

Whose Senate is it anyway?

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WHOSE SENATE IS IT ANYWAY?

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This is no way to reform the Senate of Canada— but it just may be the only way. That is the dilemma that will face the Supreme Court of Canada when it hears a Reference case on proposals to turn the Senate into a partly or somewhat elected body in November 2013.

For the second time in just over 30 years, the Government of Canada is asking the Supreme Court of Canada whether Parliament had the unilateral authority to make changes to the Senate without agreement of the provinces. In 1980, the Government of Prime Minister Pierre Trudeau sought not merely to alter the role of the Senate and the method for appointing its members, but to change the very name of the institution—making it the House of the Federation. The Supreme Court said “no”.

¹ One year later in the *Patriation Reference*² the Court sent the eleven governments of Canada off to find a ‘substantial consensus’ on constitutional reform. This the governments famously did, with the exception of Quebec, but not with respect to the Senate. That question was left for another day, a day which has never since come. And so, three decades later, a different Canadian government, with significantly different priorities, is returning to the Court in pursuit of a different answer.

I. THE PROPOSAL

The precipitating event leading to the reference to the Court that is now scheduled to be heard over three days in mid-November 2013 was the Harper Government’s introduction of Bill C-7 into Parliament shortly after winning its majority in May 2011. The proposed *Senate Reform Act* purports to make changes to both the process for appointing and the tenure of Senators. First, the statute would oblige the Prime Minister of the day to “consider” the names of those persons who won election at the provincial level for Senate nomination when recommending appointees to the Governor-General.³ Second, newly appointed Senators would be limited to a non-renewable nine-year term, rather than the current lifetime appointment to the mandatory retirement age of 75. Of these two changes, only the second is proposed to be effected by amendment to *Constitution Act, 1867*. The first change operates on the basis of the existing system for appointment of Senators by the Governor General, which by convention, is made on the advice of the Prime Minister. What the *Senate Reform Act* adds to this process is a standard model for Senate elections to be held by willing provinces set out in a Schedule to the *Act*, and the aforementioned obligation on the Prime Minister to consider the results. It is the clear hope and intention of the Government that in this way, a new convention will come into being binding future governments to appoint only election winners to vacant Senate seats.

On its merits this is a dubious proposal. This is not because the idea of electing Senators is an inherently bad one. Recent scandals about the place of residence and expense accounts of Senators like Mike Duffy have brought the reputation the current appointed institution to an all-time low. Apart from outright abolition, election of Senators has long seemed like a logical part of any solution. The problem with Bill C-7, however, is its improvised and ill-considered nature. The Bill introduces a process of election without making any changes to the role and authority of the Senate

in the Canadian political system. In addition, it rests on province-by-province adoption and elections that will not align with Senate vacancies, leading to a hodge-podge of outcomes and statuses.

With respect to the first issue, it is important to recall that under the Constitution of Canada, the Senate exercises virtually equal power in the legislative process to that of the House of Commons. The only difference lies in the inability of Senators to introduce money bills into Parliament. The lawful power of the Senate largely explains why the framers in 1867 chose to make it an appointed body. As Christopher Moore points out, most of the framers were devoted to the principles of responsible elected government and representation by population.⁴ They believed that an unelected Senate would lack the political legitimacy to exercise its full authority, and in so doing to obstruct the will of the elected House. In this, they proved prescient. With Bill C-7, Canada moves in the direction of the United States, which famously divides legislative power between three electorally legitimated branches. One might think that the worsening governing gridlock which that country has experienced over the last 10-20 years would serve as a cautionary tale for Canadians and their federal government, but that seems not to be the case..

A similar quality of improvisation characterizes the proposed move to term limits and the electoral and nomination processes. The former is necessary to produce any meaningful regularity to Senate elections. By making the terms non-renewable, however, the accountability of elected Senators is severely reduced. Elections will be held in those provinces that agree to adopt the federal formula, but not in others. Where elections are held, they will not necessarily coincide with vacancies in the Senate, but may happen years in advance.

In short, the *Senate Reform Act* would plunge the country into a new era of governance, but with little discussion or forethought of the consequences. This does not seem like the way a mature democracy should function.⁵ In Canada, when a maturity deficit threatens our basic political institutions, we have sometimes called on the Supreme Court to sort things out. Can we expect that to happen in this instance?

II. THE REFERENCES

Shortly after the announcement of Bill C-7, the government of Quebec, then led by the federalist Premier Jean Charest, declared its opposition to this unilateralist proposal. In May 2012, Quebec filed referred the constitutionality of the *Senate Reform Act* to the Quebec Court of Appeal. In the Fall of 2012, Prime Minister Harper announced that his government would seek to pre-empt the Quebec reference by initiating its own reference concerning Bill C-7 to the Supreme Court of Canada. However, it took another four months before the Attorney General of Canada got around to filing the reference questions with the Court. And what a set of questions they are!

If you are going to go to the trouble of asking the Supreme Court of Canada to rule on a major government initiative, you might as well ask the Justices a whole host of questions and give them a raft of alternatives. That at least seems to be the Harper government's philosophy. One might say they have gone well past the point of wanting to engage in a dialogue with the Court, to that of looking for a rambling after-dinner conversation. These are the six Questions asked in the federal reference:

1. *In relation to each of the following proposed limits to the tenure of Senators, is it within the legislative authority of the Parliament of Canada, acting pursuant to section 44 of the Constitution Act, 1982, to make amendments to section 29 of the Constitution Act, 1867 providing for*