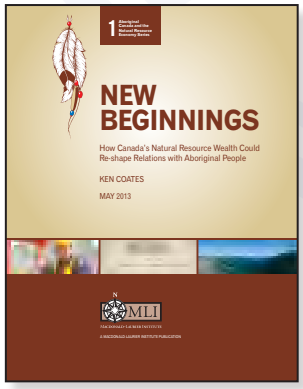

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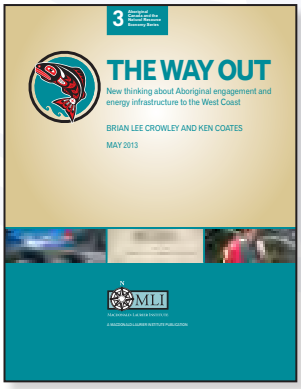

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