Senate Term Limits: Perspectives on Reform

Introduction

Can the Federal government unilaterally impose term limits on members of the Senate? Does such a drastic change in our parliamentary institutions demand a formal constitutional amendment agreed by 7 provinces representing 50% of the population?

Perhaps not.

This summer, the Federal government will propose a series of reforms to the Canadian Senate, the Upper House of Parliament. Chief among these reforms will be a proposal to change the tenure of Senators; in other words to set limitations on the term, or length of time that they can serve as a Senator.

This is the third attempt by the Conservative government of Prime Minister Stephen Harper to reform the Senate. With both the House of Commons and Senate now firmly in the control of the Conservatives it seems likely that this time, the proposed reforms will be approved by Parliament.

Senate reform has long been a key policy issue for both the Conservative Party and the Reform Party that preceded it. While the proposed changes announced by the government fall far short of the so-called "Triple E"[1] Senate, advocated by former Reform Party leader Preston Manning, they would still represent the most fundamental changes to Parliament in our country's history.

But can Parliament impose a term limit on Senators without re-opening a "constitutional can of worms"? The Federal government, as well as leading legal scholars, believe it can. The government argues the Constitution gives it the necessary power to make these changes without the support of the Provincial governments.

This article will examine the issue of Senate term limits and whether the Federal government does indeed have the power to impose them without provincial approval.[2]

What is required to make changes to the Senate?

a) Term Limits and the *Constitution Act, 1982*

The *Constitution Act of 1982* states, that:

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[3].

A plain reading of this statement appears to indicate that Parliament - that is, the House of

Commons, the Senate and the Governor General - can make changes to the Senate without the need for a formal constitutional amendment.

However, *The Constitution Act of 1982* also sets out what changes to the Senate would require use of the Amending Formula, that is , approval by at least 7 provinces representing at least 50% of the population[4]. These changes are:

a) Changes to the powers of the Senate ;

b) the method for selecting Senators;

c) the number of members representing each province; and

d) senator residency qualifications[5]

This list is important not so much for what it contains but for what it does not: there is no mention of Senate tenure. Therefore it follows that the federal government can arguably institute term limits for Senators unilaterally.

The Federal government bases its ability to institute term limits unilaterally on this interpretation of the Constitution. Although the Supreme Court has never ruled on this issue, the majority of Canadian legal scholars agree with the Federal government's position that the Constitution does give Parliament the ability to institute term limits on Senators unilaterally[6].

Nevertheless, it is at least arguable that these elements of the Constitution should be read in the context of the *Upper House Reference,* a previous decision of the Supreme Court dealing with Senate reform.

b) **Term Limits and the *Upper House Reference*, 1980**

The *Upper House Reference* was the result of the Federal government requesting clarification from the Supreme Court of Canada on its power to unilaterally change the Senate[7]. The Court ruled that Parliament could not enact any changes that would alter "the fundamental features, or essential characteristics given to the Senate as a means of ensuring regional and provincial representation in the Federal legislative process" without the approval of the Provinces.[8]

In order to determine what constitutes these "essential characteristics" the Court looked to the preamble to the *Constitution Act, 1867* which states that we "shall have a constitution similar in principle to that of the United Kingdom".[9] The Court took this to mean that we should have an unelected Upper House appointed for life.[10]

At first glance, this approach appears to hinder any attempts to institute term limits; and yet, the Court ruled that the unilateral federal decision to enact a mandatory retirement age of 75 did not impair the essential characteristics of the Senate[11]. The Court declined to rule specifically on further term limits as no proposed term had been included in the reference questions; however, it did say that at some point a term limit could be so short as

to impair the functioning of the Senate in providing "sober second thought in legislating".[12] The Court did not specify what particular length of term would be short enough to interfere with the Senate's role.

There is some debate as to the continuing relevance of this decision. The decision was issued in 1980 and many leading legal scholars argue that the *Constitution Act of 1982* has superseded this decision entirely. These scholars assert that those essential characteristics of the Senate the Supreme Court referred to were specifically listed in the new Constitution[13]. Because Senate tenure is not included, it follows that it should not be considered an essential characteristic.

However, others argue that the list of essential characteristics of the Senate contained in the Constitution is not exhaustive and that it is still necessary to interpret the Constitution in light of the Supreme Court decision in the *Upper House Reference*[14]. This was the approach taken by the Senate Committee that was tasked with examining Senate Reform in 2007. They interpreted the *Upper House Reference* to mean that the following three critical elements must be protected to meet the constitutional requirement that the essential characteristics of the Senate be maintained:

1. independence;
2. a capacity to provide sober second thought; and
3. the means to ensure provincial and regional representation[15].

The Committee felt that the term limits set out in the most recent attempt by the Federal government at Senate reform fell short of meeting these elements. The crux of their concern centred on the length of the term which, at eight years, they felt was too short. The recommendation of the Committee in their report was for a term length of no less than 15 years[16].

It is unclear whether the Supreme Court would agree with the Committee that 15 years should be the minimum term for Senators, given their broad comments about term limits in the *Upper House Reference*.

Given this interpretation of the *Upper House Reference* and the recommendations of the Senate Committee, it does appear that Senate term limits instituted unilaterally by the Federal government would be constitutionally valid. The major remaining issue to be determined then is appropriate term length.

Conclusion

Senate reform promises to remain an important issue in Canada. The Federal government has pledged to aggressively pursue the issue in the coming Parliament. With majorities in both the House of Commons and the Senate, the Conservative government is now ideally placed to successfully enact legislation to that end. Given these developments, Canadians should understand the Constitutional issues that surround attempts to reform the Senate.

The Federal government makes a compelling argument that the power it has through the *Constitution Act, 1982* gives it the authority to enact term limits without provincial support. This argument has strong support from the Canadian legal community. There is an equally strong argument that the Supreme Court's decision in the *Upper House Reference* is still a relevant tool in interpreting Parliamentary powers over Senate reform, if only with respect to the length of term limits.

The Conservative government of Stephen Harper has been trying to reform the Senate since forming government in 2006. Twice it has failed. Now, with the backing of Parliament and the legal community, it appears that, for Stephen Harper, the third time may be the charm.

In the news:

No rift within Tory caucus in Senate: Senators

Senate reform ruffles some Conservative feathers

No need for top court's advice on Senate reform: Tories

Further Reading:

Report of the Senate Standing Committee on Legal and Constitutional Affairs on Senate Term Limits

Evidence of Peter Hogg on Senate Term Limits given during Committee

Evidence of Patrick Monahan on Senate Term Limits given during Committee

Evidence of Prime Minister Stephen Harper on Senate Term Limits given during Committee

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[1] "Triple E" stands for Equal, Elected and Effective and served as a rallying cry for westerners in the 80's and 90's who strongly supported Senate reform

[2] The other major proposal of creating a system where provinces can elect senators presents issues of its own and warrants special study in a future article.

[3] *Ibid*, s 44. This power is limited by the exceptions listed in sections 41 and 42 of which the four changes to the Senate are listed below.

[4] Ibid, s 38(1).

[5] *Ibid*, s 42. These four changes are listed in ss. (b) and (c) of section 42 of the *Constitution Act, 1982*

[6] For example, both Dr. Peter Hogg and Professor Patrick Monahan, recognized experts in the field of constitutional law, expressed support for the position of the federal government that the unilateral institution of term limits is constitutionally valid during hearings of the Special Senate Committee on Senate Reform. Senate, Special Committee on Senate Reform, Proceedings, 1st Session, 39th Parliament, 20 September 2006, (evidence of Peter Hogg) and 21 September 2006, (evidence of Patrick Monahan).

[7] *Re: Authority of Parliament in relation to the Upper House*, [1980] 1 SCR 54, 102 DLR (3d) 1 .

[8] *Ibid*, at para 49.

[9] Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, Preamble, reprinted in RSC 1985, App II, No 5 [Constitution Act, 1867].

[10] *Upper House Reference Supra* note 7, at para 48.

[11] *Ibid*

[12] *Ibid*

[13] Senate, Special Committee on Senate Reform, Proceedings, 1st Session, 39th Parliament, 20 September 2006, pp. 4:36–4:37 (evidence of Peter Hogg). These would be the four characteristics set out in section 42.

[14] Senate, Special Committee on Senate Reform, Proceedings, 1st Session, 39th Parliament, 7 September 2006, pp. 2:28–2:29 (evidence of Warren Newman, General Counsel, Constitutional and Administrative Law Section, Department of Justice Canada).

[15] Canada, Senate, Standing Committee on Legal and Constitutional Affairs, Thirteenth Report, 1st Session, 39th Parliament, (12 June 2007) at p. 4.

[16] *Ibid,* p. 6.