Feature

Renewing the Senate under the Section 44 Amending Formula

Parliament has the ability to modernize aspects of the Senate without needing to resort to constitutional amendment. In this article, the author highlights some archaic provisions of the *Constitution Act, 1867* that could be updated without altering the Senate's fundamental nature. These changes would arguably allow the Senate to better reflect contemporary Canada.

Dan Hays

The Liberal government, elected in 2015, has chosen to renew the Senate by means of a one-step non-statutory reform. The change is limited to making only non-partisan, merit-based appointments and accompanying adaptations. All other features of the Upper House's antiquated constitutional foundations continue, even though many of them serve no public purpose.

'Complex' comprehensive institutional change must inevitably involve the provinces, First Nation representatives and regional public input. There is, however, much more that Parliament can do to reform the Senate that goes well beyond the appointment process.

Section 44 of the *Constitution Act 1982* states that "Subject to sections 41 (*amendment by unanimous consent*) and 42 (*amendment by 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." In its 2014 opinion, the Supreme Court interpreted s. 44 as meaning "unilateral amendment of aspects of government institutions that engage purely federal institutions." It went on to state that "section 44 encompasses measures that maintain or change the Senate without altering its fundamental nature."

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While provinces must have a say in constitutional issues that engage their interests, there would be no constitutional prohibition to Parliament acting alone through ordinary legislation to update those sections dealing with the Senate's basic design as long as such changes do not affect its fundamental nature and role. For example, the relatively open appointment process that has been created by the current government uses a selection committee to examine the qualifications of potential appointees and make recommendations.

In my view, nothing being proposed herein would change the Senate's fundamental nature or make any structural change that would require provincial consent. That said, it is important to maintaining basic standards of governance that a Senate Modernization Bill be laid before Parliament.

Updating antiquated sections of the *Constitution Act, 1867* through s. 44

Section 23 outlines the qualifications of senators. Subsection 23(1) requires a senator to be of the age of 30 years. Section 3 of the *Canadian Charter of Rights and Freedoms* provides that "Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein." As well, section 3 of the *Canada Elections Act* states: "Every person who is a Canadian citizen and is 18 years of age or older on polling day is qualified as an elector." Subsection 23(1) could be replaced by a statement that a senator must be a qualified elector. This would ensure that only eligible voters could be appointed to the Senate and would allow flexibility as the age for voting could be changed without any further need to amend section 23. Such a change would have the added advantage

of bringing the qualifications of senators into line with the *Canadian Charter of Rights and Freedoms.* This amendment becomes highly relevant if the Senate becomes an elected legislative body.

Subsection 23(2) goes on at length about the qualifications of a senator in terms of a "natural born subject of the Queen" or a person naturalized by the "Parliament of Canada after the Union." The wording is archaic. Given the proposal that to qualify to be a senator, one need only to be a Canadian citizen and the age of majority at the time of appointment, this qualification could simply be deleted.

Subsections 23(3) to (6), unchanged since the date of Confederation, require that every senator must own lands having a value of $4,000, as well as real and personal property of a net value of $4,000. A property qualification has no apparent public benefit. These subsections also specify that each senator shall be resident in the province they represent. In the case of Quebec, the senator shall have his or her property in the Electoral Division for which the senator is appointed or be resident in that district. We should update or eliminate where appropriate as many of these archaic qualifications as possible. Obviously, subsection 23(4), that senators should be resident in the province for which they are appointed, is relevant, particularly in anticipation of an elected Senate. The other five are questionable.

It has been suggested that neither the residency nor the property qualifications can be amended by Parliament alone since section 42 of the amending formula requires that changes to the residence qualifications of senators involve provincial agreement. However, section 31 of the *Constitution Act, 1867*, which deals with the disqualification of senators, refers to a senator ceasing "to be qualified in respect of property or of residence." The use of the word "or" suggests that the Fathers of Confederation distinguished between the two types of qualifications, and I believe it is entirely within Parliament's powers under section 44, as does the Supreme Court, to delete any reference to a property qualification.

It should be noted that the provisions for Quebec are quite distinctive, and the references to the 24 electoral districts as of 1867 included only a portion of the southern area of the present province. The residents of the northern part of the province on a strict interpretation of this requirement are today formally without representation in the Senate since the boundaries of the 24 senatorial districts of Quebec were not adjusted as, for instance, the province grew to include the region known as Nunavik. This section could, I believe, be modernized pursuant to section 43 of the *Constitution Act, 1982* which deals with the amendment of provisions relating to some but not all provinces and requires only resolutions from Parliament and the government and legislature of the province affected. In addition, the requirement that a senator from Quebec must be a resident in the Electoral Division from which they are appointed could also be modernized in accordance with section 43. This is particularly relevant if Quebec should choose to retain the concept of Senate constituencies. Something other provinces might wish to consider.

Under subsection 31(1), the seat of a senator is vacated if he or she fails to appear for two consecutive sessions. Section 33 states that any question respecting the qualification of a senator or a vacancy in the Senate shall be heard and determined by the Senate. There is a need to specify, through constitutional amendment, that the Senate can determine, from time to time, the attendance requirements necessary for a Senator to retain his or her place.

As for subsection 31(3), I agree that a senator who becomes bankrupt should vacate his or her seat. However, the *Act* also refers to a senator who "applies for the benefit of any law relating to insolvent debtors." This situation could have applied, for example, to a hypothetical senator from the prairies in the 1930s who sought creditor relief under the *Farmers' Creditors Arrangement Act*. Again, we must face the issue that nothing about constitutional reform is easy, even if it is a reform purely within federal jurisdiction. I am sure, however, that the wording of this section can be modernized and improved by adopting current standards of what constitutes insolvency.

One subsection of the 1867 Constitution in need of modernization is 31(4) which specifies that the seat of a senator attainted of treason or convicted of a felony or any infamous crime must be vacated. The crime of treason is still in the *Criminal Code* although very rarely invoked. The word has been contentious in Canadian history, and should perhaps be removed. The concepts of felonies and misdemeanors were replaced in the original *Code* by indictable offenses and summary conviction offences. Generally speaking, in 1867 felonies were graver crimes perhaps punishable by death which resulted in the forfeiture of the perpetrator's lands and goods to the Crown. The word felony should be replaced with "indictable offence."

The concept of an "infamous crime" found in subsection 31(5) is harder to translate into modern circumstances. Generally speaking, it is likely to be associated with a disability such as an inability to hold office. Crimes involving public fraud or the corruption of public justice or public administration tend to be classed as infamous crimes. If a senator violates the public trust, his or her seat should be vacated.

Subsection 31(5) requires a seat to be vacated if a senator no longer meets the property or residence qualifications. The residence qualifications cannot be addressed except by the general amending formula but, as I have discussed, it is interesting that subsection 31(5) refers to "property OR residence qualifications." Consideration must be given to removing the outdated reference to "property."

There is also the language of the oath of allegiance contained in the fifth schedule to the *Act*. I think the time is ripe that in addition to swearing an oath of allegiance to Her Majesty the Queen, senators should also swear an oath of loyalty to the people of Canada.

Though more problematic and controversial, a Senate Modernization Bill should give consideration to including term limits for Senators. I am in agreement that until such time as the Senate is elected, the tenure of senators should be for a fixed term, say 15 years. Such a change would permit a greater turnover of senators, allow senators to stay more in tune with public opinion, and be the first step toward a more comprehensive renewal of the Senate. However, the basic rule, set out in the 1980 Supreme Court ruling in *The Upper House Reference*, and re-confirmed in the 2014 SCC opinion, is that if a change impacts on the fundamental feature or essential characteristic of the Senate, the provinces must be involved. As we know, the Court stated in 2014 that "the imposition of fixed terms for Senators engages the interests of the provinces by changing the fundamental nature or role of the Senate."

Arguably, the changes to the appointment process made by the government of the day alter the "fundamental nature and role of the Senate" by removing time-honored features of the Westminster system where most appointments are partisan. Polarizing objectivity and partisanship does little justice to the historical record of the Senate which shows that it has, for the most part, performed both functions effectively. The loss of cohesion, rooted in partisanship, weaken the Senate's role in our democracy to the advantage of the House of Commons and the government of the day. The new appointment process has, and will increasingly, impact on the way parliamentary business plays out and, therefore, constitutes a significant change in its basic design. To date, however, the provinces have not objected.

There having been no formal provincial objections to the "reformed" appointment process. It follows that other amendments can be made to the Senate's fundamental nature as long as the provinces do not disagree. Notably, this was the case in 1965 with regard to the compulsory retirement age of 75 when Parliament proceeded unilaterally hearing no provincial objections.

The proposals noted herein would be an important step forward and would improve the quality of governance in what the Supreme Court has noted is "one of Canada's foundational institutions."

As to the urgency of such an initiative, I am reminded by the statement attributed to President Kennedy: "The time to fix the roof is when it is not raining."

Now is the opportune time.