The Upper House Reference (1980)

Ever since the Senate of Canada was established at Confederation in 1867, politicians have tried to reform the institution. Formal changes to the main features of the Senate have never succeeded, however. A few modest amendments have altered the distribution of senators by province, and mandatory retirement of senators at age 75 was established in 1965. Otherwise, the Senate has evolved since 1867 by informal changes in practice, not by legal or constitutional reform.[1]

In 1978, the federal government proposed sweeping constitutional reform in Bill C-60[2], including replacing the Senate with an upper house to be called the House of the Federation. Half the members of the House of the Federation would be chosen by the House of Commons and the other half selected by the provincial legislatures.[3] With this proposal in mind, the federal government asked the Supreme Court of Canada to rule on the scope of Parliament's authority to abolish or alter the Senate. The Supreme Court released its decision in *Re: Authority of Parliament in Relation to the Upper House* (*Upper House Reference*)[4] in 1980.

Amending the Constitution Prior to 1949

In 1980, Canada's federal Constitution was still a law of the British Parliament. However, in 1949 some limited amending authority was transferred from Westminster to Canada's Parliament by the insertion of section 91(1)[5] into the *British North America Act* (*BNA Act*, now known as the *Constitution Act, 1867*). Reflecting the Constitution's deep roots in British constitutional principles and history, the Supreme Court began its inquiry in the *Upper House Reference* with the Canadian amending procedure prior to the addition of section 91(1) in 1949.

Because the *BNA Act* was an act of the British Parliament, any amendments had to be passed as laws of the Parliament in London. After 1875, the practice had been to seek an amendment through a joint address of both Canadian and British Parliaments. The Supreme Court recognized four general principles or conventions in the amending process prior to 1949:

- *Amendment of the BNA Act is made only upon formal request from Canada. (This convention was given force of law by section 4 of the Statute of Westminster, 1931).*
- *The approval of Canada's Parliament is required for a request to British*

Parliament for an amendment.

- *No amendment to the BNA Act will be made merely by request of a province.*
- *Parliament will not request an amendment directly affecting federal-provincial relationships without prior consultations and agreement with the provinces. (This principle emerged between 1907 and 1930.)* [6]

Twenty-two amendments were made in this manner prior to 1949.[7] Only one of them, in 1915, made changes to the Senate. The 1915 amendmentrecognized the growth of western Canada by adding a fourth region for Senate representation to the three existing regions of Ontario, Quebec and the Maritime provinces. The Act also increased the number of senators to reflect this western expansion.

Section 91(1)

The *British North America (No. 2) Act, 1949* added section 91(1) to Canada's written federal Constitution. This amending clause granted Canada's Parliament the authority to amend "the Constitution of Canada" without an enactment of British Parliament (see section entitled "Constitution of Canada" below).

Section 91(1) provided a partial amending authority defined by five exceptions:

- provincial legislative powers;
- schools;
- the use of French and English;
- the requirement that Parliament convene at least once a year; and
- the requirement that the House of Commons continue for no more than five years, except in times of war, invasion, or insurrection.

The passage of section 91(1) did away with the requirement of a new act of the British Parliament for constitutional amendments that affected matters of direct concern to the federal level of government in Canada. The Parliament of Canada could amend the *BNA Act* by itself, without the help of the British Parliament, as long as the amendments were to "the Constitution of Canada" and did not touch on the five exceptions.[8] (Matters of wider constitutional change, affecting areas of provincial responsibility, still required for form of provincial consultation and the approval of British Parliament.) The lingering question about section 91(1), from 1949 to 1980, was the real legal meaning of the term "the Constitution of Canada."

The amending authority of section 91(1) had been used only five times prior to 1981, for relatively minor changes the Court calls "federal 'housekeeping'

matters."[9] Specifically, these "housekeeping" amendments involved three adjustments to the number of members of the House of Commons, one adjustment to representation in the Senate, and a compulsory retirement age for senators. None of these amendments altered the essential character and purpose of the Senate, nor did they "in any substantial way affect federal-provincial relationships."[10]

Historical Purpose of the Senate

After considering the amending procedures before and after 1949, the Court analyzed the historical roots and purpose of the Senate. Quoting John A. MacDonald and George Brown, two Fathers of Confederation, the Court describes the Senate as a means of affording protection to the various regional interests in Canada. In fact, the less populous Maritime region made it clear during negotiations leading to Confederation that without regional equality in the upper house, there would be no Confederation.[11]

"Constitution of Canada"

Until the addition of section 91(1) in 1949, the phrase "Constitution of Canada" was not used in the*Constitution Act, 1867*.[12] Rejecting the arguments of the Government of Canada, the Supreme Court gives this phrase a narrow interpretation, finding that the word "Canada" does not refer to Canada as a geographic entity, but only to the federal government.[13] Thus "the power of amendment given by s. 91(1) relates to the constitution of the federal government in matters of interest only to that government."[14] As a result, sections of the *BNA Act* that affected provincial interests could not be amended unilaterally by the federal Parliament.

The question that followed from this finding was whether, in the limited sense that section 91(1) gave authority to amend the "Constitution of Canada," Parliament could abolish the Senate.

Question 1: Does Parliament have Authority to Abolish the Senate?

The first question[15] referred to the Supreme Court in the *Upper House Reference* was whether Parliament had the authority to abolish the Senate by repealing sections 21 to 36 of the *BNA Act*.

The Court answered in the negative. Section 91(1) gives authority to Canada's Parliament, which comprises two houses, the House of Commons and the Senate (in addition to the Crown). Legislation to abolish the Senate would alter the structure of the body to which constitutional authority, including the amending authority, is entrusted:

> *Section 91(1) cannot be construed to confer power [on Parliament] to supplant the whole of the rest of the section. It cannot be construed as permitting the transfer of the legislative powers enumerated in s. 91 to some body or bodies other than those specifically designated in it.… The elimination of the Senate would … involve a transfer by Parliament of all its legislative powers to a new legislative body of which the Senate would not be a member.[16]*

Question 2: Does Parliament Have the Authority to Alter the Senate?

The second question referred to the Supreme Court in the *Upper House Reference* was whether the Parliament of Canada has authority to enact legislation that would alter the Senate in a number of specific ways. The question set out an extensive list of hypothetical changes.[17]

The Court declined to rule on several parts of this question, including whether Parliament may change the name of the upper house, whether it may change the qualification and tenure of senators, or whether it may confer some authority on the provinces in the selection process. The Court said that without more context these questions could not be answered categorically.

As to whether Parliament may change the numbers and proportions of senators representing provinces, the Court again notes that regional representation is an "essential feature" of the Senate, and "without it the fundamental character of the Senate as a part of the Canadian federal scheme would be lost."[18] Therefore the answer to this question is no.

In response to the question of whether senators may be directly elected by the public, the Court gives an unconditional answer in the negative. An elected Senate would directly contradict the intention of the *BNA Act*to create "a thoroughly independent body which could canvas dispassionately the measures of the House of Commons."[19]

In summary, the answer to this very detailed question is that Parliament may make alterations to the Senate, but:

> *[I]t is not open to Parliament to make alterations which would affect the fundamental features or essential characteristics given to the Senate as means of ensuring regional and provincial representation in the federal legislative process.[20]*

What Significance Does This Decision Have Today?

The coming into force of the *Constitution Act, 1982* effected the patriation of

Canada's Constitution. Section 44 of the 1982 Act replaced section 91(1) of the *Constitution Act, 1867.* It gives Parliament exclusive authority to amend the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons. This authority is subject only to exceptions enumerated in sections 41 and 42, which require either unanimous or broad support from the provinces.

Section 41 sets out matters that may only be amended with unanimous consent of the provinces, none of which pertain directly to the Senate. Section 42 sets out those matters that may only be amended by the general amending procedure described in section 38(1). The general amending procedure requires the consent of two-thirds of the provincial legislatures (which means at least seven out of ten) that together represent at least 50 percent of Canada's population (the 7/50 formula). Among the matters listed in section 42(2) that require the 7/50 formula are: the powers of the Senate; the method of selecting senators; the number of members by which a province is entitled to be represented in the Senate; and the residence qualification of senators.

Since the replacement of section 91(1) by this detailed amending formula, there has been some question as to the continuing relevance of the 1980 decision in the *Upper House Reference*.

Jim Young (July 20, 2009)

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[1] Jack Stilborn, "Senate Reform: Issues and Recent Developments" *Library of Parliament* (21 January 2008).
[2] 3rd Sess., 30th Parl.,26-27 Elizabeth II, 1977-78, ss. 62-70.
[3] Russell Ducasse, "Reforming Canadian Institutions: Progress and Prospects" *Canadian Regional Review* vol. III no. 3 (September 1980) 41 at 43.
[4] [1980] 1 S.C.R. 54 ("*Upper House Reference*").
[5] The full text of section 91(1) was:
"The amendment from time to time of the Constitution of Canada, exceptas regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces, or as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a province, or to any class of persons with respect to schools or as regards the use of the English or French language or as regards the requirements that there shall be a session of the Parliament of Canada at least once each year, and that no House of Commons shall continue for more than five

years from the day of the return of the Writs for choosing the House; provided, however, that a House of Commons may in time of real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such continuation is not opposed by the votes of more than one-third of the members of such House."

[6] *Upper House Reference* at 64.

[7] *Ibid*. at 60.

[8] *Ibid*. at 64-65.

[9] *Ibid*. at 65.

[10] *Ibid*. at 66.

[11] *Ibid*. at 67.

[12] *Ibid* at 69.

[13] *Ibid.* at 70.

[14] *Ibid*. at 71.

[15] The full text of the first question is:

Is it within the legislative authority of the Parliament of Canada to repeal sections 21 to 36 of the *British North America Act, 1867*, as amended, and to amend other sections thereof so as to delete any reference to an Upper House or the Senate? If not, in what particular or particulars and to what extent?

[16] *Upper House Reference* at 72.

[17] The full text of the second question is:

Is it within the legislative authority of the Parliament of Canada to enact legislation altering, or providing replacement for, the Upper House of Parliament, so as to effect any or all of the following;

(a) to change the name of the Upper House;

(b) to change the numbers and proportions of members by whom provinces and territories are represented in that House;

(c) to change the qualifications of members of that House;

(d) to change the tenure of members of that House;

(e) to change the method by which members of that House are chosen by

(i) conferring authority on provincial legislative assemblies to select, on the nomination of the respective Lieutenant Governors in Council, some members of the Upper House, and, if legislative assembly has not selected such members within the time permitted, authority on the House of Commons to select those members on the nomination of the Governor General in Council, and

(ii) conferring authority on the House of Commons to select, on the nomination of the Governor General in Council, some members of the Upper House from each province, and, if the House of Commons has not selected such members from province within the time permitted, authority on the legislative assembly of the province to select those members on the nomination of the Lieutenant Governor in Council,

(iii) conferring authority on the Lieutenant Governors in Council of the provinces or on some other body or bodies to select some or all of the members of the Upper House, or
(iv) providing for the direct election of all or some of the members of the Upper House by the public or;
(f) to provide that Bills approved by the House of Commons could be given assent and the force of law after the passage of certain period of time notwithstanding that the Upper House has not approved them? If not, in what particular or particulars and to what extent?
[18] *Upper House Reference* at 76.
[19] *Ibid.* at 77.
[20] *Ibid*. at 78.