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by James E. Crimmings

A S THE DUST SETTLES ON THE DEBACLE IN THE Senate over the Goods and Services Tax it is time to take stock of Canada's notorious upper house and ask ourselves that perennial question: what is to be done? As many have so long been saying, the Senate can no longer continue in its present degenerate condition. It may seem a trifle eccentric to attempt another constitutional reform so soon after the crushing failure of the Meech Lake Accord, but for good or ill Prime Minister Brian Mulroney has announced his willingness to do just this, and he more than anyone has just cause to be fed up with the antics of the Red Chamber.

Not that senatorial machinations have been an entirely one-sided business. While Liberals declared foul play and stormed out of the house screaming deceptively about "the end of democracy," the "rape and pillage" of the privileges of the Senate, and likened Tory strong-arm tactics to the siege at Oka, Conservatives contentedly marched to the beat of the GST drum, disregarded parliamentary convention, ignored Senate rules (such as they are), and generally flouted their newly fashioned majority after 45 years of Liberal dominance.

Make no bones about it, in its haste to get the Goods and Services Tax in operation, the government played fast and loose with parliament's second chamber. We can sympathize up to a point. The Liberals threatened to break with parliamentary convention to reject a finance bill approved by the Commons—something they have never done before and, notwithstanding contrary interpretations of sections 53 and 54 of the 1867 BNA Act, parliamentary convention dictates that they should not do. But sympathy has its limits. The appointment of eight new Tory senators may have achieved its immediate objective—the passage of the GST—but it has not altered one iota the prospect for a useful Senate in the future.

Historically, the Senate has never always been quite so ludicrous. During the 1920s and 1930s it frequently stood firm against the Commons, offering legislative amendments on a regular basis and occasionally wielding its ultimate power to veto bills to which it was opposed. True, much of its obstructionism was inherently reactionary, as when in five consecutive sessions 1926-1930 it adamantly refused to give way to the trade union demand for the repeal of section 98 of the Criminal Code restricting "unlawful associations."

But with the gradual withering away of the pre-1925 generation, when a Senate composed largely of pioneering hard-nosed manufacturers gave way to the new generation of lawyers and a different breed of corporativists, a certain moderation entered senatorial deliberations and with it a willingness to deal with government legislation scrupulously and with equanimity.

F.A. Kunz's seminal work, The Modern Senate of Canada, 1925-1963: A Re-Assessment (1964), to which we are so much indebted for our understanding of the workings of the upper house, explains in detail the positive role it once performed as a check on the power of the Commons. The vetoes exercised in the cases of the Judges Bill of 1933, the Penitentiary Bill of 1938, and the Bank of Canada Bill of 1961 (the last Senate veto prior to this year's defeat of the government's bill on abortion) were all premised on the safeguarding of the rights and interests of particular individuals—ideals that post-1982 constitutionalists might well be expected to applaud.

One thing is clear, however; the Senate has never performed the federalist task ordained for it by the Fathers of Confederation and still reiterated by professors of Canadian politics as the second of its major functions. As Kunz explains, the Senate's historic role as the defender of provincial interests was always a sham, devised to fragment the Quebec opposition to the 1867 BNA Act: "A well calculated political device used as a constitutional tranquilizer to palliate the sectional fears of the weaker partners to federalism from the numerical majorities of the House of Commons."

In this respect a federalist second chamber could not be squared with the fundamental principles of the British Cabinet system upon which the political regime of Canada was based. And so affairs have continued to the present day. Outside university classrooms little time is wasted in trying to explain the Senate's federalist role, "one of the most enduring myths of political demogogy in Canadian history," according to Kunz.

The Senate's failure to protect and promote regional interests was singled out for special attention by the 1984 Special Joint Committee on Senate Reform. The Committee recommended that senators be elected by proportional representation for a period of nine years and that seats be more equally distributed in an enlarged Senate (144 instead of 104 seats) giving the smaller provinces a stronger voice in the second chamber. Prime Minister Pierre Trudeau's response of April 1984 was courteous but non-committal. Taking office that same year, Mulroney paid lip-service to the idea of Senate reform but no more.

In practice, the Red Chamber's provincial character consists only in determining from which part of the country party hacks will be summoned when a vacancy occurs. Following the 1984 Special Joint Committee report, exponents of a "triple E" Senate argued that regional "equality" was vital but not possible while seats were filled through Prime Ministerial appointment.

Yet it is hard to see how the elected Commons could be brought to sanction an elected Senate (the second leg of the "triple E" triad), at one stroke creating a chamber able to appeal over the heads of MPs directly to "the people" for guidance, and thus able to claim a "democratic" (if not entirely equal) share in legislative power. This is unquestionably
the path to a crisis of legitimacy.

If there is no future for Senate reform in this direction, out of the shambling of last fall's follies one detects the outlines of a slightly different Senate, though not one, admittedly, that will placate the wrath of determined Senate reformers.

As with so much else in Canadian political history, the British experience helps to illuminate certain features of Canada's dilemma. In 1909, Britain faced a constitutional crisis not too dissimilar from that recently faced by the Mulroney government. In that year a finance bill— the so-called "People's Budget," promising much in the way of social programs to aid the needy and unemployed (no comparison with the GST intended on this score)—was rejected by the landed aristocracy that still held sway in the Lords. It was a victory from which their Lordships never recovered.

Not prepared to see a parliamentary convention that had stood for over 200 years breached in this manner, the Liberal Prime Minister, Herbert Asquith, devised a daring plan designed to force the Lords to accept a reduction of its own powers. Either the Lords would pass legislation reducing its power to one of delay merely, and clearly stating the limits of its power vis-à-vis Bills of Supply, or Asquith would have King George V create up to 500 new Liberal peers who would make sure the deed was done. (Mulroney's appointment of eight additional Tory senators was a minor version of Asquith's threatened "swamping" of the Lords.)

As George Dangerfield relates in his classic history of the period The Strange Death of Liberal England, 1910-1914 (1935), faced with the unsavory prospect of an upper house awash with a motley crew of Liberal all-sorts, the Lords voted to reduce its own powers, "to perish in the dark, slain by [its] own hand."

And so the 1911 Parliament Act became part and parcel of the fundamental law of the land. Later on, the postwar 1945-50 Labour government, bent on a series of radical social and economic reforms, passed a second Parliament Act in 1949, reducing the delaying power of the Lords still further, such that today it is allowed only one rejection of a bill. Should the Commons pass the same bill in a second consecutive session then it automatically becomes law.

It is a sound guide in politics that the more modest the proposal the greater the prospect of its success. An amendment patterned on the British model would stipulate that:

1) finance bills be explicitly removed from the domain of the unelected upper house, and

2) the power of the Senate be reduced to a delaying power (a suspensive veto) of only one session of Parliament.

These are modest proposals, versions of which were advocated in the 1984 Special Joint Committee report.

The first necessitates that sections 53 and 54 of the BNA Act be re-worded, plainly stating that the upper chamber's role in finance is restricted to one of scrutiny; the second removes the prospect of the kind of constitutional deadlock for which section 26 of the same act was designed as a one-time palliative (the constitutional basis for Mulroney's eight additional Senate appointments).

According to the 1982 amending formula, a constitutional amendment along the lines here suggested requires the support of both Houses of Parliament and at least seven provincial legislatures representing at least 50 per cent of the total population.

Naturally, the senators will object, just as the peers of the realm did in Britain in 1911 and in 1947-49. But, ultimately, neither of these proposals has to have the approval of the upper chamber.

Moreover, given the recent antics of the occupants of that house, we may be forgiven for not giving a hoot for their views on the matter one way or the other. According to section 47(1) of the 1982 Constitution Act, if after a delay of six months the Senate has failed to adopt a proposed amendment, then the House of Commons need only pass the resolution a second time for it to proceed to the provincial legislatures for their approval.

Provincial assent will not be easily had. Following the criticisms raised against the Meech process, nation-wide consultative committees are the order of the day. The door has been opened to a whole range of other, in many cases unacceptable, demands that could threaten the entire amendment process.

 Held hostage to federal-provincial relations and horse-traded in tandem with other provincial concerns, an attempt to reform the Senate at this juncture might well serve no other purpose than to provide provincial politicians with an opportunity to sound off about their own pet concerns. No doubt the other proposals contained in the 1984 report and variations on the "triple E" reforms will surface and demand consideration, especially the notion of an elected Senate.

However, the latter would be only a remote possibility even in the best of constitutional times, and Canada is certainly a long way from this.

And why should English Canada expect Quebec to join in at all? All true. But if these amendments to the powers of the Senate are recognized to be the bare minimum upon which substantial agreement can be reached at present, with further conferences on other aspects of the issue (composition, distribution of seats, terms of service) scheduled for more propitious times, then many of the objections can be met with effective responses.

As for Quebec, we might only say that nothing in these amendments alters in any way its place within Confederation or its representation within the Senate.

The Quebec Liberal Party's Allaire Report calls for the abolition of the upper chamber—a demand hardly likely to meet with approval in the western provinces. On the other hand, the 1992 referendum on sovereignty proposed by the Belanger-Campeau Commission could well make the issue a matter of indifference to Quebec.

If they were to gain acceptance, the Senate reforms suggested above will go some way toward resolving the central paradox of Canada's upper house: a chamber blessed with near unlimited power by the archaic terms of the 1867 Act, which it threatens but dare not use for risk of bringing down upon its head the wrath of the Commons.

Used wisely, the power of the reformed Senate will strengthen its role as a check on the executive, its very existence being sufficient to compel the government to think twice before introducing controversial or ill-conceived legislation.

The Canadian Senate would then perform the principal function of a second chamber in a parliamentary system of democracy, in the process establishing itself as an active and vital participant in the business of legislation, rather than the shabby, ridiculous comedy that it has become.

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