TOP FIVE 2014

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

REFERENCE v SENATE REFORM, 2014 SCC 32, [2014] 1 SCR 704.

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https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13614/index.do

Facts

Under Canadian law, lawmakers can submit a question to the courts if they need an opinion on an important legal question. These questions are called **references** and they typically seek input about whether a proposed law is constitutionally valid.

When establishing Canada's political structure, the framers of the *Constitution Act, 1867,* sought to adapt the British form of government. They preserved the British structure of a lower lawmaking chamber made up of elected representatives (the House of Commons) and an upper lawmaking chamber whose members were appointed by the head of state (the Senate). The role of the Senate is to carefully study laws proposed by the House of Commons before they are adopted, and all laws require Senate approval in order to come into effect. The Senate was also intended to provide regional representation as opposed to representation according to population. This was to ensure that each distinct region in Canada would have a chance to be represented in the law-making process. Over time, the Senate additionally came to represent various groups that were under-represented in the House of Commons and therefore did not always have a meaningful chance to present their views through the majority rules democratic process.

Even though the Senate is one of Canada's foundational political institutions it has been subject to calls for reform since its beginnings. Some of these criticisms are that the Senate does not provide effective oversight or meaningfully represent the interests of the provinces, that it lacks democratic legitimacy, and that appointments are based on political favours rather than merit. In light of these criticisms, and the occurrence of a number of scandals involving Senators, the Government of Canada brought forth several questions to the Supreme Court of Canada (SCC) in an attempt to determine the scope of Parliament's powers to reform the Senate and the steps necessary to effect such change.

Procedural History

On February 1, 2013, the Governor General, under s. 53 of the *Supreme Court Act*, asked the SCC for a reference on four key issues related to the constitutional procedures required to reform or abolish the Senate.

Issues

1. Can Parliament unilaterally set fixed terms of office for Senators?
2. Can Parliament enact legislation that provides a means of consulting the population of each province and territory as to its preferences for potential nominees for appointment to the Senate?
3. Can Parliament unilaterally remove the requirement that Senators must own land worth $4,000 in the province for which they are appointed and have a net worth of at least $4,000?
4. If Parliament wished to abolish the Senate, which of two processes would it need to follow: the **general amending formula** (which requires the support of most of the provinces" or the **unanimous consent procedure** (which requires the support of all of the provinces as well as the House of Commons and the Senate itself)?

Decision

1. Parliament cannot unilaterally fix terms for Senators. The general amending formula applies because such a decision engages the interests of the provinces.
2. Parliament cannot unilaterally enact legislation that creates a consultative election scheme for the appointment of Senators. The entire "method of selecting Senators" is subject to the general amending procedure.
3. Parliament can act on its own to abolish land ownership and personal net worth requirements for Senate appointees, since doing so does not affect the interests of the provinces.
4. The unanimous consent procedure rule, rather than the general amending formula, applies to outright abolition of the Senate.

Ratio

The federal government cannot make sweeping unilateral changes to the Senate. The Senate is a constitutionally-created body, and laws that would change how it is composed or criteria for its members are subject to the same rules as other constitutional law. Parliament can singlehandedly make changes to the Senate that do not alter its fundamental nature and role, but for significant changes that have an impact on the interests of the provinces and territories, the processes that are in place must still be followed.

Reasons

In answering the Governor General's questions, the SCC began by laying out the framework for constitutional amending procedures. In the *Constitution Act, 1982, (the "Act")* there are several key rules to consider. First, s. 44 sets out one rule, known as the **unilateral federal amending procedure**. It states that the federal 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".

While this might appear to give Parliament the power to make unilateral changes, in fact this power is limited by ss. 41 and 42 of the *Act*. Among other conditions, these two sections clarify what procedures are to be followed for making constitutional changes that are likely to have a significant impact on the interests of Canada's provinces and territories. Depending on whether provincial interests are at stake, and if so, how important these interests are, there are different rules that apply.

The first of these is the **general amending procedure**. This formula, also known as the 7/50 procedure, requires that constitutional amendments must be authorized by the Senate, the House of Commons, and legislative assemblies of at least 7 provinces whose population represents, in total, at least half of the population of all the provinces. The second is the **unanimous consent procedure**, which goes further and requires the approval of all the provincial governments. Finally, the government argued that it had the power to make some changes using a **unilateral rule.** This would mean it could simply enact legislation without requiring the approval of the provinces or the Senate.

The SCC first examined the notion of "consultative elections". Essentially, the question was: if the Prime Minister can appoint whomever he or she wants to the Senate, could he or she appoint a person who has won an "unofficial" consultative election? Under this rule, the Prime Minister would take a vote by the people into account when appointing Senators from a region. Appointing in this manner would leave the formal mechanism for appointing Senators (summons by the Governor General acting on the advice of the Prime Minister) untouched.

In dismissing consultative elections, the SCC turned its attention to the intentions of the Constitution. The Court found that the framers of the *Constitution Act, 1867,* deliberately chose executive appointment of Senators in order to allow the Senate to play the specific role of a complementary legislative body of sober second thought, independent from the electoral process and the political arena. In other words, the Senate must remain completely independent from the House of Commons. In this way, "[a]ppointed Senators would not have a popular mandate - they would not have the expectations and legitimacy that stem from popular election. This would ensure that they would confine themselves to

their role as a body mainly conducting legislative review, rather than as a coequal of the House of Commons." Consultative elections would significantly change the Senate's fundamental nature and role as a complementary legislative body of sober second thought. The SCC therefore ruled that the general amending formula (the approval of seven provinces representing fifty percent of the population) would be required to make this change.

With respect to the question of which amending formula applies for the abolition of the Senate, the SCC ruled that the unanimous consent procedure would be required. The general amending formula only applies to Senate reform, and outright abolition is outside its scope. Abolition of the Senate would have the effect of changing the amending formula altogether, since the Senate is mentioned in the general amending formula. In other words, this would involve changing the rules by which the Constitution can be altered, and this would be so serious that it would require unanimous support. As well, the Court noted, using this procedure would mean that the Senate itself would have the power to veto its own abolition.

The next issue is with respect to Senatorial terms. The federal government argued that s. 44 gave it the unilateral power to enact legislation defining the length of terms for Senators. Most provinces argued term limits could mean that a government could replace an entire Senate during its governing period, thus undermining the Senate's ability to conduct independent legislative review and provide sober second thought. However, the general formula, not the unilateral rule, would apply, since the amendment would affect the interests of the provinces. The SCC found that fixed terms would be a significant change affecting the interests of the provinces by giving Senators less independence.

The SCC found that the unilateral rule is an exception to the general process that only applies to changes to the Senate that do not alter its fundamental nature and role. The SCC ruled that the unilateral rule applies to the constraints on property ownership or net worth for senators, because changing these would not change the basic function of the Senate, impact a senator's ability to perform his or her duties or engage the interests of the provinces. The lone exception noted was Quebec, where there is a unique arrangement that requires senators to hold property in the province. As changing this would require the approval of Quebec's National Assembly, the SCC ruled that Parliament could remove all property requirements except in the case of Quebec.

DISCUSSION

1. What is the general purpose of the Senate? Why does Canada have two legislative bodies?

2. Which segments of Canadian society would have both owned property and had a net worth each valued at $4000 or more, when the Senate eligibility rules were written in the 19th century? Who would be modern equivalents to these Canadians?

3. Under the current structure, Ontario, Quebec, the Maritimes and Western Canada each have 24 senators and Newfoundland and Labrador and three territories each have one. Does this structure effectively ensure regional representation?

4. What are some arguments for and against the idea of having senators be elected by popular vote in their regions?

5. The "living tree" doctrine is the principle of constitutional interpretation that says that the constitution is not static and is constantly evolving. Our constitution therefore must be read in a broad and progressive way, so that it can adapt to the changing attitudes and realities of Canadian society. With this in mind, could the SCC have applied this principle and taken a different view on Senate reform? Explain your answer.