My friend, who is a senator and whom I respect was with me, explained that in 1867, $4,000 was a fortune. You could buy a carriage with four horses and various other things. Today perhaps it buys several cups of coffee or more. The comparison was perhaps a little bit far-fetched but nevertheless the point was made to our Polish colleague. He said: "Nevertheless, it is not a healthy part of a constitutional charter to have this in. Why do you not get rid of it?" Then we had to get into the intricacies of how you change the Constitution of Canada since the time of the Constitution Act of 1982, which put us in a constitutional straitjacket in relation to direct constitutional amendment but which would leave, nevertheless, possibilities of change by more pragmatic and ingenious methods.

I would like to add something and I did this in conversation with a very thoughtful senator today. We were talking of unconstitutional constitutional norms which is a European concept really devised in the belief after World War II that there must be provisions on which you can challenge Nazi or communist constitutional provisions that are in denial of constitutional principles in the constitutional charter itself.

One of the points I raised with him, because he was approaching retiring age, was: "Do you think it is constitutional in Canadian terms to have mandatory retirement at the age of 75?" Of course the answer is that it is not. This would be another point to consider.

I would raise the basic point whether a non-elected House today is constitutionally legitimate and therefore constitutional in the large sense. Obviously I am not suggesting that we rush out to the Supreme Court to obtain a declaratory judgment or advisory opinion on this point, although I do think that the most recent ruling in 1979 by the Supreme Court of Canada on reform touching the Senate was somewhat wide of the mark even then.

• (1545)

Today, granted changing public opinion controls so much in public law and the evolution of the public conscience which affects the content of constitutional norms, I would wonder whether that 1979 decision is not worth re-examining. Nevertheless in the context of the Senate today, and granted the difficulties of amending the Constitution by the front door methods the Trudeau patriation project introduced—we do have to face this issue—is the fact that we have a non-elected second chamber, part of the widespread public disaffection with constitutional institutions and processes today. I think the answer is yes.

What can we and the Senate collectively do with this? By the way, one of the suggestions I have always considered is that the courts should be used more fully. Could a constitutional ruling be obtained and, following the example of litigants in far-reaching constitutional matters of this sort before the United States Supreme Court, could one not ask the court to delay application of any ruling for enough time to allow a corrective constitutional amendment or other change to be made?

Let me, however, return to the more practical and immediate issues that could control our approach to the Senate. The Senate can be changed without its own assent. This is one of the changes made by the Trudeau constitutional patriation act of 1982, the Constitutional Act, 1982. Only a certain time delay is involved.

There are areas in which change could be made without necessarily involving the provinces constitutionally and therefore touching the power of the federal Parliament alone, which then would require the Senate's assent or delay.

I hasten to say that I advanced some of these propositions in evidence as an invited expert witness before the Senate and the House in previous years. I have said in other committees on which I saw one of my learned colleagues opposite, a pox on expert witnesses or self-styled expert witnesses. I have to say with all humility that when I have been summoned as an expert witness by the Goldenberg committee, an excellent committee of the Senate, and by the Molgat-MacGuigan committee and others I offered these suggestions with all modesty.

One of the issues would be whether the Senate would not better assume a role, as the United States Senate has, in confirmation or review of executive power rather than in review of legislative power in which its lack of legitimacy through direct election limits it. The public appointing processes in the United States are subject to Senate confirmation, as to the Supreme Court, ambassadorial appointments and what we would here call crown corporations. This is an important and democratic role in the United States and one that ensures the better functioning of the public services.

The Senate role in foreign affairs, the two-thirds Senate majority necessary to confirm a treaty made by the United States, gives a role for a body removed at once from the executive power making the treaties and from a house often subject to too much sectional pressure.

These are the sorts of powers one proposed to the Goldenberg committee, to the Molgat-MacGuigan committee and to others under condition that the Senate be reformed and be elected.

One further role would be the election of the head of state, the Governor General. There is a case to be made for this and for providing a further constitutional legitimacy for that office. Once again this is a condition precedent. A condition precedent would be electing the Senate or in some way legitimating it by some other process.

In western Canada there is a strong body of opinion associated with a former Social Credit minister, Rafe Mair, known for broadcasting and other activities, that the Senate should be a states house, very much like the German Bundesrat. The Bundesrat is really a body for federal-provincial co-operation in the practical administration and application of legislation. It is not really a second chamber in the North American or British sense. It is an interesting model.