Abolishing the Senate: the NDP’s bad idea

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November 2013
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In the summer of 2013, mounting opposition to Bill C-377 in the Senate stalled the progress of its passage. The bill is designed to compel labour unions to disclose to the Canada Revenue Agency (CRA) a detailed statement of their finances on an ongoing basis. In turn, the agency would be expected to post the material online, thereby making it available to the public.

This development brings the inadequacies of the NDP’s position on the Senate – the party seeks to abolish the institution – into the clear light of day. The reasons are obvious. First, in its role as the official opposition party in the House of Commons, the NDP was unable to muster the slightest impact on the bill’s merry passage. In the Senate, by contrast, the senators opposed to the bill managed at least to slow its approval there, by demanding hearings on it and by getting amendments made to it, thereby necessitating that the amended bill be sent back to the House for further consideration. Second, without the opposition in the Senate, most Canadians would have no idea about the very existence of the bill, let alone its ramifications for unions across the country.

What makes the situation awkward for the NDP is that Bill C-377 is not just any old bill. Whatever its merits as a transparency measure, which the government alleges it to be, in fact it is bound to weaken unions by entangling them (and the CRA, for that matter) in expensive and time-consuming red tape. Yet the NDP is a strong supporter of unions and in turn is supported by them. Bill C-377 not only demonstrates the need of the second chamber in the Canadian Parliament, it shows how foolhardy is the NDP’s pursuit of the abolition of the Senate. That the party’s position of abolition is illogical, as well, is the argument made in the remainder of the article.

**The Senate of Canada**

It is useful to remind ourselves of the original purposes ascribed to the Senate by those who established it, if only to understand why its abolition could become a position in the platform of a political party. During the Confederation debates, the proposed Senate was defended on two grounds, one being parliamentary and the other federalist. It must be stressed that the new government of Canada was the first to combine a parliamentary system of government with a federal system. Accordingly, the Senate, modeled loosely after the House of Lords, was defended first as a body of sober, second thought. Bills passed by the elected, lower house would receive another look from the Senate, and be either passed there, vetoed outright, or amended and then sent back to the elected house for reconsideration. There was little controversy at the time about the utility of this reviewing function. Most parliamentary systems of the day were bi-cameral, and many still are.

The Senate was also defended as a federal institution in which the interests of the constituent provinces would receive their due. Again, there was little controversy about the desirability of the federal function. Then, as now, the issue was *form*, a short-hand term in political science that refers to the pertinent features of the design of a political institution. These features include the number of members, the length of their term of office, how they are selected, and the powers of the institution.
Under the new constitution adopted in 1867, members of the Senate were to be appointed by the Governor General (on the advice of the prime minister) for a term of life. In 1965, the constitution was amended to reduce the term from life to age 75. Seats in the Senate were assigned according to the principle of equal regional representation, each region being given 24 seats. The founding “regions” were Ontario, Quebec and the Maritime provinces of Nova Scotia and New Brunswick. When Prince Edward Island joined Confederation in 1873, it became the third member of the Maritime region. Finally, the Senate was given a full power of veto over bills sent to it by the House of Commons.

**Function - Form**

It is an old adage in political science that form follows function. In other words, once the function of the institution is determined, then the next task is to figure out a design that enables the institution to address the function effectively. Thus the root of the controversy over the Senate at the time of Confederation was the design of the institution. Simply put, opponents of the proposal argued that the form of the Senate ran counter to its function.

Consider the parliamentary function of sober, second thought. Is the performance of that function really compatible with the appointment of senators on the recommendation of the prime minister, a recommendation invariably made on partisan grounds? During the Confederation debate, opponents of the proposed Senate thought not. The *Rouge* member of the Legislative Assembly of the Province of Canada, A.A. Dorion, pointed out, for example, that the first appointees to the Senate were to be nominated by the existing governments of Canada (dominated by Conservatives), Nova Scotia (Conservative) and New Brunswick (Liberal), a deal made to enhance the prospects of their support for Confederation, which it did. The inevitable result was that the first Senate was overwhelmingly Conservative. Given the life term of senators, Dorion could envision endless years of a Conservative-dominated Senate, with hardly a look-in for Liberals. This was not a recipe for an independent look at bills passed by the House of Commons, but instead ensured a partisan review of them, an altogether different matter.

A.A.Dorion’s brother and fellow Rouge MP, J.B.E Dorion, tackled a second ground of incompatibility between function and form that is rooted in the conservatism of the principle of appointment. Appointment, he argued, presaged an inferior process of sober second thought. His evidence was that the upper house of the Parliament of the Province of Canada that had begun to elect senators in 1856. According to him, the development had re-energised the work of the upper house and rehabilitated its reputation with the people. “This Tory scheme [of an appointed Senate],” he predicted, “will set us back fifty years.” It is worth noting that the arguments of the Dorion brothers about the effects of partisanship and appointment on the review function of the Senate have remained at the core of criticism of the body ever since. Then there is the federal function.

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Christopher Dunkin, an independent-minded Liberal representing the riding of Brome in the Eastern Townships, demonstrated persuasively how the form of the Senate virtually guaranteed its inability to function as a federal body. Since the senators would be unelected, he argued, they could not represent the people of the provinces and thereby serve as a federal check on the government of the day by virtue of their having a popular mandate. Nor were they given any special powers on which to base a checking function anyway, unlike their counterparts in the United States. In making this point, Dunkin was referring to the fact that the American Senate, the members of which were elected at that time by the state legislatures, was assigned special judicial and executive functions over and above its legislative functions, and that these additional functions gave its capacity as a check against the government real heft. True, the Canadian Senate possessed an outright legislative veto but, as Dunkin pointed out, its being an appointed body more or less ensured that the veto was unusable. He concluded that the Senate was “the worst system which could be devised in legislation.”

The CCF’s Position on the Senate

The arguments of the critics proved to be prescient. Prime ministers nominated fellow partisans to the Senate whenever they got the opportunity to do so. And the combination of partisanship and appointment had a powerful impact on the way in which the Senate discharged its functions. It never became much of a federal check on the government of the day, although this point can be pressed too far, and there were exceptions. During the 1920s, for example, the Maritime senators gave effective support to the Maritime Rights movement that originated in the demands of the eastern provinces for federal policies that would offset the economic decline of the region. On the other hand, the Senate did manage to become a relatively effective legislative check on the government – albeit in a modest way. It prolonged debate on controversial bills, and tidied up bills that bore the imprint of hasty draftsmanship. It undertook studies of complex public-policy issues. Appropriately enough for an unelected chamber, it rarely used the veto. In due course, however, something else about the Senate began to bother its critics, or at least those on the left of the political spectrum.

The Cooperative Commonwealth Federation (CCF), the forerunner of the NDP, contested its first general election in 1935 on the back of its policy book, the Regina Manifesto. The CCF was an unashamedly socialist party that aimed to replace the country’s capitalist economic order and the attendant economic inequality of the day with a planned economy and a classless society of equals. It espoused peaceful rather than revolutionary means to accomplish these ends along with the maintenance of parliamentary democracy. The bulk of the manifesto was devoted to outlining an envisioned planned economy in which all economic sectors except agriculture were to be socially owned. But there was also a promise to amend the constitution to abolish the Senate.

3. Ibid, p.495.
As outlined in the manifesto, the CCF’s argument against the Senate was a powerful one. True, the argument included the familiar lament that the Senate had failed in its federal duty to defend the provinces. Beyond that, however, was the contention that the Senate was a “bulwark” of capitalist interests. It was pointed out that many senators held company directorships. The obvious implication was that their interests therefore coincided with the interests of capital rather than labour. This orientation, particularly when combined with the features of selection by appointment and appointment for life, made the Senate into an effective instrument for blocking progressive change. Thus the CCF was able to tie its opposition to the Senate to that body’s role as the handmaiden of an inherently unjust – as the party saw it – capitalist economic order.

It could be argued that reform in the guise of election would have solved the complaint of the CCF about the Senate. But again, the party’s economic planning agenda was more consistent with there being no Senate at all. The CCF was a centralist-leaning party, with an agenda for economic planning that clearly depended on the existence of a strong central government. Indeed, the party proposed to amend the constitution to make the central government even stronger on paper than it already was so that it could deal with the many national economic problems that involved provincial jurisdiction. Despite its throwaway assessment of the Senate’s failure as a federal institution, the fact of the matter was that the CCF simply did not want a robust second chamber dedicated to the defence of provincial interests. The proposal for abolishing the Senate was thus based on a powerful economic argument which was also consistent with the centralist thrust of the party’s economic plans. In this sense, it was a coherent position.

The NDP’s Position on the Senate: The Parliamentary System

Like the CCF, the NDP stands for abolition, and stridently so under its current leader, Thomas Mulcair, who evidently plans to make abolition a key theme of the party in the next general election. The party’s website uses the catchy phrase – “Roll up the red carpet.” The difference between the two parties – the CCF and its successor NDP - lies in the reasons offered for abolition. As noted above, the CCF framed the Senate as a bulwark of capitalism, a defender of the economic status quo. What else could be expected of an institution, the members of which were appointed for life by the prime minister and able to hold company directorships while serving office? Understanding the role of the Senate in this way put a decidedly negative light on the notion of sober second thought, the implication being that the “second thoughts” would amount to nothing more than ways of blocking progressive change. The NDP, by contrast, has dropped the economic part of the argument altogether, and instead is left with a weak and much less coherent rationale for abolition that is largely based on the design of the institution. Given the contents of the NDP’s Policy book, this is hardly surprising.

The NDP’s Policy Book is as far from the Regina Manifesto as can possibly be imagined. Whereas the Manifesto was almost entirely devoted to economic matters, only about one-sixth of the Policy Book is concerned with them. The other sections are addressed instead to the environment and green energy, social policy, foreign policy and
defence, democratic institutions, and human rights and identity. The last sixth of the Policy Book is the party's Sherbrooke Declaration, billed as “Quebec's Voice and a Choice for a Different Canada.” From the standpoint of the Senate, the key sections of the Policy Book are thus the ones devoted to democratic institutions and Quebec.

In the section on democratic institutions, the claims made in favour of the abolition of the Senate are two-fold. First, the Senate is an unelected body. Second, it is an unnecessary one. That is it. The reader is left to fill in the blanks, as it were, in order to translate these simplistic claims into arguments. Let us begin with the indisputable claim that the Senate is unelected.

The opening sentences of the section on democracy suggest that Canadians have lost trust in the country’s political practices and institutions because they are not fully representative of voter opinion. Hence there is a need to repair them in order to restore the public's trust in them. The NDP thinks that Parliament is not a fully representative body. It says that the first-past-the-post electoral system that is used to elect members of the House of Commons rules out the representation of every viewpoint except that of the winning candidate in each of the ridings across the country. Worse, the winning candidate usually does not have the support of the majority of voters, and when that happens only a minority slice of opinion in fact gets represented in the House. So the party calls for a proportional electoral system in order to remedy this problem.

Obviously the Senate, being appointed, is unrepresentative of public opinion. Some would say that is the whole point of it. The NDP could take the same tack here as it does with the House, by opting to back a system of appointment or election that would make the Senate more representative of public opinion than it is now. But it declines to do so, which makes the second claim advanced for abolition very important – that is, the claim that the Senate is unnecessary.

It is difficult for the reader to figure out the ground or grounds of this claim because there are so many possibilities from which to choose, the NDP declining to identify any of them. Unnecessary for what reason? Can the work of the House of Commons not benefit from sober second thought? Is there no need for a counter weight against a government backed by a majority in the House of Commons? Is there no federal rationale of any kind that might justify the need for a second chamber like the Senate? Is there no utility in an institution that can be used to represent minorities that find themselves without a voice in Ottawa? The NDP provides no answers to these questions.

Consider the first two functions just adduced: sober second thought; and the provision of a counter weight against the government. Each of these might be described as a parliamentary function. Sober second thought encompasses many activities, ranging from the correction of errors and inconsistencies within proposed bills, as well as inconsistencies between proposed bills and existing laws like the Charter of Rights and Freedoms, to the careful consideration of bills that contain major public policy changes that appear not to have been subjected to much,
if any, public review. The treatment of Bill C-377 falls under the latter category. Until the bill reached the Senate, the general public knew next to nothing about it. And yet one of the classic roles of the legislature in any democratic system is to educate the public about proposed law. Should the House of Commons fail in this respect, then the Senate can step up and fulfill the function of public education merely by deciding to give the bill in question the full legislative treatment, including calling interested parties and experts to the chamber to speak to it.

The idea of the Senate acting as a counter weight against the government is also a parliamentary one. But it is a more sophisticated concept than the notion of sober second thought. Sober second thought conjures the image of an elected lower house being checked by an unelected, or differently elected, upper house. And this is fine, as far as it goes. But it does not go far enough because, under the Canadian parliamentary system, it is necessary to add two key factors to the equation. The first involves the relationship of the government to Parliament, given that the government is responsible to the elected House of Commons, but not to the unelected Senate. The second involves the system of political parties. Ours is a party-based system of government. The government of the day stands on the political party that controls the elected House. There is always the possibility that the governing party will hold an outright majority in the House of Commons, as does the Conservative Party today. As students of the British-style parliamentary system are well aware, a government based on a majority in the House is a very strong one for the simple reason that it holds almost all the parliamentary cards. Relying on the votes of its well disciplined caucus members, it can get its way at every turn, in votes in committees and in votes in the House. By contrast, the opposition, including the Official Opposition party, usually the party with the second largest number of seats, has very few opportunities – in fact, hardly any at all – to withstand the will of the government.

No one knows this better than the NDP, which currently is the Official Opposition party. As noted at the outset, it did not make a dent in the provisions of Bill C-377 at any stage of the bill’s passage in the House. Nor was it able to draw much attention to the bill in committee hearings. To be fair, the current government is thought to be one of the toughest the country has ever seen, bent on achieving its own legislative objectives and refusing to modify them in response to alternate opinions. It gives the opposition parties no room to maneuver at the various stages of the legislative process. But that is precisely the point being made here. Only in the Senate, where the rules of the legislative process are more flexible than is the case in the House, is a determined opposition able to prevent the government from moving a bill along at high speed. Surely this is a good thing.

Some might respond that the current government, as already conceded, is exceptional in its determination to prosecute its legislative agenda on its own terms and without interference from other political voices. When the government changes hands, they say, so too will the tone and character of parliamentary proceedings. The tone will be more relaxed and the opposition parties will carve out more room in the proceedings than they have now. Perhaps. But not likely. More likely is the opposite scenario, in which the opposition parties, quietly taking lessons
from the government of the day, take these lessons into power with them. Since winning their majority in the
general election of 2011, the governing Conservatives have given the country a master class in how to dominate
parliamentary proceedings.

The NDP's Position on the Senate: Federalism

What about the federal function of the Senate? Can the NDP find nothing of value there? Apparently not, although
the party appears to find some value in federalism itself, as indicated in section 5.1 of the Policy Book under the
section on governing in an inclusive and fair Canada. Section 5.1 is addressed to cooperative federalism. The NDP
believes in cooperative federalism, and to that end commits itself, if elected, to holding annual conferences of First
Ministers, meaning the prime minister and the premiers of the provinces and territories. It also promises to work
closely with the Council of the Federation, an institution of the provincial and territorial premiers that was
established in 2003. However, there are two clangers in the section on cooperative federalism that harken ever so
slightly to the CCF. One is the reference to the need to establish “federal spending parameters in areas of provincial
jurisdiction,” which is tucked into a promise to update the now-defunct Social Union Framework Agreement (SUFA).
(SUFA was an agreement signed in 1999 between the federal government and all of the provinces except Quebec
and the territories that was designed to plot a pathway for the federal government to establish and help finance
new social programmes.) Many provinces object to the very idea of such parameters, preferring as little federal
interference in their areas of jurisdiction as possible. On this score, Quebec is the obvious, but not the only,
example. Alberta is right behind. The other clanger in the section is an “insistence on respect for the principles of
universality and non-privatization of our public services.” The principles of universality and non-privatization are
references to the country’s health-care system, which is financed in important measure by federal coffers but run
by the provinces and territories. The trouble here is that some provincial governments might prefer a system that is
designed in accordance with the opposing principles of non-universality and privatization. A federal government
run by the NDP would find it hard to cooperate with a province that chose to permit the establishment within its
boundaries of a full-scale, private health care system. By contrast, the current Conservative government would
have no problem with this at all, because its concept of mind-your-own-business federalism insists on the sanctity
of jurisdictional boundaries, or the notion of “what’s mine is mine.”

The NDP concept of cooperative federalism clearly is moderated by its recognition of the important role of the
federal government in leading and financing social change. However, there is a twist, and it involves Quebec.
The NDP also stands for asymmetric federalism. A close reading of the Sherbrooke Declaration, the addendum to
the Policy Book, indicates that this essentially amounts to permission for Quebec to opt out of any new –
or revamped – programme spending in provincial areas of jurisdiction, with financial compensation from the
federal government that would allow any opting-out province to mount its own parallel programme.
In light of the NDP’s commitment to cooperative federalism and asymmetric federalism, the question can be posed again. Is there no value in the federal function of the Senate? It could be argued that the stronger the country’s commitment to federalism, the more important it is that one of the houses of Parliament be designed to express that commitment in a way that the other house does not do. Tricky issues of a federal nature arise most especially in relation to the very social programmes and income-distribution programmes to which the NDP is so deeply committed. The reason is that such programmes often fall squarely within areas of provincial responsibility.

Consider the idea of a federally-financed, national day-care programme. Since this would fall within an area of provincial responsibility, all provincial and territorial governments would be deeply interested in any such a proposal. Some would oppose it, others would support it. Even if the federal government were to cobble together enough support from the premiers to advance the programme, opposition would linger, and along with it the legitimacy of the programme itself. The value of the Senate is that it allows opponents of policies of this cast a further opportunity to voice their concerns in a national arena, and not just within the confines of their particular local government. They could not complain that they were railroaded by a federal government bent on its own agenda. In such a scenario, the Senate supplies another round in the process that is needed to generate the broad consensus that is an ideal starting point of any new, significant national programme.

Section 5 of the Policy Book also contains provisions on the subject of First Nations, Inuit and Métis peoples, the general drift of which is to build a new and better nation-to-nation relationship between them and Canada while at the same time garnering their active participation in the governance of the country. Given the difficulty of bridging these desiderata, which appear to point in different directions, it is natural to ask whether the Senate – a foundational institution of the government – has a role to play in this respect. Obviously the answer is yes. The Senate could play an important role as a home of representatives of First Nations, Inuit and Métis peoples. All it takes is a prime minister whose interest in the matter is strong enough to impel him to recommend the appropriate appointments when the opportunity to do so arises. In this context, appointment is a much easier path to Parliament than election to the House of Commons. Another possibility would be to reserve seats in the Senate for first peoples, rather like the assignment of seats currently in effect for the regions and territories of the country. The idea was taken up in the Charlottetown Accord, a comprehensive set of proposals to amend the constitution that was famously defeated in a referendum in 1992, although not because of the idea of Aboriginal seats in the Senate. (The killer was the guarantee of a specified percentage of seats for Quebec in the House of Commons.) In any event, the point here is simply that a party dedicated to an overhaul of the relationship between first peoples and Canada should think twice about throwing away an institution that could easily play a positive role in that process.

**Why the NDP Should Prefer Reform to Abolition**

The NDP says the Senate ought to be abolished because it is not elected and it is an unnecessary institution in any case. These are not credible arguments. The fact that senators are not elected is hardly on its own a reason for
abolition. Depending on the functions assigned to the Senate, appointment may well be the appropriate selection process. Form follows function. The idea that the Senate is unnecessary ignores its parliamentary roles in fine-tuning bills sent to it from the House of Commons and in acting as a counter weight against a government rooted in a powerful majority in the House. As it happens, both of these roles are consistent with appointment. Appointment makes the Senate a junior partner of the elected House, which is appropriate in a system of parliamentary democracy. The Senate can review bills and offer friendly amendments of them, which presumably is as much as is needed or wanted. Election would give it too much legitimacy, thereby setting it up for combat with the House. Appointment also gives the Senate enough independence to act as a counterweight against the government. Assuming that senators have not signed a contract with the government that appointed them to behave in a particular way, they should feel free to criticize government proposals that they find wanting.

In addition to the fact that the NDP’s arguments for abolition are questionable, there are three solid reasons why the party should change its position from abolition to reform. They are: (1) the requirements of federalism; (2) the (im)practicalities of constitutional change; and (3) the potential opportunity cost of abolition. Let me deal with each of these in turn, beginning with the requirements of federalism.

There is scarcely a federal system in the world, the central legislature of which does not include an upper house that represents the constitutive units of the state. The United States, Switzerland, Australia, Germany, Austria, India, and on and on. In every instance, the federal upper house is based on the principle of the representation of states or groups of states rather than the principle of representation by population, which instead governs the assignment of seats in the lower house. The idea is to give the constitutive states a stake in the national governing counsels. No state is left on its own, and able to reach the central government only through its own government. For that is not enough. It must be recalled that the major federal systems, like Canada, are also run by political parties. Occasionally political parties of different stripes – or even the same one - do not communicate well with one another. There need to be other venues of communication.

It is critical to grasp the importance in federal systems of finding a space for state representation within the foundational institutions of the central government. Federal systems can tend towards too much de-centralization – and potentially fly apart. Federal upper houses supply some glue, some cohesiveness, by ensconcing representatives of some aspects of provincial opinion within the national government. As a result, the provincial and territorial governments cannot claim to be the only representatives of local interests.

The second reason for preferring reform over abolition is rooted in the difficulties inherent in the process by which the Canadian constitution is amended. The process is complex and, more importantly, demands a high degree of consensus in favour of the proposed change. The reason is that this is so is a by-product of federalism itself. The peculiar dynamics of Canada’s federal system generated the constitutional amending formula. The formula is a
block against abolition of the Senate, and rightly so. The Senate is not only a foundational institution of the country’s governance, it was a guarantee of Confederation, itself. It is a bulwark of the weaker provinces in the federation, as it is of the weaker states in all federations. It would be a major mistake for the least populous provinces of the country – all in Atlantic Canada – to go along with the abolition of the Senate, and they know it. All they would get in return is even less representation in Parliament than they have now.

The third reason is the opportunity cost of abolition, and this should count heavily for the NDP. Without the Senate, there is no sober second thought, no additional institutionalized counter weight in Parliament against the government of the day, particularly if it is a majority government, and no exclusively provincial, regional or territorially-based representation within Parliament. How would these functions be discharged without the Senate? Of course other options might be conjured in theory, but nothing would come of them for the simple yet indisputable reason that none of the exiting political actors who matter would have any interest in establishing them. For example, having rid itself of the Senate, why would the federal government turn around and establish another counter weight against itself? Having rid themselves of the Senate, why would the premiers who believe in abolition decide to found a new institution to rival their own claims to represent the provinces and territories? Having rid itself of the Senate, why would the House of Commons choose to create a new second chamber to review its work? The answers to these questions are obvious. Were the Senate ever to be abolished, nothing would replace it, certainly nothing grounded in the constitution, which is what really matters. By contrast, there are the substantial gains that might be made were the Senate to be changed for the better, in other words, reform, to which we now turn.

The NDP and Senate Reform: Only Appointment Will Do

What changes to the Senate should a party like the NDP propose? This is the hard part. The best way to begin is to follow the function – form adage. The NDP needs to decide what functions ideally the Senate should perform. Then it can determine how the Senate ought to be designed in order to perform them.

What functions should the Senate perform? It is hard to improve upon the ideas of the Fathers of Confederation. The Senate needs to perform both parliamentary and federal duties. On the parliamentary side, it should take a second look at bills passed by the House of Commons; it should undertake studies on its own determination; and it should give interested parties a platform to speak to the bills before it, especially since these parties might not have been given an opportunity to speak to the relevant Commons committees. The Senate also needs to perform a federal function by expecting its members to cast a locally-informed eye over proposed public policy. However, these functions need to be discharged in a restrained manner, not with a vengeance. This is the reason why the option of appointment looms large.
In any modern democracy, political legitimacy is rooted in election. The elected legislature is the legitimate decision-making body. Should there be two elected chambers, the assent of which is required for a bill to become law, then each has equal standing with the other. A leading example of the phenomenon is the Congress of the United States. The Congress is comprised of the House of Representatives and the Senate. Each chamber has unique features, but each is an elected body. Thus they are rivals. The framers of the American constitution were fully aware of the likelihood of such rivalry and welcomed it in the name of limited government. The theory was that rival elected chambers would have a more difficult time getting legislative business done than a single chamber. It has proven to be well-founded, but some of its consequences have been problematic in an age of complex government.

Unless Canadians warm to the idea of American-style legislative rivalry, and to the stretches of legislative immobilisme that it often produces, they should eschew the idea of an elected Senate altogether.

The parliamentary ethic is not a limited-government ethic. On the contrary, it has come to be expected that in parliamentary systems, governments can successfully prosecute impressive legislative agendas. The reason is that they need only to dominate the one elected chamber, the House of Commons. If they had to get control of two elected chambers, their legislative life would be very difficult indeed. Hence, the last thing in the world that any political party with big ideas about the role of government in enhancing the lives of citizens should want to establish is an elected Senate. An appointed one is a much better idea, because an appointed one necessarily is inferior to the elected House of Commons. An appointed Senate cannot stand in the way of change, although it can make people look again at the validity of the reasons for change that the government of the day advances. But appointment by whom? This issue lies at the real heart of the matter.

**Appointment by Whom?**

Appointment, at least in connection with the Senate rather than in the case, say, of the courts, is an unhappy concept in this day and age. It never used to be so. For decades hardly anyone cared. It was impossible for the few devotees of Senate reform to generate any measurable public interest in their projects to find a better way to select senators. That changed, however, with the election of the Conservatives to office in 2006. The Conservative party is the heir of the Reform party, a Western-based group under the leadership of Preston Manning that broke away from the old Progressive Conservative party in 1987 and eventually more or less extinguished it. One of Manning’s crusades was the so-called Triple E Senate: elected, (therefore) effective, equal (numbers of senators per province). It was an astonishingly ill-conceived idea on parliamentary grounds (rival legislatures accomplishing nothing) and federal grounds (PEI with the same number of seats as Quebec and Ontario). Yet it gained some traction, largely in the context of the constitutional battles that dominated the federal agenda from 1987 to 1993. When the Conservative Party under the leadership of Stephen Harper was established in 2003, the idea of an elected Senate remained an important plank in the party’s platform.
As prime minister, Harper has done considerable damage to the Senate. His government launched several bills designed to establish Senate elections and shorten the term of senators. In principle, there was nothing wrong with this effort. But in order to defend the bills, the government subjected the existing body to sustained attack for being unelected, despite the fact that this state of affairs is mandated by the constitution. Moreover, no one has appeared willing or able to explain the purpose of an appointed upper chamber. Undoubtedly the effect of the government’s campaign has been to undermining the Senate’s credibility in the eyes of Canadians, most of whom cannot be expected to be students of political theory. Further, the premise of the government’s bills to alter the Senate was that Parliament could make the changes to the Senate on its own, without the consent of the provinces. Apart from being wrong, this premise carried the implication that the Senate somehow is not the provinces’ business, whereas in fact it is very much the provinces’ business. In the end, the government had to refer the constitutionality of its unilateral attempts at change to the Supreme Court of Canada, which has yet to rule on the matter. Finally, Harper not only made some questionable appointments to the Senate, he also made some of his appointees sign a document in which they agreed to work toward the establishment of an elected Senate. This highly unorthodox action appears to mean that, once appointed to the Senate, these senators are not independent of the government that put them there. But they are supposed to be independent of it. Again, the victim was the Senate. The recent scandals over the expense claims of some senators have been damaging to the institution as well, although the scandals are rooted in the one problem that is easily remediable simply by the Senate itself instituting a proper and transparent expense-claim regime.

Should the Supreme Court rule that the establishment of an elected Senate (to say nothing of something so extreme as the abolition of the Senate) requires the agreement of the provinces, or some major portion of them, then reform in that direction is likely a dead letter. That leaves appointment. Can the system of appointment be reformed? Can it be reformed without recourse to the constitution?

Certainly, in theory, the system of appointment can be changed by the establishment of a different process than the one that exists now, which is essentially the decision of the prime minister, who need not consult anyone for the purpose. The stumbling block is political partisanship. The point is worth pausing to consider.

Political partisanship is an integral part of any politics, and certainly of political systems that are dominated by political parties. Politicians prefer to consort with their political friends, the people who support them, who have fought elections with them, who share their positions on the issues of the day. They are bound to want to appoint their political friends to public offices, people who support their policy agendas, people whose loyalty deserves a reward. Why would they prefer to appoint their political enemies to such offices, or even people who are independent-minded?
Canadian political partisanship is robust. French geographer and political commentator, André Siegfried, commented on the unusual intensity of it in his famous book on Canadian politics, *Le Canada, les deux races: problèmes politiques contemporains*, published in 1906. (The English version, *The Race Question in Canada*, was published a year later.) Siegfried was astonished at the enmity between the political parties, no matter how large or small the stakes.

As far as partisanship is concerned, nothing has changed since Siegfried's day. Canadians are witness to it not only during hard-fought election campaigns, but in the media and, of course, in the House of Commons, especially during Question Period. That being so, it is futile for advocates of Senate reform who see the value in appointment over election to spend their time concocting non-partisan methods of appointment. There is none. Or at least there is none with any hope of being realized. An example that appears from time to time in newspaper editorials is the idea that holders of the Order of Canada – an honorific bestowed by the government of Canada - would meet to nominate persons deserving appointment to the Senate. Setting aside the logistical problems inherent in the idea, the fact of the matter is that not a single political leader would back it. The proposal simply has no political traction. The Senate might not exercise much political power, but it has some, and no political actor would contemplate wasting the exercise of political power on a non-partisan. Non-partisans, in their eyes, do not deserve political rewards.

Obviously the public also includes many voters who are as partisan as the politicians that they support at the polls. But it also includes a significant number of voters who are not themselves attached to a particular political party, and who would prefer to see politicians reach across the partisan divide and work together to solve policy problems. Even in the face of public hostility to partisanship, however, politicians persist in their partisan activity. They never change. What, then, is the answer to the conundrum of partisanship as it affects appointment to the Senate? The only practicable answer is to broaden the range of partisan opinion that is represented there. In other words, stop bothering about partisanship itself, and instead seek to temper the effect of it on political conduct by finding a way to open the institution to the great diversity of political opinion that exists throughout the country.

The idea of broadening the range of partisan voices in the Senate is more radical than it might appear at first sight. Since Confederation, prime ministers have belonged either to the Liberal or Conservative (sometimes styled Progressive Conservative) parties. Predictably they have nominated prospective senators from their own partisan ranks, which means that almost all senators have hailed and continue to hail from one or other of the two parties. The odd appointment of someone outside the established partisan ranks is the exception that proves the rule. Essentially, the Senate is a two-party institution that exists within a multi-party system of elective politics. Moreover, the term of appointment until age 75 (and prior to 1965, for life) has meant that in any given period, one of the two parties manages to dominate the institution. For example, Conservative prime ministers held office for most of the first thirty years of the country’s existence. By the time the Liberal era got underway in 1896 with the election of a Liberal majority under the leadership of Wilfrid Laurier, the Conservatives not only dominated the
Senate, but continued to do so for a number of years owing to the lengthy term of appointment of senators. The pattern, then, has been for there to be two partisan voices, one dominating long after the public has shifted to the other side. The phenomenon has been replicated to this day, notwithstanding the fact that in the twentieth century national politics became a multi-party system, new entrants coming and going, and one staying (the CCF/NDP).

Currently the country is facing the latest example of the phenomenon just mentioned. Under the constitution, the Senate is comprised of 105 members. Since attaining office, Harper has recommended the appointment of 59 senators, all of them Conservatives. Three of the appointees from Alberta had won the Senate nomination elections that now are held there. The Liberal-dominated Senate that greeted Harper when he took office in 2006 is now a Conservative-dominated body. Clearly the injection of partisan voices from the other political parties at the federal and provincial level would mark a significant change from the unvarying pattern that has beset the institution since 1867.

Among the many proposals for Senate reform made over the decades, there is one that represents nothing more than the attempt to broaden partisan representation in the chamber. Interestingly, it was made by a prime minister who, like the current one, sought change by non-constitutional means. In 1978, Prime Minister Pierre Trudeau proposed a House of the Federation, half of the members of which would be nominated by the House of Commons and half by the provincial legislatures. There are two interesting features of the proposal. One is the idea of releasing half of the Senate seats to the provinces, itself an unusual example of a concession of power. The other is the assignment of the nominating power to the legislatures rather than the governments. It lends an element of unpredictability to nominations whenever there is no majority party in the legislature.

If the Trudeau proposal had been a successful one, the Senate today would look much different than it does. For example, it would include NDP senators and Parti Québécois senators. In addition, it is likely that both the House of Commons and the provincial and territorial legislatures would have put in place formal processes by which nominations are made, possibly processes including public participation in the form of applications for the position. Certainly the nominating activity would have a much higher public profile than is the case today, when nominations simply are announced by the prime minister’s office.

**Senate Reform and the Constitution**

The Trudeau proposal on the process of nominating senators was part of a larger package of reforms, and understandably the subject of political controversy. As a result, the government chose to ask the Supreme Court of Canada about the scope of Parliament’s authority to make changes to the Senate on its own, without reference to the provinces. It must be kept in mind that at this point the country’s constitution had not been patriated and it did not include an amending formula, that is, a formal set of procedures to amend the constitution. The court handed
down its answers in 1980 in *Re: Authority of Parliament in Relation to the Upper House*, or the Upper House Reference. In answer to the question of whether Parliament on its own could abolish the Senate, the court said no. The government also asked the court about Parliament’s power to make various types of changes to the Senate, but the court declined to give an answer to each change on the ground that the exercise was impossible in the abstract, that is, in the absence of context. However, the court did say that Parliament does not have the unilateral authority to change the number of Senate seats assigned to the provinces; nor can it make changes to the Senate that would have an impact on the representative purposes that the institution was designed to perform within the federal legislative process.

As noted above, the Upper House Reference preceded the patriation of the constitution and the acquisition of a constitutional amending formula. Under the formula acquired since then, it is stipulated that the agreement of Parliament and the legislative assemblies of seven of the ten provinces that together include at least 50 per cent of the population of all of the provinces is required to make changes to the Senate in these respects: the powers of the Senate, the method of selecting senators, the number of senate seats assigned to a province and the residence qualifications of senators. Further, such changes can be made without the approval of the Senate, itself.

The Harper government has sought to change the term of appointment to the Senate and to make the election of senators a condition of their appointment, not under the terms of the constitutional amending formula, but instead under the authority of Parliament alone. In other words, the government has chosen to act unilaterally in a bid to get change quickly without becoming mired in the difficult negotiating processes that accompany efforts at constitutional change. The gambit has not worked, not least because the Senate itself has slowed the process, in part by holding hearings on the constitutionality of the manoeuvre. Moreover, the provinces are stirring.

In May 2013, the government of Quebec referred the constitutionality of the federal government’s current effort to reform the Senate to the Quebec Court of Appeal. By doing so, Quebec took the initiative from the federal government, introducing a dose of legal unpredictability into the mix. The response of the federal government was to refer its own set of questions about the constitutionality of the issue to the Supreme Court of Canada. It also petitioned the Quebec court to dismiss the Quebec government’s reference case on the ground that the whole thing could be settled by the national court. The Quebec court dismissed the motion. So, the country will be favoured with two judicial opinions on the matter.

In the meantime, the NDP is left with its hard line position in favour of abolishing the Senate. Supposing that were a possibility, some obvious questions arise. What would the federal government do without the Senate? What would Parliament do without it? Would it matter?
Conclusion
Without the Senate, the federal governing party stands to lose a handy tool to compensate for the lack of representativeness of its caucus. In a country the size of Canada, this is a serious matter. The problem of representation is rooted in the political-party system in combination with the electoral system that is used to elect members to the House of Commons. It is not impossible for a political party to form the government, while at the same time being shut out of a province or region of the country. The party leader could use the power to nominate senators as a short-term solution to the problem, a way of buying time for the party to build up its strength in the region in question and eventually elect some members there. The symbolism is good, because it shows concern about the region in question, as well as the intention to earn support there in the future. It is a way of forestalling malcontent that can lead to serious disaffection. A small way, perhaps, but better than nothing.

In addition, getting representation from the region via appointment to the Senate, or even appointing an incumbent senator from the region to the cabinet, helps to maintain the voice of that area of the country within the governing caucus. The caucus of a national political party needs to hear from all parts of the country. Such breadth of representation enables members from one part of the country to educate themselves about problems and opinions in other regions. The fact that fellow partisans are educating one another is undoubtedly a key part of the educative process, since political actors from opposing parties tend not to listen to one another. In any event, the continued under-representation or non-representation of a region in a party caucus has the effect of giving the caucus a tin ear about that region. It is no answer to say that the provincial premier can step in to fill the gap. For one thing, there might be partisan differences in play. For another, some federal governments, like the current one, are led by political actors who eschew federal-provincial meetings as a matter of principle. Nothing beats the party caucus that represents all parts of the country. This is why the Harper government’s recent decision to exclude senators from the cabinet is short-sighted as well as petulant. Why throw away a useful tool? Who knows when it will be needed?

What about Parliament? Without the Senate, Parliament loses the function of sober second thought. Given the utility of the function, it is worth asking whether it could be supplied some other way. For example, could the federal public service supply it? The answer is a resounding no. In theory, the public service has some independence from the government of the day. But not the kind of independence that is required by the sober-second thought function. The Senate’s treatment of the government’s bills on Senate reform is a perfect example. The Senate was able to hold hearings on some of these bills, seeking the opinion of experts from across the country. Some of them thought the government was authorized to proceed as it chose, others did not. Such hearings serve an important public education function, one of the most important functions that Parliament discharges. In the course of these hearings, the attentive public learned about potential constitutional issues associated with the government’s bid to reform the Senate. The process slowed. Time passed. And now the country awaits judicial opinion. Sober second thought, indeed.
Does it matter? Yes, obviously it does. Were the Senate to be abolished, Canada would have a unicameral Parliament. Not a federal Parliament. A unicameral Parliament with no institutionalized provincial or territorial representation within it. It would be a disintegrative institutional step, not a cohesive step. Since the NDP does not have an anti-capitalist ground on which to base its case to abolish the Senate, there is no worthy ground left to it. The position is constitutionally and institutionally reckless. Politically speaking, of course, it is an easy cop-out. In adhering to its longstanding position in favour of abolition rather than rethinking it, the NDP can claim a moral high ground in terms of consistency. Plus, it is easy to favour abolition while the Senate is embroiled in an expense-claims scandal. Finally, should the Supreme Court rule that a broad consensus is required in order to abolish the Senate, then abolition might well be a dead letter, which makes favouring it even easier since there would appear to be no cost to the position.

The real risk for the NDP is the possibility of Senate reform. Should a consensus develop in favour of reform, then the NDP will not be part of the debate. It will have nothing to contribute to the discussion. But it might have a great deal to lose in the event that the Senate-reform movement takes off in the direction of an elected Senate. Were there ever to be an elected Senate, then a future NDP government that desires to establish major, new national policies might find itself facing determined opponents in the upper chamber who are emboldened by being elected to stare down the government of the day. Suffice it to say that from the standpoint of the NDP, there are many worse things than an appointed Senate.