"A Welcome Complement"

What the SCC Reference Means for the Senate and Possible Reform

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I. Introduction

This past April, the Supreme Court of Canada gave its opinion on questions submitted by the federal government as to how the Senate might be reformed.[1] Effectively, they had been asked for a 'legal instruction manual' that would outline the constitutionally correct methods to make alterations to the Senate. The questions involved changes to the tenure, selection process and property qualifications of Senators, as well as the abolition of the Senate.[2] It was the unanimous conclusion of the Court that significant changes to the Senate cannot be made by Parliament acting alone. Substantial modifications to the nature and functions of the Senate engage provincial interests. Consequently, they can only be realized through constitutional amendments that require the consent of most or all of the provinces.[3]

The decision makes three distinct points. Firstly, it identifies the role of the Senate as a complementary body to the House of Commons.[4] Secondly, it clarifies that any substantial changes to the Senate will engage the interests of the provinces.[5] Finally, it indicates that the minimum level of support required for major reforms is the agreement of at least seven provinces, representing at least half of the population.[6]

The value of the Reference is that it provides a context for a more meaningful conversation about the role of the Senate, as well as indicating the level of support needed for any significant changes. In the course of its opinion on the questions specifically asked, the Supreme Court took the opportunity to clarify the purpose and functions of the Senate in its historical and current context. With these traits and advantages more clearly in view, and with a roadmap to possible reform having been drawn out, parliamentarians and Canadians can now better focus on building upon the Senate's strengths.

During my past 24 years as a Senator, I have both witnessed and actively participated in numerous activities providing abundant evidence for the Senate's distinct characteristics. I hope that I might be allowed to indulge a certain nostalgia, as I draw upon some of these experiences in order to illustrate several of the Senate's important functions.

One of the key elements of the Reference is that the Court has affirmed the essential role of the Senate as a complementary legislative chamber of sober second thought, serving a distinct purpose within the structure of our bicameral Parliament.[7] It supports this analysis by identifying five major characteristics and functions which are fundamentally connected to this role. These are: the appointed nature of the Senate;[8] the importance of regional representation at the centre of the national Parliament;[9] the protection of minorities;[10] the ability to take the long view of legislation and policy developments;[11] and the willingness to study and advance issues that may be too controversial for an elected body.[12]

In identifying these functions, the Court considers the history and purpose of the Senate, as designed by the Fathers of Confederation and developed over time.[13] The framers of the Constitution saw the role of the Senate as that of a revising Chamber, and they had a clear plan in mind when they deliberately devised it as an appointed body, based on their previous experiences with an elected Upper House. They knew that in a democratic age, the House of Commons would be the dominant chamber. This worked well in a system of responsible

government. At the same time, they wanted to have a body of experienced individuals, able to look at legislation from a different perspective and with another kind of relationship with their fellow citizens.

There has been an evolution in the Senate's role since Confederation. As Canada grew from a union of four Eastern colonies in 1867 to a federation of provinces and territories with borders on three oceans, the legislative responsibilities of Parliament were greatly enlarged. After the Second World War and into the 1960s, the role of Parliament expanded enormously with the development of significant government-sponsored social programs. The Senate adapted itself to meet these new challenges facing Canadian society. Originally intended as a chamber for the elites, today, somewhat paradoxically and even ironically, the Senate now serves as a defender of minority interests.[14]

II. The Senate's role as a complementary legislative chamber of sober second thought

Let me address in turn each of the five functions of the Senate that the Court identified, providing some examples as appropriate.

The complementary nature of the Senate allows it to provide a voice of sober second thought during the legislative process. It respectfully but effectively scrutinizes, revises, and advises as to broader implications of bills.

The Court notes that the Senate is able to serve this role, due in large part to the independence enabled by both the appointed nature of the position and the security of tenure.[15] Senators generally follow the same legislative process used in the House of Commons, but they can take a different perspective. The different accountability relationship can enable Senators to focus on longstanding principles and long-term implications rather than the majority opinion of the day. By contrast, the Members of the House of Commons are bound to pay closer attention to the immediate concerns of the public. The Senate also works for the public's benefit, though at a greater remove.

Herein lies the paradox of an appointed Senate in a democracy: the security of tenure after appointment enables Senators to help strengthen our democracy by working for the common good, but with a degree of insulation from electoral pressures. This enables them to take a longer-term perspective, with a net benefit to the legislation and policies that emerge from Parliament.

It is important to emphasize that the Senate, because its members are not elected, demonstrates self-restraint. As was noted by Sir John A. Macdonald, "It will never set itself in opposition against the deliberate and understood wishes of the people."[16] The rare and notable exceptions to this have tended to be when constitutional rights and principles are involved, especially with minority and linguistic rights.

Some years ago, after the House of Commons had adopted Bill C-10B,[17] regarding cruelty to animals, the Senate brought attention to the fact that this proposed legislation

threatened to criminalize a constitutionally protected right in the form of aboriginal hunting practices. It took multiple Parliaments to sort out the disagreements between the two Chambers, but the end result was legislation that strengthened penalty provisions while maintaining certain constitutional obligations.

Another function of the Senate, one lying "at the heart of the agreements that gave birth to the Canadian federation," is its role in ensuring equal regional representation.[18] Canada's demographic reality has affected the House of Commons since Confederation. Now, as then, it is seriously imbalanced from a provincial perspective, with 60% of the populace living in just two provinces, Ontario and Quebec.[19] The Senate provides a representative cushion against this demographic reality and supports national cohesion. The Constitution requires that every Senator must continually be a resident of the province or territory from which he or she is appointed.[20] This ensures that every region has a more adequate voice at the table no matter its size, leading to more balanced policies and a more united country.

The Senate's representational role is not confined to the regions but has developed to include its role as a protector of minorities. The *Canadian Human Rights Act*[21] of 1977 benefitted significantly from its examination in the Senate and from earlier work in this area by the Senate. The Act extended protections against discrimination in the workplace and established both the Canadian Human Rights Commission and the Canadian Human Rights Tribunal to investigate and judge these claims. Although its scope was only federal, it provided a practical model that was soon followed across the provinces, and this has contributed significantly to Canada's leading example in protecting human rights.

In 1996, Bill C-33,[22] dealing with discrimination based on sexual orientation, marked the first time that legislation of this kind had passed successfully in Parliament. Its origins lay in an earlier legislative proposal, Bill S-15,[23] which, following my sponsorship, had been unanimously passed in the Senate in 1993. Notwithstanding that Parliament was dissolved for an election that year, the bill was revived in the Commons shortly thereafter and, thanks to maturing societal forces that had been recognized by the Senate, it was adopted.

The Senate is also able to take a long-term view, a perspective often difficult for the Commons. In 2001, an amendment to the *Citizenship Act*[24] was initially pushed in the Senate, and this alerted the government to the fact that there was a need to address the issue of giving legal and cultural certainty to the status of Canadians who held dual citizenship or who had renounced their citizenship. Though it took several attempts over multiple Parliaments, the Senate's concerns were ultimately accepted by the House of Commons and the bill to bring the changes into effect received Royal Assent in 2005.[25]

The lesson here is that through the Senate's persistence, the government may be persuaded over time to take on legislation or adopt a policy as its own. This ability of the Senate to take a long-term view is also underscored by the success of the Standing Senate Committee on Social Affairs' study of the health care system, chaired by Senator Kirby, which uncovered deep challenges in the financial sustainability and structural capacity of our country's publicly supported health care system.[26]

Our Senators' enhanced capacity for long-view investigation and legislation also benefits from the stability of their tenures. The lack of a fixed term, save the requirement that they retire by the age of 75, allows for a continuity and 'corporate memory' within government. Senators and their Committees, by virtue of their long tenures and extensive commitments to specific subjects, are often uniquely positioned to discern patterns, advocate for issues, and hold parties to account throughout a policy's implementation over many years.

Finally, the Senate is distinguished by its significant ability and willingness to take on controversial or politically sensitive subjects. The appointed nature, long-term tenure and generally late career stage of Senators lead to a culture in the Upper Chamber that is largely spared from electoral pressures and political expediency, and this affects the orientation and priorities of Senators in advantageous ways. Many Senators are better able to assume the front-end political risks of issues that their elected counterparts in the Commons may be wary of addressing. As these issues gain momentum through investigation and debate in the Senate and its committees, things can start moving in the Commons.

A mature discussion about euthanasia and assisted suicide in our country is largely a result of what the Senate has done with its reports on this sensitive but very important subject.[27] In 2001, the Senate sought to establish a framework for protecting public servants who report wrongdoings within government.[28] This illustrates how a timely but controversial topic can find its first legislative voice in the Senate before gaining support in the House of Commons. Even when the Commons refuses amendments made by the Senate, the amending process draws attention to the contentious issue. This puts the government on notice that its work in a certain area is important and is being watched, leading to more effective and accountable policy-making.

III. Substantive reform will involve the provinces

With this Reference, the Court has rescued from ambiguity and authoritatively underlined several important parameters regarding what the Senate is and does. It has provided a context for any further discussion as to what the Senate might yet become. As we seek out new directions to make the Senate a more effective institution for the practice of freedom – a journey that all parliamentarians and Canadians share – this Reference will serve as a map guiding us in productive directions. The Court has outlined the constraints and possibilities provided for in the *Constitution Acts, 1867 to 1982* – specifically through the amending formulas[29] – and in the relationships between and among the provinces and the federation.

It bears noting – as the Court does when introducing its decision – that it was not asked whether the Senate should be reformed or which reforms would be desirable.[30] Rather, the Court was asked how specific changes might be legitimately achieved within the provisions of the Constitution. In giving its opinion, the Court has essentially said, "If you want to do X, Y or Z to the Senate, these are the steps to take." Rather than endorsing a particular destination, it has simply identified the paths from here to there. By setting out more clearly the provisions relating to the Senate and its position relative to other elements of Parliament and the federal-provincial system, we now have a clearer and more complete view of where the Senate stands and in what directions it might develop. The map is the Constitution, and the Court has simply traced – like

lines through a maze – the necessary paths to various reforms. Each "path" consists of the particular amending procedure that needs to be followed when pursuing a proposed reform. In all of these paths, the provinces have a vital part to play.

Any substantial changes to the powers and selection methods of the Senate will trigger the involvement of the provinces.[31] The Court has reaffirmed the central importance of federal-provincial relations and dialogue to the process of negotiations in order to innovate democracy and develop better governance in Canada. As a result, any substantive reform must have provincial input. If the provinces do not care about a proposed reform or are unable to form a consensus around it, the change will not happen.

In view of this Reference and its confirmation of the Senate's importance, we must also consider what the structural and functional implications of Senate reform would be for the wider system of governance. We have to think about what measures could be implemented to ensure that certain aspects of our current system that we value are preserved. For example, if the Senate becomes an elected Chamber, what should be done to preserve the complementary dynamic that exists between the two houses? How do we avoid the risk of gridlock that might arise if a more competitive relationship develops?

Whatever the reforms, substantive changes to the Senate ought to begin with dialogue among parliamentarians at all levels. The initiative will have to come from the Executives, both federal and provincial, but they can be pushed to launch a proposal if they know that parliamentarians themselves are actively interested in reform and in pursuing the necessary collaboration. That is why there is now an obligation to learn more about the Senate, an obligation shared among all representatives. It does not concern just the Senators themselves.

The Court has reminded us that the Senate shares its deep and robust relationship with the provinces as fellow stakeholders in our nation's Constitution and founding design.[32] The Reference generally provides a clearer context for discussions about improved governance and democracy, and, particularly, through enhanced federal-provincial cooperation.

IV. Level of support required for any meaningful reform will be at least "7/50"

To the extent that some may wish to continue with efforts toward reform, there is now an opportunity and indeed an obligation to work closely with provinces.

The minimum level of support required for any substantial reform is "7/50."[33] This refers to a required level of consensus across at least seven provinces representing more than half the population.

We know that structural reforms to the Senate will be challenging. The momentum of public interest and awareness generated by the Supreme Court Reference and the opinion it provided should help to promote and lead the discussion about these challenges. With the Court's decision serving as a timely and prominent reference point, the Senate is in a position to assist Canadians to understand what the Senate is, what it does, why it matters, and how it can be

improved. The Prime Minister has stated that he welcomes "the day when there is a public appetite for that discussion, because … the country needs it at some point."[34] This is the right point of view for a constructive approach. The country must continue to have this conversation, enlightened by this clarity from the Court.

Parliamentarians are in a better position to work together to develop reform proposals that are substantive and that can actually achieve the level of support required for implementation. We now know from the Supreme Court that any significant changes to the Senate must involve the provinces in order to obtain at least "7/50" support. To the extent that we may wish to attempt any structural or functional reforms, we will have to go back to the bargaining table with the provinces, as was done at Confederation.

The abolition of our Upper House is, of course, an option that some favour. The Court's decision, once again, has provided guidance as to how this could be done: it would require the unanimous consent of all legislatures across the country.[35] Our Constitution, the work of Parliament and the Supreme Court make clear that the Senate does not exist in isolation and it cannot be easily amputated from our Parliamentary system by any one actor. This Reference reminds us that the Senate, by design, interacts with the House of Commons in a complementary manner. Despite the inherent tension arising from their distinct natures, and indeed with significant benefits from this very tension, the relationship between Houses leads to an effective system of governance that is greater than the sum of its parts. In effect, to abolish the Senate would be to abolish Parliament and create something new. A full-scale re-think of how Parliament functions would be needed if we shifted to a single-chamber system.

V: Other adjustments: going beyond formal constitutional changes

What are other possible steps for how the Senate might better serve its role, meet its obligations and fulfill its potential within the ongoing project of Canadian governance, democracy and freedom?

A campaign of internal restoration, external education, and cross-country conversation would be a useful approach. The Senate has been paid "a welcome compliment" as to its essential and complementary nature and role within our bicameral system. Courtesy dictates that a compliment should be repaid, and the best and most fitting way for the Senate to do this is by focusing on those characteristics highlighted by the Court, so that Senators can find ever more effective ways to serve these functions.

The appointment process merits close examination, particularly as the subject received fresh examination in this Reference. This is ultimately the responsibility of the Executive, but the Senate might use its skill as an investigative body to provide useful insights and suggestions in this area.

Perhaps the Senate could take the initiative in improving itself from within. Given the practical challenge of achieving major structural reforms anytime soon, we should focus for now on 'cleaning house' and improving internal policies and protocols with the goal of enhancing

transparency and accountability as well as public knowledge about how the Senate functions in its role. We are hoping that the forthcoming report of the Auditor General of Canada on his audit of expenditures, including Senators' expenditures, expected in the spring of 2015, will provide recommendations as to how the Senate can achieve this important objective.

VI. Conclusion

With this Reference, the Supreme Court took the opportunity to provide a valuable service to Parliament and to Canadians. Under the light of the Constitution, it has illuminated the path connecting the Senate's past, present and future. Through its considered examination of the Upper Chamber's characteristics, functions, purpose, and place within our system of governance, the Court has helped us to better understand what the Senate is and what else it might be.

The court's affirmation of the Senate's integral and complementary role within Parliament, while a product of impartial constitutional analysis, is a welcome "compliment" to the work of the Senate at a time when its efforts on behalf of Canadians are all too often obscured from public understanding and appreciation. Like all compliments, however, this affirmation should serve not as a basis for complacency but as motivation to seize upon what the Senate does well so that it can do it even better. The most recent wave of reform debate, culminating at the Supreme Court, serves as a reminder of the need for greater public understanding as to why the Senate functions as it does. It also serves an opportunity for Parliament to engage the public in a more focused and informed dialogue as to how to improve the Senate. Senators may well take the initiative in opening and leading this dialogue.

In doing this, one must always ask who will benefit from any particular reform, and what the net benefit to governance and democracy will be. It is interesting to note that words like "governance" and even "democracy" are far more frequently and fondly used by politicians than anyone else. What is most important to Canadians is their experience living in a free country, with all the challenges and opportunities that this brings. The real test and measure of what the Senate does, and whatever else it might become, lies in the practice of freedom.

Our system of governance, assembled with remarkable skill and foresight by the framers of our Constitution in 1867, has enabled this country to develop into a vibrant, free and democratic society envied and admired all over the world. The Senate has performed its role rather well during these 147 years since Confederation. Perhaps that fair assessment has been lost amid all the talk of reform.

It is possible that we have not sufficiently exploited the capacity of the Senate to act as the complementary chamber which the Court affirms it is designed and intended to be. While not everyone is aware of it or recognizes the fact, we do make the intended contributions. This under-developed awareness is itself an issue needs to be addressed. Nonetheless, the Senate earnestly and vigilantly serves its role for the broader sake of peace, order and good government. Our highest court has recognized this. However, much remains to be done in extending this clarity and understanding into the parliamentary and public discussion.

My hope for this commentary is that it might serve as but one of several helpful starting points for the broader conversation which parliamentarians – and all Canadians – will surely have in the months and years to come.

When I last spoke to the Commonwealth Parliamentary Association on this subject, six months ago on Parliament Hill, we were eagerly awaiting the Supreme Court's decision. My suggestion was that "as Canadians consider their upper house and what role they wish for it, it is imperative that they understand what they currently have, so that they can discuss how they can build on the strengths of the body."[36] Now, with the Supreme Court's decision, we can begin the meaningful and necessary discussion about how to build on our bicameral legacy in whatever ways and new directions best serve the practice of freedom in Canada.

At the same time, we must admit that novelty is not inherently an improvement over the status quo. While using our imagination and energy to continuously innovate and improve governance, we should at the same time have the humility and intellectual honesty to ask whether the practice of freedom might not be best served by largely preserving and using structures that have served us well for 147 years.

Notes

[1] *Reference re Senate Reform*, 2014 SCC 32 (available on CanLII: <http://canlii.ca/t/g6mfs>) [*Senate Reform*].
[2] *Ibid.* at paras. 5, 49, 112; *In the Matter of a Reference by the Governor in Council Concerning reform of the Senate, as set out in Order P.C. 2013-70, dated February 1, 2013* (35203) (SCC) (Factum of the Attorney General of Canada) at para. 73 and App. A.
[3] *Senate Reform*, *supra* note 1 at paras. 3, 70, 82, 106, 110-111.
[4] *Ibid.* at paras. 52, 54, 56, 58-59, 63, 70, 79, 88, 106.
[5] *Ibid.* at paras. 3, 34, 75, 77, 82, 97, 106, 110-111.
[6] *Ibid.* at paras. 3, 11, 33, 34, 111; *Constitution Act, 1982*, s. 38(1), being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [*Constitution Act, 1982*].
[7] *Senate Reform*, *supra* note 1 at paras. 15, 52, 54, 56, 58-59, 60, 63, 70, 79, 82, 88, 106.
[8] *Ibid.* at paras. 14, 50, 55, 56, 58-59, 65-66, 79.
[9] *Ibid.* at paras. 15, 17.
[10] *Ibid.* at para. 16.
[11] *Ibid.* at paras. 57-58.
[12] *Ibid.* at paras. 79-80.
[13] *Ibid.* at paras. 13-20.
[14] *Ibid.* at paras. 14, 16.

[15] *Ibid*. at paras. 57-59, 79, 80-83, 89.
[16] John A. Macdonald, Province of Canada, Legislative Assembly, *Parliamentary Debates on the subject of the Confederation of the British North American Provinces*, 3rd Sess., 8th Prov. Parl. (Quebec: Hunter, Rose, 1865) at 36.
[17] Bill C-10B, *An Act to amend the Criminal Code (cruelty to animals)*, 2nd Sess., 37th Parl., 2002 (as passed by the House of Commons 9 October 2002).
[18] *Senate Reform*, *supra* note 1 at para. 1.
[19] Statistics Canada, 2014, *Table 051-0005 - Estimates of population, Canada, provinces and territories, quarterly (persons)*, CANSIM (database).
[20] *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3, s. 23(5), reprinted in R.S.C. 1985, App. II, No. 5.
[21] *Canadian Human Rights Act*, S.C. 1976-77, c. 33 (now R.S.C. 1985, c. H-6).
[22] Bill C-33, *An Act to amend the Canadian Human Rights Act*, 2nd Sess., 35 Parl., 1996 (assented to 20 June 1996).
[23] Bill S-15, adopted by the Senate in 1993, was reintroduced in the Senate in 1996 as Bill S-2, *An Act to amend the Canadian Human Rights Act* (sexual orientation), 2nd Sess., 35th Parl. Both this initiative and its counterpart in the House of Commons, Bill C-265, were superseded by Bill C-33.
[24] *Citizenship Act* (R.S.C. 1985, c. C-29).
[25] Bill S-2, *An Act to amend the Citizenship Act*, 1st Sess., 38th Parl., 2005 (assented to 5 May 2005).
[26] Standing Senate Committee on Social Affairs, Science and Technology, *The Health of Canadians – The Federal Role - Volume Six: Recommendations for Reform* (Ottawa: Parliament of Canada, 2002).
[27] Special Senate Committee on Euthanasia and Assisted Suicide, *Of Life and Death – Final Report* (Ottawa: Parliament of Canada, 1995).
[28] Bill S-6, *An Act to assist in the prevention of wrongdoing in the Public Service by establishing a framework for education on ethical practices in the workplace, for dealing with allegations of wrongdoing and for protecting whistleblowers*, 1st Sess., 37th Parl., 2001. The House of Commons took on this issue with Bill C-241 in the 37th Parliament (2nd and 3rd Sessions), but the initiative was not successful. However, it may be seen as laying the groundwork for the later success of the *Public Servants Disclosure Protection Act* (2007).
[29] *Constitution Act, 1982*, *supra* note 6 at Part V; *Senate Reform*, *supra* note 1 at paras. 21-48.
[30] *Senate Reform*, *supra* note 1 at para. 4.
[31] *Ibid*. at paras. 31, 37, 39, 53, 111.
[32] *Senate Reform*, *supra* note 1 at paras. 48, 77, 82.
[33] *Ibid*. at paras. 3, 11, 33, 34, 111.
[34] Canada, Parliament, Senate, Special Senate Committee on Senate Reform, *Minutes of Proceedings*, Issue 2 – Evidence, 1st Sess., 39th Parl. (7 September 2006).
[35] *Senate Reform*. *supra* note 1 at para. 110.
[36] Noël A. Kinsella, "The Senate – An Essential House of Parliament," *Canadian Parliamentary Review* 37:1 (Spring 2014) at 15.