REPORT TO THE SENATE OF CANADA

Report on CERTAIN ASPECTS of the CANADIAN CONSTITUTION

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nd Constitutional Affairs

urable H. Carl Goldenberg, Q.C.

NOVEMBER, 1980

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Report on CERTAIN ASPECTS of the CANADIAN CONSTITUTION

The Standing Senate Committee
on Legal and Constitutional Affairs

The Honourable H. Carl Goldenberg, Q.C.
Chairman

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Table of Contents

Page

Introduction 1

Part I

Toward A Renewed Federation: A New Federal-Provincial Council 3

1. The Constitutional Roots of the Provincial Grievance 3
2. A Review of the Federal Extraordinary Powers 4
3. The Extraordinary Federal Powers and a Genuine Federation 7
4. The Search for a Solution: the Parliamentary Approach 10
   (1) An Elective Senate 10
   (2) The House of the Federation 10
   (3) The Council of the Federation 11
5. The Search for a Solution: the Intergovernmental Approach 13
   (1) The Federal Council 13
   (2) A Federal-Provincial Council 15
6. The Federal-Provincial Council: Composition, Role and Operation . 18
7. Conclusion 19

Appendix 21

Part II

Toward A Renewed Senate 23

1. The Need for a Second Chamber 23
   (1) Experience of Other Countries 23
   (2) The Canadian Experience 24
   (3) Complementary Role of a Second Chamber 30
2. An Elected or an Appointed Second Chamber 31
3. A Reformed Senate 33
   (1) Functions of the Senate 33
      (a) The Legislative Function 33
      (b) The Investigative Function 33
      (c) The Regional Function 34
      (d) The Representation of Minorities Function 34
      (e) The Human Rights Function 34
      (f) Constitutional Clarification of the Senate's Role 35

(2) Composition of the Senate 35
(a) Size 35
(b) Method of Appointment 36
(c) Tenure 37
(d) Qualifications of Senators 38
(3) Powers of the Senate 38
(a) General Legislative Power 38
(b) Power to Disallow Regulations 39
(c) Investigative Powers 40
(4) Operation of the Senate 40
(a) Speaker of the Senate 40
(b) Cabinet Representation in the Senate 40
(c) Regional Caucuses 41
(d) Standing Committee on Regional Affairs 41
(e) Standing Committee on Official Languages 41
(f) Standing Committee on Human Rights 42
(g) Conferences Between the Senate and the House of Commons 42
(h) Pre-study of Bills 42
(5) Conclusions 42

Introduction

On June 19, 1980, the Senate adopted a motion approving the study of certain aspects of constitutional reform. More specifically, it provided

> That the Standing Senate Committee on Legal and Constitutional Affairs be authorized to consider and report upon constitutional provisions regarding individual and collective rights and upon the future role and composition of the Canadian Senate and alternative constitutional arrangements compatible with true federalism.

The committee decided to assign the preparation of its report to a sub-committee of 15 members under the chairmanship of the Honourable Senator Maurice Lamontagne, P.C. The sub-committee was assisted in its work by the Honourable Eugene Forsey, Mr. Raymond L. du Plessis, Q.C., Law Clerk and Parliamentary Counsel to the Senate, and by the Research Branch of the Library of Parliament.

While our terms of reference cover three topics, we did not have the opportunity to give full consideration to the matter of individual and collective rights at this time. This report, therefore, is divided into two parts.

Part I is entitled "Toward a Renewed Federation: A New Federal-Provincial Council". It deals with current proposals concerning alternative institutional arrangements to the present Senate that would enable provincial governments to have a more effective input in the exercise by the federal government of its overriding constitutional powers.

Part II, entitled "Toward a Renewed Senate", rejects proposals favouring a unicameral Parliament or an elected second chamber and puts forward proposals for substantial reform of the present Senate as an appointed and genuinely federal institution.

It should be noted that the report was approved in substance by the committee before the beginning of the First Ministers' Conference on September 8, 1980, with a final revision given at a meeting of the committee on October 30th.

PART I

TOWARD A RENEWED FEDERATION: A NEW FEDERAL-PROVINCIAL COUNCIL

For many years, provincial governments in Canada have complained that federal decisions were infringing upon their sovereignty and their priorities. In the 1970's, several proposals were made to meet that grievance and to enable provincial governments to make a meaningful input into federal decisions. The British Columbia government, the Pepin-Roberts Task Force, the Canadian Bar Association and the Ontario Advisory Committee on Confederation have all proposed parliamentary solutions to the problem. These solutions involve the replacement of the Senate of Canada as a second chamber of the Canadian Parliament by a House of the Provinces or a House of the Federation composed exclusively of provincial delegates named by and accountable to the provincial governments.

More recently, the Beige Paper issued by the Quebec Liberal Party proposed a solution at the level of intergovernmental relations. We believe that such an approach is much more compatible with a renewed federalism and with Canadian traditions and practices. We do not believe, however, that the intergovernmental approach requires the creation of a new institution, as proposed in the Beige Paper. The existing mechanism of federal-provincial conferences is a unique Canadian institution well suited to meet the historical grievance of provincial governments. The existence of that institution should be recognized in the Canadian constitution, as proposed by Bill C-60, and it should be known as the Federal-Provincial Council. Its specific roles and modes of operation should also be spelled out in new constitutional provisions.

1. THE CONSTITUTIONAL ROOTS OF THE PROVINCIAL GRIEVANCE

In 1867, the Fathers of Confederation worked out a compromise between the unitary system of government then in existence in Great Britain and the type of federalism adopted in the United States. They had conducted their negotiations mainly between 1864 and 1867 in the shadow of the American Civil War. They became convinced that British North America needed a more centralized federalism than the U.S. model. The compromise adopted by the Fathers of Confederation was described by Sir John A. Macdonald in the following terms:

> We have given to the General Legislature all the great subjects of Legislation. We have conferred on them, not only specifically and in detail, all the powers which are incident to sovereignty but we have expressly declared that all subjects not distinctly and exclusively conferred upon the local govern-

ments and local legislatures shall be conferred upon the General Government and Legislature. We have thus avoided that great source of weakness which has been the cause of disruption of the United States.[1]

Elsewhere in the same speech, Sir John A. spoke of "joining these five peoples into one nation . . . with the local governments and local legislatures subordinate to the General Government and Legislature".[2]

Consequently, the federal government was given a dominant role within Canadian federalism. It received the main responsibilities that the state was expected to exercise at that time. Moreover, it was allotted jurisdiction over all matters not specifically given to the provincial legislatures.

In addition, the scheme adopted by the Fathers of Confederation had some features of a unitary system. The federal government was given extraordinary overriding powers that would enable it to control the exercise by the provinces of their own constitutional authority (the powers of reservation and of disallowance and the remedial power), to take over that authority (the declaratory and emergency powers), and to intervene in provincial areas of jurisdiction (the spending power).

The existence and the exercise of these extraordinary powers have been over the years the main source of a deeply-rooted provincial grievance. They raise an issue that is quite different and separate from the division of jurisdiction between the two orders of government. Indeed, as long as these federal powers exist and are exercised unilaterally, the division of jurisdiction itself may be seriously affected.

2. A REVIEW OF THE FEDERAL EXTRAORDINARY POWERS

The *power of reservation* provided for in section 90 of the B.N.A. Act may be exercised by the lieutenant governor when legislation passed by a provincial legislature is presented to him for assent. He may then reserve the bill for an expression of the Govenor General's pleasure for a period of one year. If, at the end of the year, the Governor General has not given his assent the provincial legislation does not come into force. The power of reservation has been used on 70 occasions. It has been exercised mainly on the lieutenant governor's own initiative and assent has been given in 14 cases. Between 1867 and 1900, it was invoked 59 times; between 1901 and 1930, seven times; and since 1931, four times. It was used for the last time in 1961 when assent was promptly given.

The *power of disallowance* provided for in the same section of the B.N.A. Act may be exercised by the Governor General in Council when legislation passed by a provincial legislature has received the Lieutenant Governor's assent. Under this power any provincial Act may be rendered void if the power

[1] Confederation Debates in the Parliament of the Province of Canada (1865), pp. 31, 33, 41-42.
[2] Eugene Forsey, "The Third Option", *The Canadian Bar Review*, September 1979, p. 490.

is exercised within one year after receipt of the Act by the Governor General. This power has been used on 112 occasions since 1867. Between 1867 and 1900, it was invoked 75 times; between 1901 and 1930, 26 times; and since 1931, 11 times. It has not been used since 1943.

The *remedial power* is inserted in section 93 of the B.N.A. Act. It applies to provincial legislation affecting denominational schools. It has never been invoked.[3]

The *declaratory power* is contained in section 92(10)(c) of the B.N.A. Act. This provision stipulates that works, although wholly situated within a province, come under Federal jurisdiction if they "are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces". The declaratory power has been used by the Canadian Parliament on 470 occasions. It has been invoked mainly to link local lines to Canada's national railway systems, to create the grain elevator and marketing network and to develop nuclear energy. Between 1867 and 1901, it was exercised on 259 occasions; between 1901 and 1930, 185 times; and since 1931, 26 times. It has not been used since 1961.

The *overriding federal spending power* or, for that matter, the provincial spending power, does not rest on any specific provision of the B.N.A. Act. According to the prevailing doctrine, the basis for this overriding spending power is to be found in section 91(3) of the B.N.A. Act, which gives Parliament the power to raise money by any mode or system of taxation, and section 91(1A), which assigns to it the right to make laws respecting the public debt and property, the latter including the consolidated revenue fund. A judgment in the Supreme Court of Canada states:

> —that Parliament, by properly framed legislation may raise money by taxation and dispose of its public property in any manner that it sees fit. As to the latter point, it is evident that the Dominion may grant sums of money to individuals or organizations and that the gift may be accomplished by such restrictions and conditions as Parliament may see fit to enact. It would then be open to the proposed recipient to decline the gift or to accept it subject to such conditions.[4]

On appeal, the Judicial Committee of the Privy Council stated the general principle in this way:

> That the Dominion may impose taxation for the purpose of creating a fund for special purposes and may apply that fund for making contributions in the public interest to individuals, corporations or public authorities could

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[3] The corresponding power under section 22 of the Manitoba Act, 1870, was invoked to restore Roman Catholic separate schools in Manitoba. The Governor General-in-Council in 1895, issued a Remedial Order, commanding Manitoba to restore the separate schools. When Manitoba refused, the federal Government, in 1896, introduced in Parliament a remedial bill for the same purpose. This passed second reading, but was successfully obstructed in Committee of the Whole when Parliament was on the eve of dissolution because it had reached the end of its maximum five years' duration.

[4] Reference re Employment and Social Insurance Act, 1936, S.C.R. 427, Kerwin J., p. 457.

not as a general proposition be denied . . . But assuming that the Dominion has collected by means of taxation a fund, it by no means follows that any legislation which disposes of it is necessarily within Dominion competence.

It may still be legislation affecting classes of subjects enumerated in s. 92, and, if so, would be *ultra vires*. In other words, Dominion legislation, even though it deals with Dominion property, may yet be so framed as to invade civil rights within the Provinces, or encroach upon the classes of subjects which are reserved to provincial competence . . . If on the true view of the legislation it is found that in reality in pith and substance the legislation invades civil rights within the Province or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid.[5]

Thus, according to this doctrine the Canadian Parliament may offer grants for any purpose, federal or provincial, to any individual or institution, public or private. It may attach any conditions or constraints to those grants. The exercise of this overriding power, however, must not amount to legislation or regulation in a matter of provincial jurisdiction. Moreover, when the outlays involved are for a provincial purpose, their financing may come from the Consolidated Revenue Fund of Canada or from specific indirect taxes but not from specific federal direct taxes, because direct taxation within a province for a provincial purpose belongs exclusively to the provinces.

The spending power has been particularly important in the last 40 years when the federal government became involved in a series of conditional and unconditional grants and shared-cost programs. For instance, it has been calculated that 75 shared-cost programs have been established on the basis of federal initiatives since the Second World War. This estimate does not include, of course, the great number of purely federal grant schemes such as family allowances and equalization payments to the provinces.

The *emergency power* is not specifically mentioned in the B.N.A. Act. Its genesis can be traced back to judicial interpretations of the introductory clause of section 91, sometimes referred to as the "peace, order and good government" clause. Professor K. Lysyk has defined the emergency doctrine, as it developed in a series of cases decided upon by the Judicial Committee of the Privy Council and the Supreme Court of Canada, in the following terms:

Simply stated, the 'emergency doctrine' amounts to this: to meet an emergency (by definition a temporary and abnormal situation), Parliament may legislate in relation to matters which would ordinarily come within the classes of subjects assigned to the provinces.[6]

The emergency power has seldom been used. It was the basis for the *War Measures Act*, which was invoked during both world wars and during the October 1970 crisis. The emergency doctrine also served as the constitutional basis for the *Anti-Inflation Act* in 1976 and for the *Energy Supplies Emer-*

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[5] *Ibid* [1937] 1 DLR 687 (P.C.).

[6] K. Lysyk, "Constitutional Reform and the Introductory Clause of Section 91: Residual and Emergency Law-Making Authority", *The Canadian Bar Review*, September 1979, p. 547.

gency Act in 1979. These last two cases represent the only occasions when the emergency doctrine has been invoked in peacetime by an Act of Parliament. Thus, although it has seldom been applied, the emergency power has acquired a crucial significance and importance in our turbulent world, where peacetime emergencies are more likely to arise.

3. THE EXTRAORDINARY FEDERAL POWERS AND A GENUINE FEDERATION

Attitudes toward Canadian federalism have changed considerably since 1867. It is generally accepted today that Canada should have a genuine federation in which each order of government would be sovereign within its own areas of jurisdiction. This basic principle has been recognized by all the documents that have dealt with constitutional reform in recent years.

The Pepin-Robarts Task Force put great emphasis on what it described as "the principle of non-subordination of the two orders of government". It stated:

> Since we view the provincial governments as equal in stature and maturity to the central government, we have no difficulty in stating that in a restructured, genuinely federal union the provinces should be recognized as having a constitutional status equal with that of the central government.[7]

In its recent Beige Paper, the Quebec Liberal Party enunciated the same basic principle in unequivocal terms:

> Quebec wishes to belong to a Federation in which all the provinces will be sovereign and autonomous in their fields of jurisdiction. The new federation should, of course, acknowledge the need for, and a legitimacy of, the central Parliament . . . It, too, must be sovereign and autonomous in the fields of jurisdiction assigned to it.[8]

In its 1978 White Paper, the federal government set as its first condition for the renewal of the Constitution that Canada should be "a *genuine* Federation, that is, a state in which the Constitution establishes a federal Parliament with real powers which apply to all parts of the country, and provincial legislatures with equally real powers within their respective territories".[9] The White Paper added:

> —Some of our government practices restrict the internal sovereignty of the two orders of government and must be revised.[10]

Other documents as well have expressed their support for a genuine federation. There seems to exist, therefore, a general consensus on the principle of sovereignty or non-subordination of the two orders of government. However, as long as the federal government can exercise unilaterally its extraordinary overriding powers, provincial governments can argue that to this extent they are not sovereign in their own areas of jurisdiction. Proposals have been made to elimi-

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[7] The Task Force on Canadian Unity, *A Future Together*, January, 1979, p. 86.
[8] The Constitutional Committee of the Quebec Liberal Party, *A New Canadian Federation*, January, 1980, p. 37.
[9] Government of Canada, *A Time for Action*, 1978, p. 21.
[10] *Ibid.*, p. 11.

nate one or more of these powers from our constitutional arrangements. But would that be a desirable course of action?

The powers of reservation and disallowance have become obsolete. They are incompatible with a genuine federation. The Pepin-Robarts Task Force reflects the views of other groups when, with respect to these two powers, it states:

> In recognition of the principle of non-subordination we would eliminate two methods by which provincial legislation can be blocked by Ottawa . . . To eliminate these two powers would not only recognize a situation which exists, but would recognize the ability and right of the provincial governments to act as responsible non-subordinate bodies.[11]

The federal government, when it introduced Bill C-60, was almost of the same view. Clause 131(3)(a) of that Bill provided that the powers of reservation and disallowance would cease to be applicable in a province that had approved the Canadian Charter of Rights and Freedoms set out in the Bill. In the past, these federal powers have been invoked only in British Columbia and Alberta to protect rights and freedoms against provincial enactments. They have not been exercised to serve this objective since 1942. It is highly unlikely that circumstances will arise in the future where they would be used for that purpose.

The declaratory power has not been exercised during the past twenty years. The Pepin-Robarts Task Force suggested that it should be kept but utilized only with the consent of the province concerned. Other groups and individuals have recommended that such a power be abolished. For instance, John B. Ballem states:

> If the constitution is to be amended, the abolition of the declaratory power assuredly will be at the head of the provincial shopping list. Not only is it unilateral and far reaching, it has the fatal drawback of infallibility. If the federal government requires the degree of regulation over oil and gas matters that could be achieved by a declaration, surely it can only be under circumstances sufficiently severe to justify the employment of the peace, order and good government provision.[12]

And, as indicated above, the *Energy Supplies Emergency Act* is based on the emergency doctrine.

British Columbia proposes a compromise solution. It asserts:

> It is wrong for Parliament to be able to declare unilaterally, without taking account of provincial views, that provincial works will henceforth be subject to federal jurisdiction. It is equally wrong for one province to be able to decide unilaterally that provincial works will under no circumstances be used for the general advantage of the whole country. Some middle ground is required. British Columbia suggests that including the declaratory power in the Senate's absolute veto list provides a useful middle ground. The Senate, representing all the regions of the country, would in effect act as an umpire

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[11] The Task Force on Canadian Unity, *Ibid.*, p. 94.

[12] John B. Ballem, "The Energy Crunch and Constitutional Reform", *The Canadian Bar Review*, December 1979, p. 747.

between the conflicting claims of the national and individual provincial governments.[13]

This compromise might offer an acceptable solution. We feel, however, that the veto power could be exercised as well by the First Ministers' Conference and that, as we will indicate later, such an institution is much better suited to Canadian needs and traditions than the House of the Provinces or the new Senate proposed by British Columbia.

It is generally accepted that the emergency power should be retained. The following extracts from the report of the Canadian Bar Association Committee on the Constitution, the Pepin-Robarts Task Force and the Beige Paper are typical:

> The federal Parliament should have express and separate power to deal with emergencies or crises of national significance . . . [14]

> An emergency power should be assigned expressely by the constitution to the central government, for both wartime and peacetime.[15]

> We believe that, in a new constitution, it is essential to specifically allocate emergency powers to the Federal Parliament, independent of any general power to legislate.[16]

These quotations also reveal a consensus about the advisability of adding a specific emergency power clause to the Constitution. Moreover, it has been suggested that such a new clause should make a distinction between situations involving national security and other emergencies in order to leave to Parliament itself decisions related to national security and to require some degree of federal-provincial agreement when other emergencies are involved.

Finally, it is generally accepted that the federal spending power for provincial purposes should be retained. The Pepin-Robarts Task Force states:

> In our opinion, the spending power must be retained to enable Ottawa to ensure unconditional equalization payments to the poorer provinces and to ensure Canada-wide standards for programs in which a strong general interest has been demonstrated.[17]

The Beige Paper says:

> The spending power of the central government should be maintained and the constitution will impose on the latter the obligation to redistribute wealth so as to reduce disparities and encourage equality of opportunity between the regions of Canada.[18]

In conclusion, it is probable that, whatever happens during future constitutional negotiations, the federal extraordinary powers will not all be abolished. We assume, for instance, that the emergency and spending powers will be

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[13] British Columbia's Constitutional Proposals, *Reform of the Canadian Senate,* Paper No. 3, p. 29.

[14] The Canadian Bar Association Committee on the Constitution, *Towards a New Canada,* p. 139.

[15] The Task Force on Canadian Unity, *Ibid.,* p. 127.

[16] The Constitutional Committee of the Quebec Liberal Party, *Ibid.,* p. 67.

[17] The Task Force on Canadian Unity, *Ibid.,* p. 93.

[18] The Constitutional Committee of the Quebec Liberal Party, *Ibid.,* p. 69.

retained. So the problem remains of harmonizing the exercise of these overriding federal powers with the principle of non-subordination. How can this problem be resolved?

4. THE SEARCH FOR A SOLUTION: THE PARLIAMENTARY APPROACH

The question that arises can be simply stated: is it possible to find a constitutional arrangement that would reconcile the use of the overriding powers of the Canadian Parliament with a "genuine federation" and the sovereignty of the two orders of government? Two requirements would have to be satisfied by any such constitutional arrangement. First, provincial governments would have to get the constitutional authority to approve the use of federal extraordinary powers. This may be referred to as the *provincial requirement*. Secondly, any such arrangement would have to respect the federal character of Canadian political institutions and hence preclude the introduction of confederal elements into the Canadian Parliament. This may be described as the *federal requirement*.

Most of the proposals that have been made in recent years have sought a parliamentary solution to the conflict mentioned above through the creation of a new second chamber of Parliament as a substitute for the present Senate. Each of these proposals fails to meet the two basic requirements just described.

Before considering these proposals, a brief reference should be made to the Senate as seen in that light. It is obvious that the Senate, as presently constituted, cannot meet the provincial requirement. It cannot claim to be a House whose members are credible spokesmen for provincial governments. It was not designed originally to exercise that function, although it was expected to reflect broad regional interests and aspirations, which is quite a different thing. This has led various individuals and groups to present alternative constitutional arrangements. The following are some of them:

(1) An Elective Senate

It has been suggested by some that the Senate become an elective chamber and, for this purpose, various electoral systems have been proposed. It is not the place here to review the pros and cons of such proposals in the context of a genuine federal chamber of the Canadian Parliament. Such a review will be presented in Part II of our report. It is clear, however, that such an elective institution could hardly have any more credibility than the present Senate as an institution of spokesmen for provincial governments. It would certainly not guarantee such governments direct and effective control over the exercise of federal overriding powers.

(2) The House of the Federation

Bill C-60, introduced in the House of Commons in 1978, would have replaced the Senate by a House of the Federation. Here, we will only review

briefly the composition and the powers of that proposed chamber in the perspective of our immediate purposes.[19]

The House of the Federation would have been composed, after each provincial and federal election, of an equal number of provincial and federal members fairly reflecting the voting preferences of the provincial and federal electorates at such elections. Thus, provincial representation would have been limited to one half and provincial members, like their federal colleagues, would have represented political parties rather than governments.

Moreover, Bill C-60 was designed to guarantee "the supremacy of the House of Commons" and, as a consequence, it limited the legislative power of the House of the Federation to that of a suspensive veto. This feature of the bill led Senator Eugene Forsey to make the following caustic comment:

> It looks as if the government were saying to the provinces: 'You feel alienated? You feel you should have more input into the federal legislative machinery? We'll give you half the members of the Upper House. That, you must admit, is a massive input'. But it is adding: 'Of course, when it comes to *output*, that's rather a different matter. Naturally, we can't allow the Upper House, with its perpetual, guaranteed, entrenched Opposition majority, to have more than a very modest, brief delaying power'.

The House of the Federation failed, at least, to meet the provincial requirement. This federal proposal received a cool reception from provincial premiers in 1978, and it has since been abandoned.

(3) The Council of the Federation

Groups as different as the British Columbia government, the Pepin-Robarts Task Force, the Canadian Bar Association Committee on the Constitution, the Ontario Advisory Committee on Confederation and the Canada West Foundation[20] have proposed another type of second chamber of Parliament. The model presented by the Pepin-Robarts Task Force and known as the Council of the Federation is selected here because it is probably the most elaborate.

The Council of the Federation, or the House of the Provinces, as the British Columiba government used to call it,[21] is modeled on the West German Bundesrat. It would be composed of delegations representing provincial governments that would act under instructions of and be led by a cabinet minister or, on occasion, by a premier. It would have no more than 60 voting members "to be distributed among provinces roughly in accordance with their respective population up to a maximum of one-fifth". According to that distribution,

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[19] For a more general analysis of that proposal see: The Honourable Eugene Forsey, "Some Problems Raised by the Constitutional Amendment Bill (C-60), 1978", Ottawa, unpublished paper; Professor David Kwavnick, "Comments on Bill C-60, An Act to Amend the Constitution of Canada", Ottawa, unpublished paper; Dr. Peter McCormick, "The House of the Federation: A Critical Review", unpublished paper; and W. H. McConnell, "The House of the Federation: A Critical Evaluation", *The Canadian Bar Review*, September, 1979.

[20] The Foundation now appears to favour an elective Senate.

[21] British Columbia now calls this proposed new second chamber the Senate, which is perhaps more palatable but highly confusing.

Ontario and Quebec, on the one hand, or the four Western provinces, on the other, would have more than one third of the representation.

Federal programs in areas of provincial jurisdiction and based on the federal spending power, whether cost-shared or fully financed by federal funds—with the exception of equalization payments—would, under the Pepin-Robarts proposal, require approval by a two-thirds majority in the council. The use of the federal emergency power either in peacetime or wartime would require the same majority. In addition, the council would have a suspensive veto on proposed federal legislation in areas of concurrent jurisdiction. It would also have the power to initiate bills proposing constitutional amendments and, through an appropriate committee, to approve appointments to the Supreme Court of Canada and major federal institutions such as the National Energy Board and the Bank of Canada.

We have asserted before that the Constitution contains features of a unitary state illustrated by the federal overriding powers, and that these features are not compatible with a genuine federation because they subordinate the provinces to the central Parliament. We now suggest that the proposals submitted by the Pepin-Robarts Task Force and other groups go to the other extreme.

While the task force (at page 82 of its report) rejects confederal systems as being unstable and ineffective, it introduces a major confederal element (at page 97) when it proposes a Council of the Federation as a second chamber of the Canadian Parliament. While it subscribes to the "principle of non-subordination of the two orders of government", it subordinates the federal Parliament to the provincial governments in broad and major areas. While the task force notes the weaknesses of what it calls "executive federalism" as represented by intergovernmental meetings and conferences, it proposes to extend such a system. But it also introduces the provincial executive branch in a *legislative* chamber by, to use its own words, "institutionalizing the processes of executive federalism (with their confederal character) within the parliamentary process".[22]

Some of the proponents of a Council of the Federation or a House of the Provinces, like the Government of British Columbia, argue that much less decentralization of jurisdictions would be required if provincial governments were able, through such an institution, to have a significant input into federal decisions and appointments. This type of argument may sound attractive to those Canadians who feel that too much decentralization has already taken place. However, it is doubtful that this attitude would be shared by many other provincial governments. Moreover, the argument could be deceptive. Indeed, if the use of the larger jurisdictions assigned to the federal government were subjected to the vetos of provincial governments, such an arrangement could lead to paralysis and to the creation of a legislative no-man's-land.

In fact, one may wonder how the Canadian body politic could accept the institutional transplant that a Council of the Federation would involve. Profes-

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[22] The Task Force on Canadian Unity, *Ibid.*, p. 97.

sor Edward McWhinney, a well-known expert on constitutional matters, says this about the *Bundesrat* model:

> It is perhaps a commentary on comparative constitutional law research in Canada and on the interlocking character of the various political parties and public and private pressure groups on the constitution that such a casually developed and badly researched idea as the *Bundesrat* should go so far, so quickly . . .
>
> Those provincial politicians and others who have combined to sponsor a *Bundesrat*-style 'House of the Provinces' are indulging in a confusion (apparently an unwitting one), between *executive* and *legislative* power. For, in its historical origins and in its latter-day practice under the Bonn Constitution of 1949, the *Bundesrat* more nearly resembles the Canadian First Ministers' conferences than a *bona fide* legislative chamber.[23]

Given its composition and its role, the Council would certainly meet the provincial requirement. But it would fail the federal requirement rather badly. Indeed, that institution would be clearly incompatible with a true, genuine federation. It would give to the *executive branch* of the provincial order of government suspensive and absolute veto powers over the *legislative branch* of the federal order of government. It would make the federal Parliament a hybrid body amounting to a monstrosity. We believe that there are better alternatives available to Canadians.

5. THE SEARCH FOR A SOLUTION: THE INTERGOVERNMENTAL APPROACH

It is obvious to us that the various proposals that have been made within the framework of a parliamentary approach fail to meet either the provincial requirement or the federal requirement. A solution must be sought, therefore, at the level of intergovernmental relations.

(1) The Federal Council

The Beige Paper published by the Quebec Liberal Party proposes the creation of a Federal Council. The basic difference between that council and the Council of the Federation recommended by the Pepin-Robarts Task Force is that the former would not be a legislative body and it would not be part of the Canadian Parliament. It would be an intergovernmental institution. This is as it should be.

Apart from that basic difference, the proposed council would have more or less the same composition and functions as the Council of the Federation. It is important to note, however, that while the council would have absolute powers, in addition to advisory powers, its mandate would not extend to federal legislative proposals in areas where the central Parliament has specific jurisdiction. The use of the federal overriding spending power in the area of income redistri-

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[23] Edward McWhinney, *Quebec and the Constitution, 1960-1978*, Toronto, 1979, pp. 134, 135.

bution would be subject to the council's ratification only when shared-cost programs are involved. The Beige Paper states:

> Moreover, the central government has the responsibility of overseeing the sharing of wealth among Canadians. It accomplishes this in part through the mechanism of equalization, but it must also have the power to make direct transfers to individuals, as it does through family allowances and old age pensions.[24]

In the area of culture, the Beige Paper recommends that:

> The federal government should be granted the specific powers necessary for the protection and development of the cultural heritage of all Canadians, including the power to create or maintain national institutions such as the Canadian Broadcasting Corporation, the national archives, a national library, the National Gallery and the National Film Board.
>
> Aside from these specific jurisdictions, the federal government should be empowered to intervene in cultural matters on the basis of its spending powers. Such interventions should be subject to two-thirds approval by the Federal Council.[25]

The Beige Paper is not too clear on when the council would intervene to ratify federal measures involving the use of overriding powers. Would it be *before* bills are introduced in Parliament, as it has become the general practice over the years at federal-provincial conferences, or would it be *after* they have received parliamentary approval? A careful reading of the Beige Paper leads to the conclusion that it proposes the latter course. Such a provision would amount to giving to provincial governments a power of disallowance over legislation passed by the central Parliament. It would be clearly incompatible with the principle of non-subordination enunciated in the Beige Paper itself and it would fail to meet the federal requirement. It would also be contrary to sound democratic principles because it would give to an intergovernmental body a veto power over a legislative institution. It is, therefore, as objectionable as the proposal for a House of the Provinces.

Moreover, we do not necessarily subscribe to all the specific functions assigned by the Beige Paper to the proposed council. For instance, it would be unwise to subject the proclamation of a wartime emergency to a provincial veto. Moreover, it is very doubtful that the ratification by the council of the appointments of the presidents and chief executive officers of major central government agencies would prove to be a sound provision. Here again we detect the introduction of a cumbersome confederal element into our federal system.

We have other objections to the council proposed in the Beige Paper. We do not believe the creation of such a new and complex institution is necessary to achieve the important purpose it would serve. Why, for instance, should there

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[24] The Constitutional Committee of the Quebec Liberal Party, *Ibid.*, pp. 90, 91.

[25] *Ibid.*, p. 79.

[26] The Constitutional Committee of the Quebec Liberal Party, *Ibid.*, p. 54.

be 80 members on the council, since "provincial delegations would vote 'en bloc' according to the instructions of their respective governments"? The only apparent reason would be to provide for a weighted vote system, but there are more simple ways of achieving that objective.

Moreover, the council would not be expected to replace the mechanism of federal-provincial conferences. The Beige Paper says:

> The existence of a Federal Council would not eliminate the need for the usefulness of summit meetings of First Ministers, nor of the various conferences and other manifestations of cooperation which are regularly initiated at every level by ministers, in fields of common interest.[26]

In other words, the council would be a new parallel institution accomplishing in a more formal and objectionable way the same functions that federal-provincial meetings would continue to exercise. Such duplication does not seem to be desirable. It would create further confusion in an already complicated area of the Canadian political system.[27] It would seem much more simple to recognize formally in a new constitution the institution of the federal-provincial conference and to assign to it the specific roles that the council would be expected to play.

(2) A Federal-Provincial Council

After intense but dubious attempts at institution-building designed to meet a deeply-rooted provincial grievance, a more recent current of opinion is rediscovering the federal-provincial conference, an old and unique Canadian mechanism that could easily provide a practical solution with the minimum of institutional disruption.

The idea of establishing the First Ministers' Conference in the Constitution is not a new one. It goes back at least to article 48 of the Victoria Charter proposed in 1970. It was also favoured by the Special Joint Committee of the Senate and of the House of Commons, which issued its final report in 1972. It reappeared in Bill C-60 in 1978.

What is new, however, is the proposal that the First Ministers' Conference be given specific roles and powers. In 1979, G. V. LaForest, the executive vice-chairman of the Canadian Bar Association's Committee on the Constitution, which had previously recommended an upper house of the provinces, had this to say:

> —It may be, for example, that the Federal-Provincial Conference could be raised to a constitutional level, requiring meetings at least yearly and providing for decisions to be formally reached. It is imperative that federal-provincial wrangling, at least at the decision-making level, be conducted in a formal setting, thereby providing a focus for national debate, and that the decision reached be clear, open and effective.[28]

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[27] The 30-member Council of the Provinces proposed by the Government of British Columbia as an interim measure at the First Ministers Conference in September, 1980, raises the same difficulties.

[28] G. V. LaForest "Towards a New Canada: The Canadian Bar Association's Report on the Constitution", *The Canadian Bar Review*, September 1979, pp. 507, 508.

Professor McWhinney states:

> We have our own distinctive Canadian institution—the First Ministers' Conference—that is capable of further organic growth in its own right. Should we not try to build on, develop, and strengthen that institution? Is that not wiser than to try to convert an existing federal *legislative* institution, the Senate, into one's own mistaken image of a foreign federal executive institution?[29]

More recently, Gordon Robertson, a well-known expert on Canadian federalism with long experience as a top public servant, wrote:

> The valid problem of control over actions by the central government that could seriously affect the provinces may present a case where it is important to keep clear the distinction made in the "beige paper" between objective and principle on the one hand and method of achievement on the other. The objective of adequate consultation with and voice for the provincial governments in actions of the central government of direct concern to them is clearly desirable. However, if the problems surrounding the Federal Council should prove too difficult of solution, it might be preferable to rely on a combination of a reformed Senate and a constitutionally established Conference of First Ministers . . .
>
> A constitutional requirement for periodic meetings of the Conference of First Ministers, with a clear definition of matters that would require formal decision by the Conference, might be the best means of achieving the objective that both the "beige paper" and the proposals for a Senate made up entirely of provincial nominees were designed to attain.[30]

Since the end of the Second World War, and especially since the mid-1960s, the Conference of First Ministers, together with more specialized meetings of ministers and officials, has become a well-entrenched institution that has developed strength and legitimacy. Over the years, it has been used as a framework for negotiating specific constitutional amendments and broad constitutional reform. It has been perceived as a method for ensuring provincial participation in the elaboration of federal policies involving the exercise of the overriding spending power related to shared-cost programs and of the peacetime emergency power. It has also provided a forum for discussion and coordination in other policy areas.

The Pepin-Robarts Task Force has this to say about intergovernmental conferences:

> Executive federalism in Canada has done a great deal to adapt our federal system to changing circumstances and it has some remarkable achievements to its credit. To name only the most obvious: it has facilitated the implementation of fiscal equalization programs intended to reduce disparities among

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[29] Edward McWhinney, *Ibid.*, p. 135.

[30] Gordon Robertson, "Our Other National Sport", *Policy Options* June-July 1980, p. 10.

the provinces, to promote regional economic development, to provide basic health and social services up to a minimum standard across the country, and to negotiate a continuing transfer of financial resources and responsibilities from the central to the provincial governments.

But these successes should not hide the weaknesses of the process and its contribution to the present crisis of Canadian unity. The general public has been more aware of the dramatic public confrontations between central and provincial leaders which it has occasioned. The way in which the process has been conducted has often left provincial governments with the feeling that central government's choice of priorities and conditions has imposed a *fait accompli* upon them, distorting their own priorities, while the use of intergovernmental meetings by provincial leaders to score points against the central government for partisan advantage at home has exasperated representatives of the central government . . .

Another unfortunate side effect of the current form of intergovernmental relations in Canada is that it has developed outside the framework of our traditional democratic and parliamentary institutions and has sometimes seemed to be in competition, if not in conflict, with them.[31]

It is regrettable that the Task Force has recommended extending executive federalism without attempting to improve it. It is true that intergovernmental conferences have been the scene of public confrontations. This is inevitable in a federal system. The Task Force's proposals would only multiply the occasions for such federal-provincial confrontations by giving them an additional forum in Parliament itself. It is true that, in the past, the provinces were faced with a *fait accompli* by the central government but, by providing them with a special mechanism by which they could approve the exercise of federal overriding powers, the source of their frustration could be removed. It may be argued that intergovernmental relations have developed outside the framework of our democratic institutions, but it must be realized that up to now, the positive decisions taken at federal-provincial meetings have been subject to the approval of Parliament and the legislatures.

In conclusion, we submit that there is no ideal solution to the conflict between the principle of non-subordination of the two orders of government and the existence of federal overriding powers. We believe, however, that a constitutionally established Conference of First Ministers with specific roles and powers and with appropriate decision-making mechanisms constitutes the best practical solution for Canada. Such an approach would formalize and improve well-established Canadian practices at the level of intergovernmental relations. In this perspective, it would not represent an unproved and revolutionary institutional transplant but an important evolution toward true federalism. We would propose that this constitutionally established Conference of First Ministers be called the Federal-Provincial Council.

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[31] The Task Force on Canadian Unity, *Ibid.*, p. 95.

6. THE FEDERAL-PROVINCIAL COUNCIL: COMPOSITION, ROLE AND OPERATION

The Federal-Provincial Council would be created by a special provision of the new constitution. It would be composed of First Ministers, or their ministerial substitutes, specifically designated for the purpose of specialized federal-provincial meetings. It would have a permanent secretariat and an advisory committee of officials.

The council would have three roles. First, it would exercise a *constitutional role* and negotiate amendments to the constitution and the delegation of powers if such a delegation is inserted in the constitution. Secondly, it would be assigned an *overseeing role* that would enable provincial governments to approve federal proposals directly affecting provincial areas of jurisdiction *before* such proposals are formally considered by Parliament. The objective would be to enable provincial governments to have a detailed idea of the proposals. Thirdly, the council would have a *co-ordinating role* illustrated by current federal-provincial meetings of finance ministers where an attempt is made at reaching a consensus on the broad orientation of fiscal policy. Since, in a federation, decisions by the two orders of government affect the same population, there is a great need for these orders of government to harmonize and co-ordinate their respective policies as much as possible.

The first and third functions correspond to well-established practices and do not need to be made more explicit here. The overseeing function would cover the exercise of the remaining federal extraordinary powers, notably the emergency and spending powers. That function, however, should be restricted to the peacetime use of the emergency legislative power.[32] Moreover, it would only cover the use of the spending power in provincial areas. It would apply to shared-cost programs but it would not extend, for instance, to federal redistribution of income schemes for individuals in the area of social policy nor to federal cultural and research activities authorized by the Constitution. As current negotiations on a new constitution develop, the council's overseeing role could possibly be expanded to other federal areas of direct concern to provincial governments. It could also cover provincial decisions and proposals that might infringe upon federal areas of jurisdiction.

How would the council operate and reach decisions? Its formal meetings would be public. In the exercise of its constitutional role, the council's decisions would be taken according to whatever amending formula is in effect at the time. The co-ordinating role does not raise any problem in this respect: it would be purely advisory and conclusions or recommendation reached in this area would not be binding.

With regard to the overseeing role, we suggest that the approval of proposals by the council require a vote representing both a majority of the provinces and a majority of the population. This would be a sound democratic rule. In this way, no single province would have a veto power and no single bloc of provinces in Eastern, Central or Western Canada could force ratification. In any case, a

[32] The wartime emergency power would cover real or apprehended war, invasion and insurrection.

province refusing to participate in a federal program based on the overriding spending power and approved by the council would be entitled to receive the fiscal equivalent in federal funds. The Canadian government has already accepted this principle of the opting out formula in the case of shared-cost programs.

An alternative formula for reaching a consensus, suggested in 1972 by the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, would also be acceptable. It would require the assent of provincial governments in at least three of the four regions of Canada. Approval would have to be given by at least two of the four provinces in each of the Western and Atlantic regions.

However, in accordance with our democratic and parliamentary traditions, the council's decisions should not be final. They should be submitted to Parliament and to the legislatures for approval, according to the council's voting formulas.

It has been said that federal-provincial relations have developed in Canada in much the same way as labour negotiations have been conducted in many countries, more particularly in North America, and that they have too often resulted in confrontation, frustration and paralysis. When strong conflicts of interest arise, such results are almost inevitable in a federal system. We believe, however, that an important factor accounting for the poor climate of intergovernmental relations in Canada has been that important areas of mutual concern to the two orders of government have not been subject to a system of shared responsibilities. As a consequence, conflicts have been over-dramatized because they appeared, at least, to oppose one province or another to Ottawa, which was always involved as the culprit. We feel that our proposed council would minimize this danger because important areas of mutual concern involving broad national interests would be subject to joint decisions taken not only by the federal government but also by provincial peers. In other words, the council would institutionalize cooperative federalism and give it a constitutional basis.

At the end of this part of our report we present in an appendix a synopsis of the proposed Federal-Provincial Council, its composition, its role and its decision-making mechanisms.

7. CONCLUSION

Constitutional reform, of course, involves several dimensions. The division of jurisdictions probably represents the most contentious issue. However, in our modern and complex society, it is impossible to assign exclusive jurisdiction in many areas to one or the other level of government. Moreover, there are extraordinary powers transcending the division of jurisdictions that the central government must have in order to maintain a certain degree of flexibility within the overall political system. The exercise of these overriding powers also raises another fundamental constitutional issue. This is why the Beige Paper rightly asserts that "Constitutional reform will thus be inadequate if it simply

improves the existing division of jurisdiction". It describes the particular problem created by the exercise of the federal overriding powers in this way:

> Throughout the history of Canadian federalism, these powers have frequently been used and have often given rise to disputes and crises. The fact is that such powers introduce into our institutions a unilateral dimension which constantly threatens to tip the scales of the balance of power in favour of the central government. They violate one of the basic principles of federalism: that one level of government should not be subordinated to the other.[33]

Various proposals have been made to solve this problem. The proposals that recommend a parliamentary solution are incompatible with the principle of non-subordination. Some of them, such as the House of the Federation proposed in Bill C-60, would maintain the subordination of the provinces to the central Parliament. Others, like the Council of the Federation put forward by the Pepin-Robarts Task Force, would infringe upon the sovereignty and the integrity of Parliament as a federal institution by introducing into it a confederal chamber directly involved in the formal legislative process.

We believe that a solution truly compatible with a genuine federation can be found at the level of intergovernmental relations, by establishing in the Constitution the unique Canadian institution of the First Ministers' Conference to be called the Federal-Provincial Council, and by assigning to it, among other functions, the responsibility for overseeing the use of federal overriding powers. It could also oversee provincial decisions and proposals that might infringe upon federal areas of jurisdiction.

In the light of current intergovernmental practices in Canada, such a constitutional arrangement would not be revolutionary. It would mark, however, an important evolution because it would, in the best practical way, guarantee the sovereignty of the provinces *de facto* and *de jure* and eliminate one of their most deeply-rooted grievances. We believe this new arrangement would mean that, for the first time in their history, Canadians would live in a political system based on a genuine federation.

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[33] The Constitutional Committee of the Quebec Liberal Party, *Ibid.*, p. 66.

APPENDIX

A SYNOPSIS OF THE PROPOSAL FOR A FEDERAL-PROVINCIAL COUNCIL

1. COMPOSITION:

   First Ministers or their ministerial substitutes assisted by a permanent secretariat and an advisory committee of officials.

2. ROLES:

   (1) *A constitutional role:* to negotiate amendments to the constitution.
   (2) *An overseeing role:* to approve federal proposals involving the use of extraordinary overriding powers in provincial areas of jurisdiction and similarly provincial proposals that might infringe upon federal areas of jurisdiction.
   (3) *A co-ordinating role:* to harmonize and co-ordinate policies of the two orders of government in areas where they have an impact on each other.

3. DECISION-MAKING MECHANISMS:

   (1) *With respect to the constitutional role,* decisions would be taken according to the amending formula in effect at the time.
   (2) *With respect to the overseeing role,* approval would require a majority of the provinces representing a majority of the population, or the consensus of at least three of the four regions of Canada, including at least two provinces for each of the Western and Atlantic regions.
   (3) *With respect to the co-ordinating role,* the consensus, if any, would not be binding.

4. PARLIAMENTARY APPROVAL:

   Decisions reached by the council would have to be ratified by Parliament and the provincial legislatures.

PART II

TOWARD A RENEWED SENATE

In Part I of this report, we rejected the idea of a confederal chamber of Parliament composed of delegations from provincial governments with the power to disallow federal legislation. In this Part, we consider three questions.

First, is it desirable to have a second, genuinely federal chamber in the national Parliament?

Second, if so, should it be elected or appointed?

Third, if it is to be appointed, would a reform of the present Senate meet Canadian needs?

1. THE NEED FOR A SECOND CHAMBER

It is sometimes alleged that there is no need for an upper house at all. The New Democratic Party and its predecessor, the CCF, and large sections of the trade union movement, have called for abolition. So has the Constitutional Committee of the Quebec Liberal Party in its Beige Paper.

The argument for a single chamber Parliament is simply that a popularly elected house can do everything, especially if its committees are given enough power and enough staff. The house itself would settle major questions of policy, and the committees would look after details. If the house made a major mistake, the electors would deal with that at the next election.

(1) Experience of Other Countries

This argument does not seem to fit the evolution of modern parliamentary systems. Professor Frank Scott (himself once an advocate of a single chamber Parliament for the Canadian federation) pointed out to the Joint Committee on the Constitution in 1970: "There have been about sixty new constitutions written since the end of World War II and in a great many of them there is a second Chamber . . . It is not an idea which is fading away gradually and I would think that there could be now some legitimate place for a Senate that had some regional representation."

Many unitary states have a second chamber; for example, France, Belgium and the Netherlands. In none of these is there any serious call for abolition. The United Kingdom's House of Lords is, logically, the least defensible of second chambers; yet it persists, and its usefulness is generally acknowledged; even the Labour peers, in spite of their party's demand for abolition, favour retention with reforms, and have said so, publicly and emphatically.

There are, obviously, additional reasons favouring a second chamber in countries with a federal constitution. It is surely not without significance that every federal state outside the Soviet bloc has an upper house. It seems more probable that the people who drew up their constitutions, over long periods of years in which opinions and institutions changed considerably, had solid reason for what they did, and their successors have not seen any recent justification for reversing it.

The Canadian Senate has been a favourite target for criticism, especially from those who knew little of what it was doing. Like many of our other institutions it needs fundamental reform, and later in this report we will present a series of recommendations to that effect. However, we believe that the Senate's record over the years must be briefly recalled here, not in a spirit of self-defence to preserve the *status quo* but to indicate that, even as it is, it shows the usefulness of a second chamber.

(2) The Canadian Experience

For many years the Senate has accomplished an important *revising role* as a legislative body. Its major work in this respect has been the revision of government bills, especially complex, technical bills, passed by the House of Commons or introduced in the Senate itself.[34] Experience has amply proved that House of Commons committees are too overburdened with work to be able to give to bills the detailed attention and study so many of them require before they are enacted into law. The job of revision is done largely by the Senate, and on a substantial scale, and the Senate is particularly well equipped to do it. It has an impressive reservoir of talent and experience: legal, business, agricultural, administrative, political; former provincial Premiers, former federal and provincial Ministers, and former members of the House of Commons and of provincial legislatures.

A good example of what the Senate does in this field, and how it does it, is the recent work of the Standing Committee on Banking, Trade and Commerce.

Complex bills introduced in the House of Commons have often reached the Senate so late in a session that it has been very nearly impossible to give them the careful examination they deserved and needed. The Banking, Trade and Commerce Committee has therefore adopted the practice (since 1971) of making an advance study of such bills the moment they are presented in the House of Commons.[35] The committee asks the Senate to refer to it "the subject matter" of whatever bill is in question. When the Senate agrees, the committee subjects the bill to a most meticulous scrutiny, often lasting for months, and

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[34] For a comprehensive description of both the legislative and investigative functions carried out by the Senate through its committee system, see the research paper *Standing Senate Committees*, by Barbara Plant Reynolds, Ottawa, Library of Parliament, March, 1980. This study is tabled with our report.

[35] See Robert Fortier, "A New Initiative in Canadian Senate Procedure", The Commonwealth Parliaments, (2nd revised edition), Lok Sabha Secretariat, New Delhi, 1976. (Copies of this article can be obtained from the office of the Law Clerk and Parliamentary Counsel to the Senate.)

reports to the Senate what amendments it thinks will be necessary. The report is, of course, made available to the government, which can (and often does) propose and carry the suggested amendments in the House of Commons; or which may find the suggested amendments so numerous and far-reaching that it decides to withdraw the bill and introduce a revised version (embodying the amendments, or many of them) in a later session.

To the Bankruptcy Bill of 1975, the Senate committee suggested 139 amendments. The government withdrew the bill, and in 1978, 1979 and 1980, brought into the Senate new bills embodying most of the amendments suggested by the Senate committee.

Many similar examples could be cited, notably the tax reform legislation of 1971. The Banking, Trade and Commerce Committee spent three months examining the preliminary White Paper, received some 443 briefs, heard 118 witnesses, and suggested over 40 changes in the proposals. The government embodied most of these changes in the bill introduced into the House of Commons. The Senate committee then subjected the bill itself to the same meticulous scrutiny, for another three months, and recommended another nine amendments, all of which were adopted by the House of Commons. When the bill came to the Senate, therefore, that body had already, in effect, put in six months' work on it, and secured most of the changes it thought necessary, and was able to dispose of the matter in a few days. The press, noting only those few days, attacked the Senate and its committee for shirking their duty on one of the longest, most complex and most important bills in the history of the country.

Senate committee meetings are seldom exciting or spectacular; they are almost invariably completely non-partisan; so they are rarely newsworthy. But they do an indispensable job for the taxpayer and the citizen in simplifying and clarifying legislation, saving the taxpayer money, saving the citizen from unfair and unworkable provisions, saving the citizen and the courts from needless and costly litigation.

The Senate's performance of this function could be improved, and later in this report we suggest several changes that we believe would contribute to that end.

The Senate is also fulfilling an *investigative role.* More and more, over the last few decades, the Senate has been performing a function that the Fathers of Confederation did not foresee at all, and that has become an important part of its work. This is the investigation of public questions that governments may have neglected, or may not have considered ripe for action. This work can, of course, be performed by royal commissions or task forces. But these have to be set up by the government, which may be reluctant to have the particular question inquired into. A Senate committee can do the job as well, or better, and at a fraction of the cost of a royal commission or a task force. More important, with a royal commission or a task force, there is no body that can follow up the report. With a Senate committee, there is. Having received the committee's

report, the Senate can keep track of what happens to it; and if it finds nothing is happening it can raise the matter, forcefully and, if need be, repeatedly; it can also, if need be, appoint another committee to pursue the matter further.

Special committees of the Senate have, in the last 25 years, investigated Land Use in Canada (1957-63), Manpower and Employment (1960-61), Aging (1963-66), Science Policy (1968-77), the Northern Gas Pipeline (1978-79), the Constitution (1978-79).[36] The Standing Committee on National Finance has also made a number of investigations of the work of various government departments or agencies. The Standing Committee on Foreign Affairs has investigated many aspects of Canadian-American relations. Indeed, these two standing committees, and the Standing Committee on Agriculture, issue investigative reports on a regular basis, and have been doing so since 1972. A subcommittee of the Standing Committee on Health, Welfare and Science has for the past three years been investigating childhood experiences as causes of criminal behaviour.

In addition, senators have made a very valuable contribution to the work of the joint committees, and can make them more effective than committees of the House of Commons alone, partly because senators have more time and partly because of the greater continuity of Senate membership. Undoubtedly, in areas such as immigration, a joint committee can work more effectively and its report will carry more weight.

It is widely believed that the reports of the Senate committees are purely academic exercises, without results. This is not so.

The report of the Committee on Manpower and Employment led to the establishment of the Department of Industry and the Department of Manpower and Immigration, to a series of legislative measures relating to manpower training, the *Industrial Research and Development Incentive Act,* the DREE program and the Atlantic Development Board.

The report of the Committee on Land Use led to the establishment of the Department of Forestry and several programs under the department, to important amendments to the *Farm Improvements Loans Act,* the *Farm Machinery Syndicats Credit Act* and the *Crop Insurance Act*; to a greatly expanded soil survey, to a much wider dissemination of agricultural information, and to the enactment of the *Agricultural and Rural Development Act (ARDA).*

The report of the Committee on Aging led to the lowering of the minimum age for old age security benefits, the guaranteed income supplement and amendments to housing legislation.

The report of the Committee on Science Policy led to the establishment of the Ministry of State for Science and Technology. Of this committee's 85 recommendations, about 60 have been adopted by the government.

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[36] For a general description and summary of the work carried out by these committees, see the research paper *Special Senate Committees*, by Barbara Plant Reynolds. Ottawa, Library of Parliament, March 1980. This study is tabled with our report.

The report of the Committee on Mass Media led to changes in the *Income Tax Act* that have put new life into the Canadian magazine industry.

The *regional role* of the Senate has been less significant than anticipated in 1867. One of the main reasons for creating the Senate was to protect the interests of the less populous regions in matters under federal jurisdiction. The Atlantic provinces and Lower Canada alike were afraid that Ontario, with its larger and probably increasingly larger population, would have things too much its own way in the House of Commons where representation was to be based on population. So they insisted that the Maritime provinces and Quebec should each, as a region, have the same number of senators as Ontario; and, for good measure, Newfoundland was to have four senators in addition. An amendment to the British North America Act, in 1915, added a fourth region (the four Western provinces), again with the same number of senators as Ontario.

It should be emphasized that senators were intended to represent regions and provinces, not provincial governments or legislatures. They were not intended to play any significant part in protecting the jurisdiction of the provincial legislatures. The courts would do that.

But, in the very highly centralized federation set up by the British North America Act, 1867, everything not specifically and exclusively assigned to the provincial legislatures was to fall, automatically, under federal jurisdiction. The Fathers therefore felt that there should be a power in Parliament that could stop Ontario from riding rough-shod over the interests of other provinces or regions in matters like tariffs, banking, interprovincial and international trade, interprovincial and international transportation and communications, and even labour legislation.

The British North America Act, however, did not spell out the regional protection role of the Senate, let alone provide any mechanism for performing it. This alone makes it hard to decide whether the Senate has lived up to the Fathers' expectations in this respect.

What makes it harder still is that much of the protection for the regions that the Senate was intended to provide has, in fact, been provided by other bodies: the courts, the Cabinet, the regional caucuses.

The courts have protected provincial jurisdiction. The Judicial Committee of the British Privy Council (until 1949, our final Court of Appeal) so interpreted the British North America Act that, from about 1892 on, the power of the federal Parliament was, in general, steadily narrowed, and the power of the provincial legislatures widened, and the Supreme Court of Canada, since 1949, has not substantially changed this situation. Because of this, the field in which the regions had to be protected turned out to be much smaller than the Fathers of Confederation had anticipated.

From the beginning, the regions were well represented in the Cabinet, and the voices of the ministers from each region were strong enough to make the regional protection work of the senators much less necessary.

More and more, also, the regional party caucuses, consisting of members both of the Senate and the House of Commons, have taken over the protection of regional interests in matters under federal jurisdiction, and have done so very effectively.

The Senate has become only one of a number of bodies for voicing and protecting regional interests.

Within the limited sphere open to it, the Senate has, in fact, been an effective forum for the expression of regional concerns, and an effective protector of regional interests. The pages of *Hansard* and the minutes of committees are replete with examples of the former; and even recent years provide conspicuous proof of the latter.

A recent notable instance is the Maritime Code Bill of 1977. The Senate saved the Atlantic provinces, Quebec, British Columbia and Ontario as a Great Lakes province, from the bill's proposal to abolish all coastal ports of registry for shipping and replace them by the single port of Ottawa. By some 80 drafting amendments, it also protected the coastal provinces from provisions that could have caused serious problems for their shipping industries.[37]

A second recent instance of the Senate's work as a regional protector is the report of its Standing Committee on Agriculture on the problems of the rural economy of Kent County, New Brunswick, a report that led to the establishment of a most effective program of agricultural development there, and in similar areas elsewhere.

The Standing Committee on Agriculture has also been a vigilant watchdog for the interests of Prairie farmers, and numerous Acts and amendments to agricultural legislation, are eloquent testimony to the committee's effectiveness.

In federal-provincial intergovernmental relations, the Senate has not played a major part. It was never intended to. None of the governments, federal or provincial, has expected it to, and it would be foolish to suppose that this will change. Provincial governments wish to deal directly with the federal government in these matters. In the main they involve complex questions of policy or administration that can be worked out only in lengthy government-to-government negotiating sessions at various levels.

The Senate has done a good deal to voice the feelings of the regions and to protect their interests. It could have done more. If our recommendations are adopted, the Senate will be equipped to do a great deal more, and, in particular, to provide a channel through which popular feeling in the regions can be expressed and can influence policy at the centre.

Many people seem to believe that re-structuring the Upper House would solve all the problems of regional dissatisfaction or alienation. This is a delu-

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[37] For an analysis of the role performed by the Standing Senate Committee on Transport and Communciations in its examination of the Maritime Code Bill of 1977, see Wilbrod Leclerc, "A 'Useless' Senate Rebuffs Transport", *Optimum*, Vol. 9, No. 2, 1978, p. 46.

sion. These problems are rooted in geographic, economic, cultural, attidudinal and demographic factors and will remain no matter how the Upper House is constituted or what powers it has.

We believe, however, that with mounting regionalism in Canada, especially during the last decade, the role of the Senate in overseeing the impact of federal policies on our broad regions should be emphasized and made more specific.

The role performed by the Senate as *protector of linguistic and other minorities* has not been a major one. Critics of the Senate have complained that it has not effectively championed the cause of racial, religious or linguistic minorities. In this there is some truth. The Senate did not, for example, take up the cause of the Japanese-Canadians during the Second World War. On the other hand, it was the Senate that, in 1877, in the face of opposition by the government, put official bilingualism into the *Northwest Territories Act*.

The Senate repeatedly discussed the Manitoba school question in 1891, 1893, 1895 and 1897; the Saskatchewan and Alberta school questions in 1905; and the Ontario school question (Regulation 17) in 1917. It did not discuss the New Brunswick school question of the early 1870s, but on all four of these matters the House of Commons was so vociferous as to make any effort by the Senate almost superfluous. The New Brunswick school question produced a flock of resolutions and amendments to resolutions, culminating in 1873 in passage of a motion calling on the government to disallow the New Brunswick legislation. The House of Commons debates on the Remedial Bill of 1896, which would have restored Roman Catholic separate schools in Manitoba, were among the longest and most vigorous in its history.

The Senate has, however, given special attention to the problems of two particular groups in Canadian society: the aged and children. A Special Committee on Aging, in 1966, produced a notable report (recommending, among other things, a guaranteed income for the aged); and the Special Committee on Retirement Age Policies, 1978-80, has only just completed its report. A subcommittee of the Standing Committee on Health, Welfare and Science has, for several sessions, been engaged in a pioneer study of childhood influences as causes of criminal behaviour. Its work has already attracted world-wide attention.

Here, again, the Senate could no more do than it has done to protect minorities; and, again, adoption of our recommendations will equip it to do more, especially for the protection of linguistic minorities (English-speaking in Quebec, French-speaking in the other provinces).

These brief references to the historical record show that the Senate has been useful over the years as a second chamber. They also clearly indicate that certain functions of the Senate could have been exercised more efficiently, but to that extent they strengthen the case for improvement and reform, not for abolition. Moreover, apart from the New Democratic Party and the Constitutional Committee of the Quebec Liberal Party, there seems to be no strong demand for a single chamber Parliament in Canada.

(3) Complementary Role of a Second Chamber

These references may also be useful to point out in general terms what kind of second chamber is needed, under ideal conditions, especially in a country like Canada. Broadly speaking, we need an upper house not to duplicate what the House of Commons is mainly intended to do and can do efficiently, but to complement it and to correct its deficiencies. Sir John A. Macdonald succinctly described this complementary role of a second chamber when he referred to it as a chamber of "sober, second thought". Such a role is based on certain basic characteristics that the House of Commons has and that no reform can change substantially. The following are some of them:

(1) The Canadian political system is based on the principle of parliamentary democracy, and there is no serious suggestion for change in this respect. This means that the House of Commons operates on the basis of party discipline and that it is dominated by Cabinet, especially under majority governments. A second chamber less subjected to party discipline and more independent from Cabinet can, therefore, offer a guarantee against arbitrary decisions and for a more detached consideration of legislation.

(2) Debates in the House of Commons are usually prolonged and repetitive. They reflect broad party lines and remain fairly general. Discussion in committees tends to be a continuation of debates in the House. Moreover, members are always pressed for time. They are expected to consider legislative measures, to vote supply and to approve the detailed estimates of departments and budgetary proposals. In addition to their parliamentary duties in the House and its committees, they have to participate in party caucuses and their committees and they must remain in close contact with their electors. As a result, legislation—especially complex and technical bills that are increasing in number—may not receive detailed consideration by the House of Commons. A second chamber, while concerned with the broad principles of bills, is assisted by less partisan and more independent committees and can devote more time and expertise to the detailed consideration of legislation.

(3) Party discipline in the House often results in compromises in the national interest. Debates also tend to reflect national concerns. This is, of course, as it should be. But, as a consequence, the more particular impact of legislation on regions, minorities and individuals may receive little consideration. This is a complaint that can be heard more and more in Canada today. A second chamber can exercise this watchdog role if it is properly designed for that purpose.

(4) The turnover in the House is relatively high. A growing number of members are dropping out for various reasons, including frustration. Others fail to be re-elected. In a democracy, this is to be expected. However, this is not good for the legislative process, especially at its stage of detailed consideration, where experience and expertise are most needed. A second chamber, with greater stability and continuity in its membership, can compensate for the inevitably high turnover in the Commons.

(5) Members of the House, pressed for time and anxious to be re-elected, cannot be expected to put a high priority on long-term investigations of complex issues. Moreover, their initiatives in this area may be inhibited by the government. Yet, experience has shown that this investigative role of parliamentarians can improve existing government programs and inspire new policy initiatives. Here again, a second chamber properly constituted can be most useful.

2. AN ELECTED OR AN APPOINTED SECOND CHAMBER

While there is no popular demand in Canada today for a unicameral Parliament, some people seem to favour an elected Senate. The observations presented above on the specific needs for a second chamber may help to clarify this issue.

Those who advocate an elected second chamber usually do not support adoption of the U.S. model. The American Senate is part of a totally different system of democratic government, the presidential-congressional, as opposed to our responsible-Cabinet-parliamentary. The American executive is not in Parliament, as ours is, nor responsible to Parliament, as ours is. The American system is based on separation of executive and legislative power. The Canadian system is based on concentration of executive and legislative power. To pluck an institution from one system of government and insert it in the other will not work. The United States Senate is immensely powerful because it is elected and because of its special powers in respect of the approval of treaties and of certain appointments. No Canadian Senate, appointed or elected, can be immensely powerful, unless we change our whole system of government.

Those who advocate an elected second chamber agree that the House of Commons should have legislative supremacy and that the Senate should have, broadly speaking, the complementary roles that we have outlined above. Moreover, they do not favour the election of senators by a simple majority on the basis of a single constituency.

The basic proposal of the proponents of an elected second chamber would preserve the four Senate divisions as they are at the present time with their respective allotted number of seats. The electoral system would be based on proportional representation in each division. In Quebec, for instance, there are 24 seats. Thus, before an election 24 candidates from ranked lists would be announced for that province by each political party and seats would be awarded to parties on the basis of the popular vote.

One of the arguments of the proponents of this system is that an appointed second chamber having the same legislative powers as the House of Commons is not compatible with our democratic traditions. This is a valid argument, at least in theory, although in practice the Senate has not used its absolute veto power to reject a House of Commons bill in its entirety for many years.

In Australia, the elected Senate enjoys powers almost equal to those of the House of Representatives. It can reject tax or appropriation bills or delay them indefinitely, and in November 1975 it did. The government, with a majority in

the Lower House, found itself without money to carry on essential government services. It refused either to resign or to advise a dissolution, and the Governor General was obliged to dismiss it and grant to a caretaker government the simultaneous double dissolution (of the House of Representatives and the Senate), which the Australian Constitution provides for. This caused an uproar and much bitterness, which have not yet disappeared. Some Australian writers on the Constitution are now saying that, as a result, the Australian government will henceforth be responsible to, and removable by, the Senate as well as the House of Representatives; that the Senate will be able to make and unmake governments. Would Canadians tolerate such a system?

A second argument used by the proponents of an elected Senate is that the present system of appointments is not satisfactory. They argue that a second chamber would better serve Canadian needs if it were elected by proportional representation. A distinctive feature of a Senate so elected would be that it would reflect the changing opinions and feelings of the people of each province in all their variety and in proportion to the support they enjoy. It would give representation to minor parties in proportion to their popular support. It would assuage feelings of alienation by giving the Liberals of the West, the Conservatives and New Democrats of Quebec, and the New Democrats of the Atlantic provinces the voice at Ottawa that the present electoral system with its simple plurality denies them in the House.

Would the selection of candidates for the Senate through ranked party lists and proportional representation be the best solution? Would it eliminate partisan considerations? What would be the role of the party leader and of party conventions in this selection? Many potentially good senators would hesitate to be submitted to this process. Moreover, senators once elected would have to follow the party line and would lose much of their independence and their objectivity, especially if they wanted their names to re-appear on their party list at the next election. Given the specific roles of the Senate, we do not believe that this proposed election procedure would represent an improvement over the present situation. We feel, however, that the method of appointment can be substantially improved and that it should, for instance, provide for provincial as well as federal appointments. We will make specific recommendations in this respect in a subsequent section of this report.

A third argument presented by the proponents of an elected second chamber is that tenure in the existing Senate is too long. We agree that the present system should be changed. But what about an elected Senate? Would the senators be elected for a fixed term or elected at each federal general election? If they were elected for a fixed term, then, unless the term was very short, they might soon cease to be genuinely representative. If it were very short, or if they were elected afresh at each general election, they would be here today and gone tomorrow. They might scarcely have time to learn their job; the continuity and the experience so necessary to a revising chamber would be imperilled. If senators were elected afresh at each provincial election, the dangers of the revolving

door might be even greater.[38] The best compromise between the present tenure and renewal at each election would be to provide for term appointments.

The choice between an elected and an appointed Senate is straightforward: either Canadians want a second chamber as a replica of the House of Commons with the same powers, in which case the Senate should be elective, or they want a complementary and largely advisory second chamber, in which case an appointed Senate seems preferable. While there is a growing number of Canadians in favour of an elected second chamber, we believe that they form a small minority. On balance, we believe that Canadians will be better served by an appointed but reformed Senate.

The ideal situation, in our view, would be to have an appointed Senate with only suspensive veto powers. In this way, the second chamber would still be in a position to accomplish its specific complementary roles efficiently and the supremacy of the elected House of Commons would be guaranteed not only in practice but also in principle. The Senate would, of course, have less political weight than the House and its value would depend on the quality of its advisory role.

3. A REFORMED SENATE

The reform of the Senate has been discussed for too long. The time has now come for action. Some of the changes that are needed can be made internally by the Senate itself. Others can be effected by the government, mainly by the Prime Minister. Some of the others would require amendments to the Constitution but could probably be made unilaterally by Parliament. We hope that all our recommendations will be given a high priority during the current session. The required legislation might even be initiated in the Senate after proper consultation with the government.

(1) Functions of the Senate

(a) *The Legislative Function*

The legislative function of the Senate is, of course, primary. It has been described earlier in this report and we have no change to propose in this respect, but we will later on present specific recommendations relating to the powers of the Senate.

(b) *The Investigative Function*

The 1972 report of the Special Joint Committee on the Constitution recommended that the Senate's investigative role should "be continued and expanded at the initiative of the Senate itself." It has been. It recommended also that the government "should make more use of the Senate in this way."

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[38] For any one province, the change at each election might not be large, since the proportion of the popular vote each party wins does not usually change markedly. But for all ten provinces the cumulative effect might be considerable.

The primary purpose of Senate committee investigations should be to influence government policy, priorities or administration. Therefore, the Senate itself should initiate investigations in areas where it believes there is a need. We question the desirability of having the government take the initiative in suggesting areas where the Senate, rather than the two Houses in a joint committee, should launch an investigation.

We believe that the standing committees of the Senate should ordinarily institute and carry on investigations in the fields assigned to them by the rules of the Senate, as the Standing Committees on National Finance, on Agriculture and on Foreign Affairs already do. This could sometimes be done by a subcommittee, which would hold hearings and make recommendations to the main committee. (This, as indicated earlier, has been done now by the subcommittee on Health, Welfare and Science which has been investigating childhood experiences as causes of criminal behaviour). If these suggestions are adopted, there would be less need of special committees.

(c) *The Regional Function*

For various reasons explained earlier, the Senate did not devote much of its time to its regional function. Today, regionalism is increasing in Canada as elsewhere. Frequent complaints are being voiced that federal policies do not correspond to regional aspirations or run contrary to regional interests. This is almost inevitable in a country as diverse as Canada where the federal government must concentrate its attention on the overall national scene. More systematic attempts must be made, however, to reconcile the national interest with regional aspirations. The Federal-Provincial Council proposed in Part I of our report would make a significant contribution in this respect. We feel also that if the Senate were assigned a specific role in the Constitution in this area, it would look on a systematic basis at the regional impact of federal policies and become a forum where regional grievances would be heard.

(d) *The Representation of Minorities Function*

The Senate could do much more than it has done for the protection of minority rights and more particularly linguistic minorities (English-speaking in Quebec, French-speaking in the other provinces). The charter of rights and freedoms, even if it is adopted and entrenched in the Constitution, will not solve all the problems of these minorities. Moreover, the federal linguistic policies and programs require a more systematic parliamentary review than they have received in the past. The Senate is in a good position to exercise this watchdog role on a continuing basis.

(e) *The Human Rights Function*

Until comparatively recently, the subject of human rights did not figure conspicuously in Canadian political or constitutional discussion. The Senate took part in the joint committee of the two Houses on the subject in 1947, and of course in the enactment of the *Canadian Bill of Rights* in 1961 and of the *Canadian Human Rights Act* in 1977.

This subject is bound to be of increasing importance, whether or not a revised Constitution includes an entrenched charter of human rights. The Senate should play in this area a role parallel to that proposed above for the protection of linguistic rights and it should have a specified procedure for dealing efficiently with these two issues.

(f) *Constitutional Clarification of the Senate's Role*

The legislative and investigative functions of the Senate are generally recognized and well established. However, the three other functions mentioned above would be new, at least in a contemporary context. For this reason it would be useful for all concerned to spell them out. We recommend, therefore, that the Constitution should state clearly, though in general terms, the Senate's role as a representative and protector of the interests of the regions, and of linguistic and other minorities, in matters within federal jurisdiction.

(2) Composition of the Senate

(a) *Size*

The enormous increase in population of the Western provinces has led to general agreement that Western representation in the Senate should be increased. We are convinced, on the other hand, that any reduction in the existing representation of any province or region is politically impracticable. We have also noted that Bill C-60's offer of two additional seats to Newfoundland seems to have won general acceptance.

Clearly, less populous regions should have a disproportionately larger representation in the Senate, especially when those regions are at the extremities of the country and feel acutely their distance from the seat of government. Clearly, also, representation must take some account of the economic strength and importance of each region, which may be out of all proportion to its share of the total population. Balancing these considerations even for the regions, let alone the provinces, is not easy, especially when any reduction of existing representation is ruled out, as it must be.

We recommend that a reformed Senate should have 126 members instead of the present 104. We believe that such an increase would not only improve regional representation but would also enable the Senate to carry out its greater responsibilities more efficiently. Membership would be distributed as follows:

Newfoundland	8	Manitoba	10
Nova Scotia	10	Saskatchewan	10
New Brunswick	10	Alberta	12
Prince Edward Island	4	British Columbia	12
Quebec	24	Yukon	1
Ontario	24	Northwest Territories	1

We also recommend that the present provision in the Constitution for four or eight extra senators, drawn equally from each of the four regions (Atlantic, Quebec, Ontario, the West) be retained, but that the power to make the

appointment be vested in the Governor General. The existing reference to the Queen places the decision on whether or not to appoint the extra senators in the hands of the Government of the United Kingdom. This has now become constitutionally obsolete, and the wording should be changed to conform with the constitutional reality.

The provision for extra senators was intended to meet the problem of a deadlock between the two Houses, and ensure, in such cases, that the will of the elected House should prevail. If our recommendation that the Senate should have only a suspensive veto is adopted, the provision for extra senators would no longer be required for this purpose. But it might still be useful to enable a government that had no members from a particular province in the House of Commons, and no Senate vacancies for that province, to give it its due representation in the Cabinet.

(b) *Method of Appointment*

Recent major proposals for Senate reform would place appointments in the hands of provincial governments, and, in effect, make the Upper House a body for provincial disallowance of federal legislation. These proposals, whether for a "Council of the Federation" or a "House of the Provinces," would really destroy the complementary role of the upper chamber as part of the federal legislative process.

As indicated in Part I, those who have made such proposals seem to have been captivated by the West German Bundesrat, which is made up entirely of ministers of the provincial (Länder) governments, and which enjoys powers not dissimilar from those proposed for its Canadian imitation. But what works for West Germany would not necessarily work for Canada.

West Germany is a much smaller country. It is also a much more homogeneous society, with a much greater degree of "consensus politics". Moreover, the Länder have very little legislative power of their own. Their role is largely one of administering the laws made by the federal Parliament. There is obvious merit in giving bodies called on to apply and execute laws a direct role in their making. But this is not the case in Canada, in general, nor does anyone suggest that our provinces should be reduced to the status of the West German Länder.

We recommend that all appointments to the Senate should continue to be made by the federal government, but that every second appointment should be made from a list of names submitted by the government of the province (or territory) concerned and that consideration be given to filling a due portion of the early vacancies from such lists. This, especially if adopted in conjunction with our recommendations for tenure and retirement, would mean that within a fairly short time half the senators would have been nominated by the provincial and territorial governments. (If a provincial government failed to submit its list within six months, the federal government would have to make the appointment itself.) This is essentially the system recommended by the Special Joint Committee of the Senate and the House of Commons on the Constitution in 1972.

Our recommendation would produce a Senate much more diversified politically than it is now under the present method of appointment, and lessen the likelihood that any one party would have an overwhelming majority in the chamber, a situation that almost everyone regards as unhealthy for the body politic.

We also recommend that the Constitution stipulate that all Senate vacancies must be filled within six months of their occurrence. Vacancies lasting for years on end (as has happened in the not too distant past) are against the spirit of the Constitution and should be made impossible.

Whatever the method of appointment, the primary criterion that should govern the choice of senators should be to maintain a good balance of representation of different segments of society and of the expertise required for the effective performance of the Senate's functions.

(c) *Tenure*

The Joint Committee on the Constitution, in 1972, proposed that the age of retirement from the Senate be lowered from 75 years to 70. We do not believe that this is an effective method of improving the quality of the Upper House or its work. A large proportion of the senators between the ages of 70 and 75 are valuable and active members. The purpose of lowering the age of retirement would be to relieve the Senate of members who, for one reason or another, are no longer productive. But that is a different problem, which may arise with people well under 70. To solve this problem, we submit three specific recommendations.

First, senators should be appointed for a fixed term of ten years, renewable for further terms of five years upon the recommendation arrived at by secret ballot of a Senate committee set up for that purpose. Senators would continue to retire at 75.

A shorter first term than ten years would be unlikely to attract enough men and women of the kind most needed in a second chamber. A term of six years (which has been suggested) would interrupt their careers at perhaps their moment of greatest promise; they could not just go back at the end of that period and take up where they left off. This point is the more important if the Senate is given the added responsibilities that we are recommending and that require experience and some continuity of service.

We believe it is essential that renewal of an appointment be made by the government but only on the recommendation of a committee of the Senate itself. The committee would make its recommendation not on the basis of how well the senator had pleased the government or the opposition, but on how well the senator had done his or her work, and how capable he or she was of continuing to do it. A decision by the government alone might undermine, and would certainly be widely believed to undermine, the senator's independence.

Second, any senator who has attained the age of 65 years and has been serving for at least fifteen years (or who has attained the age of 70 years and has been a senator for at least ten years) should be entitled to resign, on full pension, with the usual pension for his or her widow or widower. (Similar provisions for judges are contained in the *Judges Act*).

Third, any senator who fails for two successive years to attend at least one-third of the sittings of the Senate in each of those years should forfeit his or her seat. (This would replace the present section 31.1 of the British North America Act, under which the seat is forfeited if the senator fails to give any attendance whatever for two consecutive sessions.)

(d) *Qualifications of Senators*

We recommend that the property qualification for membership in the Senate be dropped. We further recommend that the division of Quebec into senatorial districts, and the requirement that Quebec senators have their residence, or their property qualifications, in a particular district, be dropped. This requirement was put into the British North America Act, 1867, to guarantee Senate representation for the particular areas of Quebec that were predominantly English-speaking. Since these areas have now become predominantly French-speaking, the requirement has become meaningless.

(3) Powers of the Senate

(a) *General Legislative Power*

Under the British North America Act, 1867, the legislative powers of the Senate are precisely the same as those of the House of Commons, except that the Senate cannot initiate money bills. We recommend that this limitation remain, but that it be re-defined so that measures involving only routine administrative expenditures should not fall under this limitation. This would enable the government to introduce more bills in the Senate, which would save the time of the House of Commons, since much of the detailed work of re-drafting (especially of technical, largely uncontroversial bills) could be done in the Senate before the bills went to the Commons. It would also reduce the possibility of the Senate being faced, as it often is now, with important bills from the House of Commons within a few days of a parliamentary recess or adjournment or the end of a session. In such circumstances, especially if the bill is to come into force within a few days, the Senate's ability to do its essential revising work may be seriously impaired.

At present the Senate has the legal power and right to reject any bill whatever, and as often as it sees fit. As already noted, it has not exercised that power for many years. Its members have been fully conscious of the fact that any such action would provoke a storm of protest against "frustration of the people's will" as expressed by the elected House of Commons.

It is conceivable that if the Senate were faced with legislation that in its view would seriously undermine national unity, or that had aroused strong opposi-

tion in one or more of the regions (especially if the bill were brought forward toward the end of a Parliament, and embodied a policy that had never been before the people at a general election) it might decline to pass it until it had been endorsed in a general election. (The Senate did this with the Naval Aid Bill of 1913).

We do not believe that in a democratic society an appointed second chamber should have these powers. It is important, however, to make sure that any highly controversial bill passed by the House of Commons really does represent the will of the people, or, at the very least, the considered judgment of the people's representatives. In such cases the House of Commons should at least be forced to think again.

We feel that for this purpose the present absolute veto power is not necessary; indeed, the very fact of its absoluteness makes the Senate reluctant to reject any bill, however bad, even temporarily. We believe that a six months' suspensive veto would give the Senate all the power it needs. The government, the House of Commons and the country would be compelled to think again. The Senate would have enough time to put its case squarely before the public. If, when the six months were up, the government and the House of Commons were so convinced of public support for the bill that they insisted on re-passing it in the House of Commons, then the Senate would have done its duty and could acquiesce with a clear conscience. It would be essential, of course, that the bill be re-introduced in the House of Commons and re-passed there. A mere lapse of six months, after which the bill would come into effect without any re-consideration by the Commons, would destroy the whole purpose of the suspensive veto.

(b) *Power to Disallow Regulations*

At present, an enormous amount of legislation, and important legislation, is really made by regulations or other statutory instruments of the Governor General in Council (the Cabinet) under authority granted by Parliament. These instruments, or most of them, come before the Standing Joint Committee of the two Houses on Regulations and Other Statutory Instruments. This committee subjects them to meticulous scrutiny according to a comprehensive list of specific criteria. But its only power is to report to both Houses, and in many instances an adverse report, even when concurred in by both Houses, has no result whatever. Even if the committee reports that, in its opinion, a regulation or other statutory instrument is completely invalid, nothing happens. The instrument remains in force, unless and until it is successfully challenged in the courts; and only instruments that are challenged on the single ground of *vires,* the strict legal power of the Cabinet to pass them, can come before the courts.

The Joint Standing Committee on Regulations and Other Statutory Instruments, in its Fourth Report to the two Houses during the first session of the present Parliament, recommended (p. 23) that "All subordinate legislation not subject to a statutory affirmative procedure" (that is, not actually affirmed by

both Houses before it can come into effect) "be subject to being disallowed on resolution of either House and that the Executive be barred from re-making any statutory instruments so disallowed for a period of six months from its disallowance."

We endorse this recommendation insofar as it applies to the Senate. Adoption of this recommendation would give the Senate a powerful instrument for the protection of the rights of the citizen whenever, in the Senate's opinion, those rights were invaded by any form of subordinate legislation, even if the instrument involved was technically legal. The protection of such rights ought to be a major activity of a reformed Senate, and it should be given the power to make such protection effective.

(c) *Investigative Powers*

The Senate already has all the necessary power to undertake any investigation it sees fit. It has already made extensive use of this power. It should continue to do so. It should, if anything, make even more use of it. It should not accept any limitation on such power.

(4) Operation of the Senate

(a) *Speaker of the Senate*

We recommend that the Speaker of the Senate be elected by the members of the Senate and that his role as presiding officer be clearly defined in the Constitution in such a way that his duties and responsibilities are analogous to those of the Speaker of the House of Commons.

(b) *Cabinet Representation in the Senate*

The last two governments, being short of supporters in the House of Commons from certain regions, have had three ministers in the Senate, two or all three of them with departmental responsibilities. Future governments may be faced with the same problems, and may have to resort to the same solution.

The presence of more than one minister in the Senate (and that one without portfolio) has been unusual, though not unknown, since 1911. Until 1896, it was customary to have three, four or five ministers in the Senate, out of a Cabinet of thirteen to sixteen members; and every portfolio except those of Finance, Railways and Canals, and Customs, and the short-lived portfolio of Secretary of State for the Provinces, had been held by a senator. There had even been two prime ministers in the Senate—Sir John Abbott, 1891-1892, and Sir Mackenzie Bowell, 1894-1896.

Nothing of this sort is conceivable now (unless, perhaps, with an elected Senate). But there is no doubt that the presence of three ministers in the Senate since the summer of 1979 has not only made the public more conscious of the Senate's work but, more important, has facilitated that work. When there was only a single minister, namely, the Leader of the Government in the Senate, he was generally able to answer questions by taking them as notice, and bringing down the real answer only after some delay—and often considerable delay.

We recommend that where, as has often happened, and sometimes for many years, a government has no supporters in the House of Commons from a particular province, it should appoint to the Cabinet, with or without portfolio, a senator from that province.

(c) *Regional Caucuses*

To enable the Senate to discharge its responsibility for regional representation and protection more effectively, we recommend the establishment of all-party regional caucuses. They would constitute regional sounding-boards and identify the changing aspirations, needs and grievances of the Canadian regions and monitor the attitudes of provincial governments and legislatures toward federal legislation and programs.

(d) *Standing Committee on Regional Affairs*

We recommend the establishment of a new Standing Committee on Regional Affairs. The chairmen of the regional caucuses would form the nucleus of this committee. The committee's mandate would be to receive reports from the regional caucuses; to identify regional problems and to recommend the best means for dealing with them; to inform provincial governments of federal bills that might affect regional interests, and to invite them to present their views to this committee and to other appropriate committees of the Senate.

(e) *Standing Committee on Official Languages*

We recommend the establishment of a Standing Committee on Official Languages, made up of equal numbers of French-speaking and English-speaking senators. Its task would be to review the working of any charter of linguistic rights that may be incorporated in the constitution, the *Official Languages Act*, and, generally, the operation of the federal policy of bilingualism.

Both Bill C-60 and the report of the Constitutional Committee of the Quebec Liberal Party contain provisions on this subject. But the proposals of Bill C-60 would have involved a drastic and complex interference with the normal functioning of Parliament. The proposals of the Quebec Liberal Party's committee would have taken the matter out of Parliament entirely, entrusting it to a committee of the proposed Federal Council, with a power of veto over some legislation, and a sweeping administrative power over the public service. We are convinced that our own recommendation will produce better results and fewer problems.

The existing Special Joint Committee on Official Languages cannot perform the functions that we are proposing for this new standing committee of the Senate. For one thing, it is special and temporary; not standing and permanent. For another, its terms of reference are much more restricted. Even if successive Parliaments continued the Special Joint Committee on the Official Languages, the proposed standing committee of the Senate would still have a wide field of activity.

(f) *Standing Committee on Human Rights*

We recommend the establishment of a Standing Committee on Human Rights. Even if such rights are embodied in a charter of human rights entrenched in the Constitution, what happens to them in practice will need to be carefully watched, not only to see that the charter is, in fact, effective, but also to suggest remedies for deficiencies that experience may reveal. If there is to be no entrenched charter, the committee might be still more necessary. In any event, it would be its duty to monitor continuously the whole human rights situation; examine and report on the human rights aspects or implications of any legislation brought before Parliament; review the annual reports of the Human Rights Commission; and provide a forum for discussion of the whole subject.

(g) *Conferences Between the Senate and the House of Commons*

We recommend that the provision in the Senate's rules for conferences between the two Houses be broadened, and that this procedure, now very rarely used, become part of the normal way of dealing with differences on bills sent to the Senate from the Commons, or to the Commons from the Senate. We recommend also that this procedure be used to establish co-operation between committees of the two Houses considering the same bill.

(h) *Pre-study of Bills*

We have already referred to the difficulties experienced by the Senate in the performance of its legislative function because important bills often come to the Senate just before a parliamentary recess or adjournment, or just before the end of a session, or, indeed, just before a dissolution. We have noted also how the Banking, Trade and Commerce Committee, under the chairmanship of Senator Hayden, has met this difficulty by studying the subject matter of bills in advance of their formal introduction in the Senate. This has become known as the Hayden formula. We recommend that other standing committees of the Senate make use of the same method of dealing with important bills.

Standing committees must, of course, be careful to avoid approving the principle of a bill during this preliminary examination, and foreclosing discussion on second reading when the bill actually reaches the Senate.

(5) Conclusions

In this part of our report, we have assumed that the deeply-rooted grievance of the provincial governments arising mainly from the unilateral use of the federal overriding powers in the areas of provincial jurisdiction would be met by establishing in the Constitution the First Ministers' Conference and calling it the Federal-Provincial Council. We have, therefore, examined the possibility and the desirability of a second House in Parliament, not as a House of spokesmen for provincial governments, but as a genuine federal chamber.

Our first conclusion is that there is real need in Canada for a second Chamber. This conclusion is based on the experience of many other countries, more

particularly of other federations, on the record of the present Senate, which has proven its usefulness over the years, in spite of its obvious shortcomings, and on our interpretation of prevailing popular opinion in Canada. We have further concluded that a second chamber is needed not as a mere replica of the House of Commons but as a complement to provide "sober, second thought", and to do what the House of Commons cannot do efficiently. Viewed in this perspective, the Senate's role should be to revise legislation, to conduct investigations on specific matters of public interest, to reflect regional aspirations and to protect linguistic, minority and individual rights.

Our second conclusion is that it is preferable to have an appointed rather than an elected Senate. If this second Chamber were to be a replica of the House of Commons with similar roles and powers, we would favour an elected Senate. We believe, however, that an appointed Senate would be in a better position to accomplish the complementary and largely advisory roles it should have in our democratic and parliamentary system where the House of Commons should be the supreme legislative authority. It would be less partisan and more independent; it would have greater continuity and more expertise, especially with improved methods of appointment. It is argued that an appointed Senate lacks credibility and legitimacy. We submit that a Senate elected by proportional representation, with the complementary roles and the limited powers that a second Chamber should have, would suffer from the same defects and would accomplish its specific mission less efficiently.

Our third conclusion is that the present Senate should be reformed substantially. Its role as protector of regional interests and linguistic, minority and individual rights should be considerably strengthened. Its size should be increased to provide better regional balance and to cope with a greater volume of work. Appointments should continue to be made by the federal government, but half of them should be made from lists submitted by provincial governments. Appointments should be for a ten-year term, but renewable for further terms of five years on the recommendation, by secret ballot, of a special committee of the Senate. Specific measures should be taken to permit the retirement of the few senators who still have life tenure and who have reached 75, and even of others below this age under certain conditions. The legislative power of the Senate should be limited to that of a suspensive veto.

Our fourth conclusion is that the internal operation of the Senate should be improved. The Speaker should be elected by the Senate and his role defined in the Constitution. The practice of having the Senate ministers with or without departmental responsibilities should be continued when a province cannot have representation in the Cabinet from the House of Commons.

New Senate standing committees should be established on regional problems, on linguistic and minority rights, and on human rights and individual freedoms. Conferences between the Senate and House of Commons should be broadened to include their committees and should become the normal way of dealing with differences on bills between the two Houses.

Other more specific suggestions and recommendations for internal improvements are included in our report. We are convinced that the implementation of our recommendations and proposals would go a long way toward making the Senate a more efficient second Chamber, and to put it in a better position to complement the House of Commons and to serve Canadians.