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### **Great big time wasters**

*Constitution need not get in way of reform*

*Bryan Schwartz explains how our obsession with changing the "sacred text" has distracted us from easier paths to reform.*

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TRUDEAU'S 1982 constitution includes a list of documents that are part of the "Constitution of Canada" - the "Sacred Text." They are "supreme" over other parts -- and usually hard to change.

Canada has wasted much time and goodwill since 1982 on attempting massive overhauls to the "sacred text." We have suffered from irritating Solons: prime ministers and premiers overly concerned about leaving a permanent entry in the secular scriptures. The sprawling deals tended to contain many good ideas. But they also contained provisions that were irresponsibly vague or ill-advised.

A large part of the constitution of Canada lies outside of the "sacred text." Many needed reforms can and should be accomplished by ordinary legislation or agreements. These can be more easily agreed upon -- and more easily revised in light of experience. Let us see what these provisions are, and how they can be changed.

The Supreme Court of Canada has decided that part of our legal constitution is not set down in black and white. It consists instead of basic principles, like democracy, federalism and minority rights. The court "finds" these principles from various parts of the sacred texts and constitutional traditions. Then it uses them to "deduce" a set of specific rules that apply to a murky situation like an attempt by Quebec to separate.

In reality, this method involves as much magic as logic. The Court weights and balances abstract principles, and with a waive of a "therefore" produces a result that seems to make sense. In the Quebec Secession case, the Court wanted to emerge with a result that ensured order in the face of a potential crisis. It did not want to make secession too easy. At the same time, it did not want to inflame opinion in Quebec. The "Secession Reference" was broadly received across Canada as a reasonable set of rules.

Much of our system of government is based on "political convention". These are principles of government that arise from tradition, rather than being set out in the sacred text. They can be changed by political innovation and debate. Governments can appoint judges on merit or patronage or some mix, and with more, or less, public input.

A large part of the way we conduct government is set out in ordinary acts of legislatures, rather than the sacred text. How many seats does a provincial legislature have? What system is used to choose them? How are their salaries determined? Reform in these and many other areas does not require anything but the will and a bill.

Several provinces, for example, have passed laws that set a fixed date for provincial elections. While elections can still be called in some other circumstance, the legislation establishes the routine expectation. This is a far superior system to letting the ruling government set elections based on its own self-interest -- all the while holding the element of surprise over the opposition parties.

Much more reform can be usefully done along these lines. Provincial governments today tend to evade accountability by holding short sessions of the legislature. Laws or internal rules could be changed so that the legislature as a whole meets longer or more often, and that its committees continue in operation even when the fully assembly is not meeting.

One of the biggest opportunities for "constitutional reform" in Canada is in our voting systems. All the provinces and the House of Commons use the "first past the post" system. Whoever gets the most votes (which is rarely a majority) in any riding wins. The result can be massive distortions between popular vote and seats actually won. A party can win 30 to 40 per cent of the vote in an election and wind up with no seats. A premium is placed on appealing to regional sentiment. The Bloc Québécois became the official opposition party by winning a large percentage in Quebec. The Reform party did the same in the West. Under the first past the post system, a "majority government" can be formed even when 60 per cent or more of the electorate voted against the political party forming it.

Across Canada, commissions, task forces and "citizens' assemblies" have been considering reforms to the voting system. British Columbia's citizens' assembly recommended a sophisticated "multi-member single transferable ballot system." Voters can chose express subtle choices. They can rank their choices of candidates, not just choose one candidate or party. The number of members elected from a political party tends to closely match its share of the overall popular vote.

The system is, however, somewhat impractical. You could have 25 or more candidates running for three or five seats in one large district. The prospect of 25 candidates running for three seats in one geographically sprawling location does not seem practically appealing. It makes it expensive to run in a constituency, and hard to represent it. A voter's choices will outrun his information. (How many of the 25 candidates can a voter possibly know?) I do think, however, that provinces should experiment with more modest reform. That could mean setting aside a relatively small number of seats to directly reflect the overall popular vote.

Ordinary laws could also be used to reform the Senate. In its present form, it serves no useful purpose. However, it is in fact a scandalous waste of money. (How many diagnostic machines could be bought and operated with the hundreds of millions of dollars it costs each year to run the Senate?) Its members consist largely of patronage appointments of the particular governments of the day, so it has no democratic legitimacy. While the powers of the Senate to stymie proposals from the House of Commons is theoretically unlimited, it is not needed as a chamber of "sober second thought." There are other counterbalances in our system, including the voices of the provincial governments and the power of the Supreme Court under the Charter. More rationality in legislation can be promoted by making the House of Commons work in a more genuinely deliberative fashion. While we may be stuck with the Senate for decades to come, it could be improved somewhat. A minority of members could be, for all practical purposes, elected -- say three from each province. (You wouldn't want a majority elected until other

Senate reforms are made. Otherwise, you could end up with a powerful Senate that drastically underrepresents Western Canada and stymies the House of Commons.) Some committees of the Senate could be reserved for elected members -- such as one that issues a report every year on whether the federal government is being fair to all provinces in how it spends its money.

The obsession in Canada over the "sacred text" may now be over. Had the last 25 years seen the same energy devoted to easier and more flexible paths of reform, including experiments in various provinces, our system of government might by now be considerably more open and democratic.

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