

THE SPECIAL SENATE COMMITTEE ON SENATE REFORM

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LEGAL PERSPECTIVES

There are three issues of constitutional law surrounding the current examination of Senate reform options by the Special Senate Committee on Senate Reform.

1. The question of renewable appointments

The government's bill to alter the tenure of Senate appointments, Bill S-4, states that all new appointees to the Senate "shall hold a place in the Senate for a term of eight years." This language of this provision has given rise to the question whether appointments to eight-year terms will be renewable. A Department of Justice lawyer assured senators in a Special Committee hearing that these appointments would be renewable. The basis for this view is that section 24 of The Constitution Act, 1867 gives the Governor General (only on the advice of the federal cabinet, of course) power to summon qualified persons to the Senate. Qualifications for Senate appointment are set out in section 23 of The Constitution Act, 1867 and relate to age, citizenship and property ownership. Beyond the limits set out in section 23, there is no other condition and certainly not the condition that the person summoned to the Senate has already served an eight-year term. There is nothing in Bill S-4, it is argued, that will change this.

On balance, this, straightforward reading of the relevant constitutional texts seems correct. Yet, the renewability of eight-year appointments has become an issue. This may be because the language in Bill S-4 seems to create such a complete limit on length of Senate service. The phrase “shall hold a place in the Senate for a term of eight years” seems to connote an absolute limit on the time one can be a Senator. Perhaps, the concern also arises because the potential for corruption of senatorial independence is so pronounced if it turns out that appointments are renewable, that legislators want to believe that this is not a possibility. Certainly, if constitutional text were interpreted on the basis of sound constitutional theory (and the extent to which sound policy can be source of textual meaning is a controversial question) there would be undoubted force against reading Bill S-4 to allow reappointment of Senators holding eight-year terms.

There is some basis for wondering if the clear opinion of the Department of Justice lawyer is correct. There is often conflict between constitutional texts. For instance, the constitutional protection of sectarian education for some, but not all religions seems to violate freedom of religion and the guarantee of equal protection of the law, both of which are protected by the Charter of Rights and Freedoms. When this issue was brought to the Supreme Court of Canada, that body resolved the textual conflict by assigning primacy to the specific constitutional guarantee that had been given to a historic minority community.¹ That decision bears on the question of Senate tenure if one assumes that Bill S-4 actually suggests an absolute limit of eight years. If it does it would not be surprising for a court to impose it as one further qualification of the general appointment power, especially if the court were to draw on, in aid of its interpretation, the idea that it should give the meaning to the constitutional text that promotes best the democratic legitimacy of legislative institutions.²

There seems to no undue interpretive straining in finding ambiguity in the provisions that bear on tenure, or in resolving that ambiguity against the intentions of those who have introduced Bill S-4. What is clear is that this degree of uncertainty is simply not necessary; it would be simple matter (if renewability were truly desired) to make it clear that an appointment under section 24 was for an eight-year term, rather than stating that

an appointee “shall hold a place in the Senate for a term of eight years.” The difference is slight but gives rise to needless uncertainty.

2. The legality of using section 44 to implement the constitutional changes in Bill S-4

Part V of The Constitution Act sets out the procedures for amending the Constitution. Section 44 in that Part gives the Parliament of Canada unilateral power to amend the Constitution in relation to the executive government of Canada, the Senate and the House of Commons. Provinces have a similar unilateral power. These provisions relate to the internal basic organization and operation in both orders of government. When section 44 says that the Constitution may be amended with respect to the Senate it is not the case, I maintain, that all elements of Senate reform are achievable by ordinary parliamentary enactment, other than the four matters identified in section 42(1) of The Constitution Act, 1982 as requiring compliance with general amending rule (the 7/50 procedure) for constitutional amendments.

When Prime Minister Harper spoke to the Special Committee on Senate Reform on September 7, 2006 he stated that the constitutional amending formula “says that the Constitution of Canada in respect of the Senate can be amended by the Houses of Parliament with four exceptions, and [the current proposal] is not one of them.” The Department of Justice lawyer who appeared before the Special Committee immediately after the Prime Minister seems to have reiterated this position. It is noteworthy, however, that in his testimony he did not explicitly claim that the implication of expressing in section 42 specific exceptions to Parliament’s power to amend the Constitution of Canada under section 44 is that the section 44 power is otherwise comprehensive. He tentatively claimed that it was *exclusive* but that characterization of the power of Parliament under section 44 does not speak to its scope, just that, whatever its scope, it will displace other amending procedures.

The first question is whether altering the term of a Senate appointment falls within the categories of amendment listed in section 42. These categories are: the powers exercised by the Senate, the method of selecting senators, the number of Senators to be appointed from each province and residence qualifications of senators. Arguably none of these are engaged through altering the term of office of senators. However, it is not beyond reason to entertain the possibility that “method of selection” includes the length of time of an appointment in that the purpose for doing anything closely bears on the method of doing it. It cannot be denied that both the purpose and effect of an appointment are significantly altered by changing the term of appointment from “until age 75” to eight years and selection practices may change to reflect this. Moreover, if the Constitution is interpreted purposively, and if the Senate’s purpose is to reflect the federal nature of Canada in the Canadian parliament, then the categories of changes requiring provincial consent should be read widely. In this light, changes to the way appointments are made are likely to change how regions or provinces will actually be represented. It could certainly be argued that a change that touches provincial interests properly belongs in the category of amendments requiring consent from both orders of government.

If it is assumed that length of tenure does *not* fall within “method of selecting” under section 42, the next claim of the government is that Parliament can unilaterally, under section 44, change the tenure of senators. This claim arises from the presumption in statutory interpretation that by specifically naming particular members or topics within a general class legislators mean to exclude from the general class all other particularities. But, this is only a presumption and can be displaced when to do so makes better interpretive sense.

There are a number of reasons for believing that the naming in section 42 categories of Senate amendments (and thereby subjecting them to the general amending procedure) does not mean that every other type of Senate amendment falls to unilateral federal amending power under section 44. The first is that sometimes particularities within a class are named not to exclude implicitly all other instances but simply to ensure that named particularities are brought within the class. This argument applies in this case.

Section 38 seems largely to be related to federalism structures in Canada. The lists in section 41 and 42 remind us that elements of the national government also affect the federal structure and, therefore, should also require provincial consent. The counter argument to this is that while this is undoubtedly true those matters of national government organization that require provincial consent are limited to those matters that have been specifically named in section 42..

Second, one can see that listing in section 42 certain matters that require use of the general amending formula under section 38 has another purpose. The matters listed in section 42(2) are rendered immune from provincial opt outs from an amendment. The general class of amendments under section 38 is amenable to provincial opt outs. The purpose, therefore, of the section 42 list is to avoid this particular mechanism in the general amending formula. It could be argued that provincial opt-outs from Senate amendments not included in section 42 would also be undesirable and it is, therefore, dangerous to interpret the amending formula to place any Senate amendments within the general formula. However, provincial opt-outs can occur only in very specific circumstances – circumstances that sometimes pertain with respect to matters listed in section 42, but generally would not pertain to Senate amendments. The basic point, however, is that there is plenty of textual evidence against reading section 42 as intending to place every other sort of Senate amendment within the power of Parliament to make unilaterally under section 44.

Third, if one considers the provisions of The Constitution Act, 1867 that relate to the Senate it defies sense to say that any change of them, save the four changes named in section 42, can be implemented unilaterally by the federal level. That would mean that parliament, without provincial consent, could amend the 1867 constitution with respect to the distribution by electoral divisions of the Quebec senators, the age qualification, the citizenship qualification, the property and wealth qualifications, the power to add supernumerary senators, the requirement to reduce Senator representation when there are supernumerary senators, the total number of senators, the conditions for the removal of senators and the replacement of senators. Most, if not all, of these elements of Senate

structure impact on how provincial and regional representation will occur in the Parliament of Canada and it is not sensible to conclude that the framers of the 1982 constitution believed that they could all be altered unilaterally by Parliament. Furthermore, there is no sound argument that all Senate reforms (other than those under section 42) must fall within section 44 in order for the section to have *any* meaning since there are other constitutional provisions relating to how the Senate does business that are clearly part of the internal constitution and, hence, amendable under section 44.

Finally, The Supreme Court of Canada in the *Reference re Authority of Parliament in relation to the Upper House*³ limited Parliament's authority to amend the Senate to changes that neither impaired the second sober thought in legislation nor changed the essential character of the Senate. Two issues arise from this. Do the standards established by the Supreme Court prior to the constitutionalization of a formal amending procedure have any bearing on how the terms of that new formal procedure are to be interpreted and, second, even if they do have some bearing, does changing a Senate appointment to an eight year term change the essential character of the Senate. The answer to the first question is that if the Court were to accept the proposition that section 44 allows full unilateral amending capacity, apart from the four section 42 exceptions, its earlier decision would be irrelevant. However, if it decided that the section 44 power required a limited reading in order to preserve interests of the federal structure the case would be highly relevant. Of course, in deciding whether section 44 is exhaustive of Senate amendment authority, the Court could well be influenced by the conception of federalism interests that it adopted in *Reference re Authority of Parliament in relation to the Upper House* in describing limits to unilateral federal authority. As for the second question, if the *Upper House* decision were to be considered relevant, the Court is likely to see the change in the term of a Senate appointment as altering the functioning and essential character of the Senate – not necessarily for the worse, but, nevertheless, a significant alteration.

There is one further prudential argument with, perhaps, only weak legal significance. The current proposal to limit senatorial terms to eight years, if it can be implemented

under section 44, will require approval by the Senate. If such an amendment required provincial because it fell under section 38, the Senate could not block the reform beyond 180 days from a House of Commons resolution. It makes sense to suggest that the amending procedures should be interpreted to restrict a Senate veto with respect to reforms to the Senate, especially when such reforms are very likely to weaken the political legitimacy of sitting senators.

Such policy arguments, however, would not normally bear on judicial interpretation unless there was legislative history to suggest that the framers of the provisions had made this very calculation.⁴ The very complicated provenance of The Constitution Act, 1982 makes any discernment of the intentions of the framers almost impossible

3. Can Parliament enact a scheme of advisory senatorial elections?

In the course of Special Committee hearings the prospect of senatorial elections came up. In particular, it was noted that if the government feels it can only make reforms to the Senate that can be implemented by Parliament under section 44, how does it plan to initiate Senate elections. At the very conclusion of the Special Committee hearing on September 7, 2006 an official from the Privy Council Office suggested that a parliamentary enactment that would establish an "... elections type consultative type bill that would provide other guidance to the Prime Minister in that appointment process." The Department of Justice lawyer then gave his opinion that it is always possible to "temper" the effect of constitutional restrictions through "... various legislative and other techniques." He corrected senators who had suggested that governments and legislatures should not do indirectly what they cannot do directly by saying that that principle is often honoured in the breach, rather than in the observance. He buttressed this claim by pointing to the prohibition against legislative delegation between orders of government having been sidestepped by the delegation of administrative authority between jurisdictions. Apart from objecting to the characterization of this distinction as not preserving a vital principle of democratic responsibility and credibility, and instead

representing it as a mere technique, the analogy is imperfect. Inter-delegation case law has imposed real restraints on the operation of Canadian federalism and governments are not now doing what they attempted to do more than half a century ago.⁵

Calling elections consultative or advisory will not persuade the Court to overlook the lack of provincial consent for a reform in the selection of senators unless there is credible evidence that Senate elections will actually be treated as simply consultative by the government. To my mind, it is simply inconceivable that a government would initiate a non-binding electoral scheme for the Senate. It would fly so directly in the face of the accountability and legitimacy principles that induce reform and it would create in the nation a corrosive level of electoral cynicism. It would be reasonable to assume that the Court would share this incredulity over the claim that Senate elections would not constrain completely the discretionary power of governments with respect to appointments. The Supreme Court of Canada seeks to apply constitutional norms to real contexts and to actual practices, and advisory elections implemented under section 44 would, therefore, be in constitutional jeopardy.

¹ See, *Reference re Bill 30, an Act to amend the Education Act (Ontario)*, [1987] 1 SCR 1148. Wilson J. said: “It was never intended ... that the Charter could be used to invalidate other provisions of the Constitution, particularly a provision such as s. 93 which represented a fundamental part of the Confederation compromise.”

² The use of implicit constitutional principles, and specifically the principle of democracy, in determining constitutional rules was endorsed in *Reference re Secession of Quebec*, [1998] SCR 217.

³ [1980] 1 SCR 54

⁴ Even then there would be considerable controversy over the extent to which the record of legislative intent should influence legal interpretation. In Canada, we are perhaps too conservative in our reluctance to conduct statutory interpretation in light of the purposive context.

⁵ See *A.G. Nova Scotia v. A.G. Canada (Nova Scotia Inter-delegation)*, [1951] SCR 31.