

*Constructive and Co-operative Federalism?
A Series of Commentaries on the Council of the Federation*

A Short Path to Revitalized Federalism

Tom Kent*

Foreword

Canada's Provincial and Territorial Premiers agreed in July 2003 to create a new Council of the Federation to better manage their relations and ultimately to build a more constructive and cooperative relationship with the federal government. The Council's first meeting takes place October 24, 2003 in Quebec hosted by Premier Jean Charest.

This initiative holds some significant promise of establishing a renewed basis for more extensive collaboration among governments in Canada, but many details have yet to be worked out and several important issues arise that merit wider attention.

The Institute of Intergovernmental Relations at Queen's University and the Institute for Research on Public Policy in Montreal are jointly publishing this series of commentaries to encourage wider knowledge and discussion of the proposed Council, and to provoke further thought about the general state of intergovernmental relations in Canada today.

This series is being edited by Douglas Brown at Queen's University in collaboration with France St-Hilaire at the IRPP.

Harvey Lazar
Hugh Segal
October 2003

The thesis of this paper is that an elected Senate is an urgent need, too important to remain undone because federal and provincial politicians cannot agree on the constitutional amendment required for full reform. There is another way. If the Prime Minister really wants to reduce Canada's democratic deficit, he should forgo his patronage power to make Senate appointments. Legislation could provide for federally-organized elections to fill Senate vacancies. The nature of the Senate would be changed quite quickly if the legislation authorized early pensions for present appointees who create vacancies by retiring before – say, up to ten years before – the mandatory age 75.

Senate reform has been long needed, but it is given urgency by the recent decision of provincial and territorial Premiers to establish their "Council of the Federation", billed to "revitalize the Canadian federation and build a new era of constructive and cooperative federalism".

That grand purpose requires not one reform but at least two. There is need, certainly, to secure better collaboration among the provincial governments and between them and the federal government. The Premiers' Council will no doubt help in the first respect. But in relation to national affairs it is, in itself, an assertion of power without responsibility. Federalism will be weakened, not strengthened, unless the Council is soon accompanied by a method of ensuring that effective representation of Canada's diversities is brought to bear within the internal working of the federal government.

*Tom Kent is now an independent analyst of public policy. His long career has included many posts in journalism, academia and public service.

The two needs – better federal-provincial collaboration, more effective democracy within the federal government – are distinct, but frequently confused in one prescription. Some of the fathers of confederation, Sir John A. Macdonald particularly, wanted their new country to be as much as possible a unitary state – like Britain, like France also. They could not altogether avoid the federal model next door, but they made the second chamber of the legislature, the Senate, as much as possible like the British House of Lords – appointed, not elected. The BNA Act gave a nod to the principles of federalism by identifying Senators by province of residence. That was and is all. They are the creatures of Prime Ministerial will, without credentials as democratic representatives of any kind from any place. Those who are somebodies, at least on Parliament Hill, owe that status to their personal qualities, not to geographical identity.

That was the design. The constitution provides no hedging of authority at the centre by chosen representatives of regions. For most of its first century, this peculiarity of Canadian federalism had little practical significance. In the looser politics of those days, federal parties produced regional barons for Ottawa. Saskatchewan needed no voice in addition to Jimmy Gardiner's. Since 1968, however, we have moved into the era of the political party as a machine obedient to an emperor, to Prime Minister Pierre Trudeau or Brian Mulroney, Jean Chrétien or Paul Martin. Backbenchers may mutter about their constituents' concerns, but no one thinks that they can (or will, under Mr. Martin) bend party policy on anything that matters to the PMO. Some Ministers may still count as regional bosses in the distribution of patronage, but for little else outside their portfolios. They are anyway depreciated by their numbers in a Cabinet inflated far beyond effectiveness. With Ministers so depreciated and Senators rootless, regional viewpoints have minimal place in the Ottawa process of decision-making.

Public affairs do not tolerate vacuums. If regional viewpoints are not articulated where federal policy is formed, they will be brought to bear on it from outside. Provincial Premiers have

shown themselves increasingly eager and adept in the role. Their publics have come to expect it of them. And federal politics have bent with the wind. The weaknesses of opposition parties have magnified Premiers as the federal government's significant adversaries. The decisive debates on national policy are now less in Parliament than in the public exchanges between federal and provincial leaders. Many commentators have long labeled this executive federalism. Unfortunately, it is no more genuine federalism than it is responsible, accountable democracy.

Federalism is more than the division of jurisdiction between two orders of government. The regional diversities that call for the division call equally for assurance that the diverse viewpoints receive balanced consideration in the making of national policies. For the balance to be real and visible, regional presences need to be directly incorporated within the country's central institutions. Hence the representative second chamber of other federations. Its absence, the substitution of patronage for election, has always been a flaw in Canada's constitutional structure. Now, in the circumstances of the twenty-first century, it is developing the look of a fatal flaw. It invites a worsening federal-provincial confusion that increasingly inhibits national policy serving the interests of all Canadians.

The democratic deficit is plain. As long as we are without elected Senators, provincial politicians will assume more power for which they have no democratic mandate. Their elections are fought on provincial, not national, issues. A Premier is elected to run the business of the province, not for his or her views on national affairs. There have been, certainly, Premiers who acted with fully responsible understanding of the national interest. Premiers John Robarts and William Davis of Ontario are two of the conspicuous examples. But their statesmanship is a bonus, not a product of our institutions. It contrasts with the more frequent pressing of particular political interests. It is the democratic deficit in Ottawa, not their own qualifications and mandates, that gives Premiers claim to act as national politicians.

Nevertheless, the claim is now real and will become increasingly effective if Ottawa remains

stuck in its present ways. Federal and provincial responsibilities have been becoming more interdependent for decades. Necessity has ruled practice. But attitudes have been slower to change. Executive federalism has been seen as only a modest qualification to the centralization of the war and early postwar years; there would be longer, more contested negotiations, but the feds could always come out on top.

That assumption has been reflected in Ottawa's frequent take-it-or-leave-it stance. It has become increasingly unproductive. Unless there is reform in Ottawa, and soon, brave words will not save federal capacity for leadership from decline. More and more, policies for all of Canada will be settled by negotiations in which provincial governments have the stronger hand.

This shifting of power has been too gradual for the media to take much notice, but it is likely to continue because it is inherent in the dynamics of an asymmetrical relationship. The asymmetry is that the federal government has more at stake, more to lose politically, than the provinces. Most provinces may be relatively puny in resources, but in the court of public opinion they have the strength of ten. They have only to put an issue on the table, to complain about federal policy or lack of it, and Ottawa is on the defensive. The issue may be in either jurisdiction, but it becomes of national concern, potentially affecting what people think of the federal government, how they will vote next time.

Ottawa politicians, on the other hand, rarely have any significant influence on the internal politics of a particular province, certainly not on the electoral fates of provincial governments in general. The disparity in bargaining power is plain. The federal government needs agreement with the provinces. It gets most of the blame if meetings end in disagreement. On most matters most of the provinces have little, politically, to lose. They can just blame the feds at once, instead of spending a little time digesting a federal concession before returning to the attack.

Federal politicians have two ways to counter the superior bargaining strength of the provinces. One is not to bargain, to act unilaterally and talk, if at all, afterwards. That may work on the

particular issue. The permanent consequence is the mounting resentment and distrust that makes provincial officials and politicians, almost without regard to party affiliation, harder bargainers on the next occasion.

For example, in 1995 the federal government not only made large, sudden cuts in its transfers to the provinces; worse, it unilaterally replaced what had been funding commitments by the arbitrary CHST. The immediate outcome, the ending of federal deficits, was a triumph. But Ottawa's subsequent dealings with the provinces have been continual retreats. Far from the intended further cutting of transfers, they have had to be largely restored – without, in the play of public opinion, saving the federal politicians from getting much of the blame for medicare woes transferred to them.

The other federal countervail is even more conspicuously short-term than unilateral action. It is money, usually in exchange for what are billed as provincial concessions. Agreeing to pay more to the provinces enables the Prime Minister to proclaim before the TV cameras his prowess in settling things. Mr. Chrétien did it before the 2000 election and again early in 2003. In fact, he settled nothing. The effect, far from keeping the provinces bought, has been to sharpen their appetites for the next occasion.

The accumulating consequence is to weaken the role and the resources of the federal government. There was a period, in the aftermath of war-time centralization, when this was the right direction of change. It has now gone dangerously far. It is continuing in a period when clear national leadership is crucial to sustaining Canadian identity in an ever more interdependent world. It is a trend that must now be arrested. It can be, if the new Prime Minister is prepared to fight another deficit: the lack of democracy within his own party.

Mr. Martin's path to power has as yet only strengthened the public image of the Liberal party as a top-down, tightly controlled, centrally directed Ottawa machine. That image will not be changed by picking a few names from peripheral provinces, a Frank McKenna or whoever, to come from safe ridings to lubricate the machine. They

may secure some patronage goodies for their areas. They will not remove the well-based perception that, in the making of major policies, the viewpoints that count are those of the centre, of Ottawa with Toronto and Montreal.

There is, however, a clear way to revitalize federalism by making federal politics more representative. That will be done to only very minor extent by the changes within the House of Commons that Mr. Martin talks about. MPs will, and should, continue to come to Ottawa as party people, to sustain or oppose the government of the day. Democratic federalism calls for additional representation. It means that Canadians should be able to elect also people who go to Ottawa primarily as spokespersons for all the people of their communities, able to inject regional viewpoints directly into the consideration of national policies. Democratic federalism requires, in short, an effective Senate. It means replacing appointment by election.

The present Senate is indefensible. In public opinion the question is whether it should be reformed or abolished. The pretext for doing neither is the requirement for a constitutional amendment, and on that politicians are, since the Charlottetown referendum, gun-shy.

It is true that, without such an amendment, the Senate cannot be abolished, nor can it be immediately and comprehensively reformed. But it can, within a few years, operate as an elected assembly. Mr. Martin has only to give up this patronage power.

The constitution provides that the Prime Minister, in effect, fills a vacant Senate seat by appointing – subject to minimal qualifications such as being 30 years old – whoever he wants. How he should make his choice is not defined. To legislate on that is entirely within the competence of Parliament. A simple provision would require that the person “summoned” to the Senate be the successful candidate in an election arranged for the purpose.

There is precedent. Alberta once embarrassed Ottawa by staging, with municipal elections, a vote on who Albertans would like to fill a Senate vacancy. That was, of course, a deliberate

invasion of federal jurisdiction; the Senate is a place in the Parliament of Canada. But the democratic point was well made. Federal legislation should replace patronage by election.

The most effective way – giving, in the current jargon, maximum transparency – would be an Act of Parliament instituting Senate Day, for elections to all seats that had become vacant over a previous twelve-month period. For the sake of illustration, if Senate Day were fixed as the last Thursday in April, time for campaigning could be provided by polls for the seats vacant on March 1st.

While there would no doubt be party candidates, the electoral process should be designed to encourage independents broadly representative of provincial opinion, rather than particular causes. For that reason there would be quite low limits to election expenses, and they could be reimbursed by Elections Canada for candidates who registered a significant number of endorsements.

The significant number would necessarily vary with provincial population. A desirable refinement would be to establish Senatorial subdivisions. From the beginning, Quebec’s Senate seats were divided among districts, and that model might now be adopted for all provinces, PEI perhaps excepted. By that means, cities would gain the direct representation in Ottawa that they sorely need.

Admittedly, that element of the reform would be a hard sell among MPs, who claim to be representatives of their ridings, serving all their constituents. Most do so, on specific problems. But everyone knows that on significant policies they are bound to their party lines. A different kind of representation through the Senate would be warmly popular, particularly in the cities. It could lead to a significant re-balancing of the influences that shape national policy.

Change will not come immediately with the legislation. However, on January 1st 2004 there were, in addition to 2 vacancies, 11 Senators aged 74 and therefore required to retire this year. There will be a further 11 vacancies in the following two years. By then, certainly, the democratic

breeze would be enough to change the character of the Senate.

The breeze could be strengthened. Of the Senators in place on New Year's Day, 62 were aged 65 and over. To change the terms of present incumbents would be objectionable, but the legislation could reasonably provide that presently appointed Senators who choose to retire at 65 or later will receive the same pension as if they remained for their full entitlement. The advent of elections might then be considerably accelerated. For the future, elected Senators could be appointed for fixed terms, rather than to a certain age.

Nevertheless, the proposed legislation would fall short, even when its effects are fully mature, of the ideal Senate reform. That has sometimes been identified with equality of provincial representation. For provinces as different in size as Ontario and Prince Edward Island, this would be neither defensible in principle nor acceptable in public opinion. Certainly, however, some realignment is required.

The most complete reform would accompany conversion of the House of Commons from the first-past-the-post electoral system to proportional representation. In that case Senators would be essential in the role of "our person in Ottawa" regardless of party; they would be appropriately elected from single-member constituencies by transferable voting, so that the successful candidate is the one most acceptable to a majority of voters.

When thorough reform becomes possible, the powers of the Senate will no doubt be redefined. In theory they are at present almost the same as those of the House of Commons. In practice they cannot be exercised by a body without electoral authority. A reformed Senate would have authority, but the government's responsibility to "Parliament" cannot be a responsibility to two, separately elected chambers. There can be only one place where the government stands or falls, and that must be the House of Commons, designed to mirror national opinion. A Senate mirroring regional viewpoints would contribute importantly to the discussion of all public affairs. It could initiate legislation. It could propose

changes to legislation passed by the Commons. But in the last analysis it must be the Commons that prevails, its legislation passing even if a majority of the Senate disagrees.

In sum, legislation can be only partial reform. The ideal requires a constitutional amendment. But we will wait a long time for that. Substantial improvement is practicable meanwhile. And it has become urgent. The creation of the Council of the Federation should be recognized in Ottawa as a wake-up call.

From the provincial viewpoint, the Council is a constructive modernization of the machinery for collaboration that federalism requires. The feds have no grounds for complaint or opposition. The Council is cause for concern if, but only if, there is no corresponding modernization on the federal government's part, if it still fails to ensure that regional viewpoints are directly represented within Ottawa. That can be readily done, can be seen to be done, by instituting elections to the Senate. If it is not done, if the provinces' Council stands by itself while federal governance remains unchanged, the Prime Minister will have only himself to blame for the outcome: for further strengthening of provincial power and progressive weakening of the Canadian national state.

That is not what most Canadians wish, or indeed what most of their politicians intend. On the contrary, the tensions of a closer world make more coherence in our federalism more than ever critical to our national identity. The obstacle is not in the provinces. It is not in the diversities of our regions. It lies in the poverty of democratic involvement in our national politics. They would be significantly enriched by Senate elections. If the Prime Minister is serious in wishing "to bring regional concerns and issues to the heart of the national government", legislation to replace patronage by polling is the significant action that he can take now.