Reference re Senate Reform (2014): The Supreme Court Clarifies the Senate Reform Process

This article was written by a law student for the general public.

Introduction

On April 25, 2014, the Supreme Court of Canada advised in *Reference re Senate Reform*[1] (the *Senate* reference) that significant changes to the Senate require constitutional amendments. It also clarified what the federal government can and cannot do regarding Senate reform:

- At least seven provinces representing at least half of Canada's population, also known as the "7/50 amending procedure", must agree to any reform dealing with the selection or length of senatorial terms;
- Abolishing the Senate requires the unanimous consent of the Senate, the House of Commons, and the legislative assemblies of all Canadian provinces; and
- The only changes that Parliament may unilaterally make with respect to the Senate are the requirements of property ownership and net worth.

Does the Supreme Court's decision hinder or pave the way for further Senate reform? The *Senate* reference decision may appear to have delayed the reform process, but it also provided a clear process for any future Senate reform attempt. Still, Parliament cannot make major changes to the Senate without substantive constitutional discussion, debate, and approval from all the Constitution's stakeholders.

Facts

Background

The Senate is the upper house of Canada's Parliament. It was created by the Constitution to consider and revise legislation and to provide "sober second thought" to the House of Commons. Father of Confederation George Brown called the Senate and its potential to balance power as the key to Confederation, "the very essence of our compact.… Our Lower Canadian friends [in present-day Quebec] have agreed to give us representation by population in the Lower House on the express condition that they would have equality in the Upper House. On no other condition could we have advanced a step."[2]

The Constitution outlines the role of the Senate and its requirements for membership, dividing the country into four regions: Ontario, Quebec, the Maritimes and the western provinces, each with 24 senators. It also allocated one senator to Newfoundland and to each territory. Each senator must be a Canadian citizen at least 30 years old, own land worth at least $4,000, have a net worth of at least $4,000, and reside in the province or territory that they represent.[3]

Canadians have long regarded the Senate as a controversial institution of patronage that should either be reformed or abolished.[4] The Liberals introduced reform proposals in 1978 but they did not receive enough support. Politicians unsuccessfully debated the issue again in the 1980s during the Meech Lake and Charlottetown Accords. Alberta has held elections for its senators since the 1980s (*Senatorial Selection Act*), but the Prime Minister is not obligated to accept a provincially-elected candidate.[5] Senate reform became a part of the Conservative party's agenda when it was elected in 2006, but the issue has had little success. It recently came to the forefront of Canadians' minds because of the 2013 Senate scandal when three senators were accused of filing improper expense claims.[6][7]

The federal government argued that section 44 of the Constitution, known as the "unilateral federal amending procedure," allows it to make these changes. Part of the general amending procedure set out in Part V of the *Constitution Act, 1982*, section 44 states, "[s]ubject to sections 41 and 42 [other amendments by unanimous consent or general procedure], Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons."[8] The Supreme Court's main task in answering these questions, therefore, was to clarify whether provincial interests were at stake and, if so, to what extent.

More specifically, the questions posed to the Court were as follows:

1. Can Parliament amend the part of the Constitution that provides for fixed senatorial terms?

2. Can Parliament enact legislation that sets out a way to ask the population of each province and territory about their preferences for possible Senate candidates from their area?

3. Can Parliament establish a framework for provincial and territorial legislatures to enact legislation to consult residents about preferences for possible Senate candidates from their area?

4. Can Parliament repeal the Constitution's property qualifications for Senators?

5. Can Parliament abolish the Senate on its own, using the Constitution's general amending procedure?

6. If the Constitution's general amending procedure is not sufficient to abolish the Senate, does the Constitution's unanimous consent procedure apply?

Issues

The *Senate* reference addressed the six questions mentioned above on four key issues. Can Parliament unilaterally reform the Senate in the following ways?

- By electing Senate members;
- by setting fixed senatorial terms;
- by abolishing the Senate; and
- by removing the real and net worth qualifications for Senators from the *Constitution Act, 1982*.

The Decision in Brief

The Supreme Court ruled that Parliament could not reform the Senate by allowing provincial senatorial elections although it could change the real property requirements in all provinces except Quebec. Overall, the federal government requires the consent of at least seven provinces representing at least half of the population of Canada (the 7/50 amending procedure) to reform the Senate. Moreover, abolishing the Senate requires the consent of all the provinces. The Senate is an important part of Canada's constitutional structure of which the provinces are an important part and, as such, the interests of all stakeholders must be considered.

Analysis

The Supreme Court was careful to point out that its decision was not an amendment to the Constitution but simply an answer to the questions asked by Parliament.

Question 1 (Senatorial Tenure): The Government Cannot Change Fixed Terms for Senators

The federal government argued that changing the amount of time a Senator can sit in the Senate is within the federal unilateral power given by the Constitution in section 44. The provincial governments' positions were mixed. Most argued that senatorial term limits could allow a government that sat in power long enough to replace an entire Senate during its tenure. This would compromise the Senate's role as a house of legislative review and sober second thought. Although Saskatchewan and Ontario agreed with the federal government, they argued that senatorial terms lasting at least nine or ten years long would prevent these issues.

The Supreme Court agreed with the majority of the provinces: "The Senate is a core component of the Canadian federal structure of government.... [C]hanges that affect its fundamental nature and role engage the interests of [provincial] stakeholders and cannot be achieved by Parliament acting alone." The Court also ruled that security allows Senators to act independent of the House of Commons. Senatorial term length was connected to the idea that the Senate would complement the House of Commons' work. Therefore, the general amending procedure must apply in this case.[9]

Questions 2 and 3 (Consultative Elections): There Can Be No Consultative Elections for Appointments to the Senate

The federal government argued that changing the selection of senators from being appointed to being elected is an amendment that can be made unilaterally under section 44 of the *Constitution Act, 1982*. In this scenario, senatorial elections would function similarly to Alberta's current non-binding process. Although Alberta and Saskatchewan supported the government's position, the remaining provinces argued that even "advisory" elections would, indirectly, bind the Prime Minister's selection and require a constitutional amendment under the 7/50 rule.

The Supreme Court agreed with the majority of the provinces: the process would weaken the Senate's fundamental nature and role as a body of sober second thought and it could lose its objectivity.[10]The Constitution's early framers believed that the Senate *must* be independent from the same electoral process as members of the House of Commons so that it can complement rather than rival the lower house. This is part of the Constitution's structure, and changing it also requires the 7/50 amending procedure.

Question 4 (Property Qualifications): Senators' Real Property and Net Worth *Can* Be Amended

The federal government argued that it can use the unilateral federal amendment procedure in section 44 to change Senators' real property and net worth requirements and that, with the exception of Quebec, the move would not affect provincial interests.

The Supreme Court agreed, but with one limitation. Removing the real property requirement in the *Constitution Act, 1982* would not alter the Senate's fundamental nature and role. Yet removing the real property requirement for Quebec's senators would violate their special "real property" arrangement. (They are required to hold property in the province and changes to this provision require the approval of Quebec's National Assembly). The Supreme Court's solution was to allow Parliament to remove all real property qualifications except in Quebec.

The Supreme Court also ruled that Parliament could unilaterally revise the net worth requirement, and that removing it does not affect a senator's ability to carry out his or her duties. The Court described this type of repeal as exactly "the type of amendment that the framers of the *Constitution Act* intended to capture under section 44. It updates the Constitutional framework relating to the Senate without affecting the institution's fundamental nature and role."[11]

Questions 5 and 6 (Abolition of the Senate): Provincial Consent is Required to Abolish the Senate

The federal government argued that it could unilaterally abolish the Senate using section 42 of the Constitution's amending formula, a provision that describes the power of Senators and their method of selection. Saskatchewan and Alberta agreed, but British Columbia

supported the change only if it followed a national referendum. The remaining provinces argued that abolishing the Senate requires unanimous support from all the provinces and the federal government.

The Supreme Court ruled that abolishing the Senate would fundamentally change Canada's constitutional structure by removing its bicameral (two-house) system. In a unicameral system "there [is] one less player in the process [and] one less mechanism of review."[12] This change would also invoke the amending formula's unanimity clause, which states that all the provinces must have a say in the decision. To do otherwise departs from what the Constitution's framers may have originally intended: while the Prime Minister may make significant changes to the powers of the Senate and the number of senators, it "[can]not strip the senate of its powers and reduce its number of members to zero."[13]

Significance of the Ruling

Reference re Senate clarifies two important points. First, a "quick fix" to Senate reform does not exist. Second, changes to the Senate require carefully considered constitutional amendments. Prime Minister Stephen Harper said in response to the decision that "[w]e know that there is no consensus among the provinces on reform, no consensus on abolition and no desire of anyone to reopen the Constitution and have ... constitutional negotiations."[14]

But despite the disappointment that many political actors felt in response to the court's opinion, it shows that the Constitution provides a framework for reforming the Senate. Political commentators such as Emmett McFarlane suggest that the Court found the right balance: "Reading [the amending formula] too narrowly might let the federal government make changes unilaterally in cases where the provinces should have substantial input; reading [it] too broadly risks making it too difficult to change the Constitution even when there is a pressing need to do so."[15] As the country's blueprint, its rules and procedures are not taken lightly, nor are they easily changed.

[1] *Reference re Senate Reform* 2014 SCC 32 . <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13614/index.do>

[2] Parliament of Canada, "Senate," online: Government of Canada < http://sen.parl.gc.ca/portal/about-senate-e.htm>.

[3] *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[4] Richard Foot, "Senate," *The Canadian Encyclopedia* (June 19, 2014) online: Historica Foundation .

[5] *Ibid*.

[6] *Ibid*.

[7] *Senate*, *supra* note 1 at para 6:

Before referring the issue to the Supreme Court, the Conservative government had introduced three unsuccessful bills in the House of Commons:

1. Bill S-4 would have replaced the current senatorial term of office, lasting until age 75, with renewable eight-year terms;

2. Bill C-20 set out a detailed framework for consultative elections of "nominees" for office; and

3. Bill C-7 suggested provincial and territorial legislation that would have created consultative elections like Alberta's, and specified that Senators would sit for non-renewable nine-year terms.

[8] *Constitution Act*, *supra* at note 3.

[9] *Ibid* at para 80.

[10] *Ibid* at para 52.

[11] *Ibid* at para 90.

[12] *Ibid* at para 110.

[13] *Ibid*.

[14] *Ibid*.

[15] Emmett Macfarlane, "Did the Supreme Court kill Senate reform" *Maclean's* (April 25, 2014) online: Rogers Media.