Verbatim/Brian Mulroney

Reforming the Senate: We Already Have a Road Map

In a major address to the Canadian Bar Association in Montreal, former Prime Minister Brian Mulroney proposed a way to make Senate appointments that would meet the test of the Supreme Court's 2014 landmark decision on the reference on Senate reform, term limits, elections and even abolition. His suggestion, the Meech Lake formula of the prime minister appointing senators from ranked lists furnished by the provinces, would fall within the framers' intent in the British North America Act while avoiding the need for a constitutional amendment under the 7/50 or unanimous amending requirements of the 1982 Constitution Act.

The separation of powers between the legislative and judicial branches is, of course, fundamental to our democratic way of life. The independence of the judiciary is as sacrosanct in one branch of government as the accountability of Parliament is in the other.

We were reminded of all those attributes last year in the Supreme Court's ruling in the reference from the government on Senate reform. The executive wing of the legislative branch was asking the judicial branch whether an appointed Senate could be replaced by an elected one, whether there could be consultative elections in the provinces, whether term limits were possible, even whether the Senate could be abolished by the executive and legislature alone.

In its landmark decision, the Court reminded us that, while the amending rules are part of the Constitution Act of 1982, Canada's constitutional experience dates from the Constitution Act of 1867: In other words, the British North America Act, the constitutional framework that has served this country so well for nearly 150 years.

Canadians value both the BNA Act and the Constitution Act of 1982, at the heart of which is the Canadian Charter of Rights and Freedoms, along with the amending formula. The two constitutional streams are perfectly complementary. Both define Canadian values of a tolerant and diverse society.

Sir John A. Macdonald and the Fathers of Confederation knew what they were doing at the Quebec and Charlottetown Conferences of 1864, and at the London Conference of 1866-67. They were building a principled but pragmatic constitutional model, one derived from the Westminster tradition, but adapted to the realities of the emerging Canadian federation.

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The division of powers and the pragmatic federalism of the BNA Act are at the very heart of the Canadian compromise invented by Sir John A. and the founding fathers. The founding fathers created a bicameral legislature—an elected House with representation by population, and an appointed Senate in which the regions had equal representation.

"The Senate is one of Canada's foundational political institutions," the Court declared. "It lies at the heart of the agreements that gave birth to the Canadian federation."

And so any change in the appointment of senators touching on the framers' intent of 1867 amounts to a constitutional amendment under the amending procedures of 1982, requiring either the consent of Ottawa and seven provinces comprising 50 per cent of the population under the 7/50 formula, or the unanimous consent of Ottawa and the provinces.

The Supreme Court justices have confirmed a high constitutional threshold in the Senate reference. Equally important, they have reminded us that our Canadian constitutional experience did not begin in 1982, but in 1867. We all know that the Senate is badly in need of reform. It has become a dysfunctional chamber, and has fallen into disrepute, notwithstanding the good work it often does, especially in its committees.

This is not to say nothing can be done under the present rules. I have two suggestions.

First, whoever is prime minister following the next election could name a commission of two prominent Canadians—perhaps a former auditor-general and a former member of the Supreme Court—and give them six months to produce a code of conduct for the Senate that addresses malfeasances and the absence of regulations governing expenses, residences and the like. There should be clear, strict rules, and they should be enforced. To ensure compliance, the prime minister would refrain from making new appointments until the new code is in effect.

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"Among the provisions adopted in the Meech Lake Accord, the prime minister would name senators from ranked lists provided by the provinces. This had a number of purposes—to diminish the centralization of power in the PMO, end the process of packing the Senate by the party in power, as well as affirming the Senate's role as the House of the provinces."

There is also one way of reforming the executive appointment process without a constitutional amendment, and that is the formula adopted at Meech Lake in 1987. Among the provisions adopted in the Meech Lake Accord, the prime minister would name senators from ranked lists provided by the provinces. This had a number of purposes—to diminish the centralization of power in the PMO, end the process of packing the Senate by the party in power, as well as affirming the Senate's role as the House of the provinces.

Although Meech was not yet in force, I offered to apply the appointment provisions in the interests of constitutional innovation and harmony, pending final approval by all provinces.

Looking back at it now, I'm struck by the outstanding quality of senators our government appointed from Quebec, on the recommendation of the government of Premier Robert Bourassa and from other provinces that chose to avail themselves of the opportunity.

There was Claude Castonguay, minister of health and the father of healthcare in Quebec; Gérald Beaudoin, a professor of law known around the country; Thérèse Lavoie-Roux, the former president of the Montreal Catholic School Board; Jean-Marie Poitras, the chairman and CEO of l'Alliance Insurance; Roch Bolduc, the head of the Quebec public service; there was Solange Chaput-Rolland, the broadcaster and journalist; and Jean-Claude Rivest, Mr. Bourassa's closest political adviser, who is still in the Senate sitting as an Independent.

In 1990, I also appointed Stanley Waters from Alberta at the recommendation of Premier Don Getty. Mr. Waters was Alberta's first "elected" Senator, as the winner of a consultative election. From Newfoundland, on the recommendation of Premier Brian Peckford, I appointed Gerald Ottenheimer, a Rhodes Scholar, who had been president of the Newfoundland House of Assembly.

All of these appointees proved to be excellent senators, and not one of them was a Pro-

gressive Conservative party loyalist, or organizer—with the exception of Senator Ottenheimer. In other words, I wasn't sending my friends to their political reward, I was sending highly qualified people to do good work.

The provision on the Senate was typical of the pragmatic character of Meech. It would also have constitutionalized Quebec's three seats on the Supreme Court and seen Ottawa choose candidates from lists submitted by the provinces; entrenched the Cullen-Couture agreement on immigration between Ottawa and Quebec; limited the federal spending power in shared-cost programs; extended unanimity in the amending formula to several other areas, including any change in the role of the Queen.

The first of six items provided for the recognition of Quebec as a "distinct society within Canada," tied to a duality clause that would entrench English-language minorities in Quebec and French-speaking Canadians elsewhere in the country as a "fundamental characteristic of Canada." In other words, affirmation of Quebec's distinctive identity within Canada, without any grant of special status.

It is interesting to note that, some years after the acrimonious debate about the "Distinct Society" provision of Meech, former Chief Justice Brian Dickson of the Supreme Court of Canada said:

> "Let me say quite directly that I have no difficulty with the concept. In fact, the courts are already interpreting the Charter of Rights and the Constitution in a manner that takes into account Quebec's distinctive role in protecting and promoting its Francophone character. As a practical matter, therefore, entrenching formal recognition of Quebec's distinctive character in the Constitution would not involve a significant departure from the existing practice in our court."

You will not find anywhere a more reasoned, persuasive and lethal repudiation of the main argument of the anti-Meech forces at the time. P

Excerpted from a speech to the Canadian Bar Association in Montreal, June 3, 2015.