Updating Some Antiquated Constitutional Provisions Relating to the Senate

by Hon. Dan Hays

The Constitution Act, 1867 (formerly called the British North America Act, 1867) contains a number of sections which relate to the management of the Senate and many are clearly in need of an update. This article highlights certain sections of the Act in need of revision. In the author's opinion such revisions do not require provincial approval as they relate to matters parliament alone can deal with under section 44 of the Constitution Act, 1982.

Parliament and the agencies of government often undertake a review of statutory law with a view to revising provisions which are outdated, inconsistent or need improvement to ensure that they respond to the changing needs of society. Constitutional law and certainly the provisions thereof which fall within the legislative authority of parliament should be treated no differently. All the more so if content may pre-date Confederation and contains language which is no longer in use and requirements which do not serve any public purpose.

Qualifications of Senators

Subsection 23(1)[1] of the *Constitution Act, 1867* requires a senator to be 30 years of age and at the other end of the spectrum section 29 requires mandatory retirement at 75. I support the proposals put forward by the present government in the legislation tabled in previous sessions that, subject to establishing fixed terms, we should remove the retirement limitation for senators as well as the minimum age requirement, the latter to be replaced by the eligibility requirements of Member of the House of Commons. Such a change would have the advantage of bringing the qualifications of a senator into line with the *Canadian Charter of Rights and Freedoms*. All Canadians who are eligible to vote should be eligible to serve in the Senate.

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 and given the proposal that to qualify to be a senator one needs only be a Canadian citizen and have reached the age of majority at the time of appointment. This qualification could simply be deleted.

Subsections 23(3) to (6) require that every senator should own lands of $4,000 clear of mortgages, and real and personal property of a net value of $4,000. They also specify that each senator shall be resident in the province for which they are appointed. In the case of Quebec, the senator shall have his or her property in one of 24 Electoral Divisions from which the senator is appointed or in the alternative be resident in that District.

Parliament should update or eliminate where appropriate as many of these anachronistic qualifications as possible as they no longer serve any public policy purpose. Obviously, section 23(4), requiring senators to be resident in the province for

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which they are appointed is relevant but the other four 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 *Constitution Act, 1982*[2] requires that changes to the residence qualifications of senators involve provincial agreement. However, section 31(5) of the *Constitution Act, 1867*,[3] 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 framers of Confederation distinguished between the two types of qualifications, and I think that parliament subject to my next point may well be able to deal with property qualifications under section 44.

The provisions relating to Quebec however, are quite distinctive, and refer to 24 electoral districts as of 1867 that include only the southern area of the present province. The residents of the northern part of the province are today formally without representation in the Senate since the boundaries of the 24 senatorial districts of Quebec were not adjusted as the province grew and so for example do not include the region known as Nunavik. This section could, with Quebec's approval and pursuant to section 43 of the *Constitution Act, 1982*, be modernized.[4] This would involve the elimination of the $4000 property ownership requirement leaving Quebec Senators as representatives of the existing Divisions with no requirement to be a resident of other than the Province of Quebec. Quebec might also consider redrawing the Division Boundaries to cover the entire Province or in the alternative do away with them. Finally, Quebec could, of course, simply do nothing and preserve the status quo in that Province.

Section 29(2),[5] which was added to the *British North America Act* in 1965, provides for the mandatory retirement of a senator at the age of 75. This provision is in my view inconsistent with fixed terms for senators. If, as I believe will be the case, parliament amends the constitution to provide for fixed terms and if section 23 is amended as suggested then a senator would need only to meet the qualifications of the *Canada Elections Act*, that is be at least 18 years of age, section 29 should be deleted.

Appointment of Extra Senators

Section 26[6] which describes the appointment of additional senators beyond the 24 from each region is the only provision of the constitution which addresses breaking a deadlock between the Senate and the House of Commons. It allows that four or eight members may be added to the Senate representing equally the four divisions of Canada. It is not effective and almost of no use in dealing with disagreements which arise between the two houses over the course of normal parliamentary session. I suggest that section 26 be replaced by a new section, headnoted "deadlock" or "resolution of difficulties", that would set out a process requiring the greater use of conferences between the Senate and the House of Commons.[7] Senators would obviously have to consult closely with the House of Commons, but various mechanisms have been suggested in the past to allow joint meetings to resolve any such deadlock. Under current procedures the House of Commons or the Senate, if they insist on amendments and refuse a request for a free conference, the other chamber is left with the only option of rejecting the measure outright. I would suggest that an amendment to the constitution be made to stipulate that if there is a disagreement on a government bill whereby the Senate or the House insists on its amendments, a conference shall be established to prepare a report to be either approved or rejected by both Houses within a specific period of time.

Such a procedure would empower senators to be more activist in proposing amendments to Commons legislation and thereby better serve the public interest. In modern times the Senate has amended less than ten percent of the legislation that came up from the other place. Senators can do better than this. They have good ideas and should initiate alternative policy positions so they can be properly vetted. Tension between the two Houses can, from time to time, be a good thing as competition of ideas can lead to better legislation. However, conflicts between the two chambers should not, except in the most exceptional circumstances, result in obstruction, stalemate or deadlock. There must be procedures in place where disagreements can be efficiently resolved.

Disqualification Provisions

Under subsection 31(1),[8] the seat of a senator is vacated if he or she fails to appear for two consecutive sessions. Although this section has prompted modifications to the Rules of the Senate with a view to giving it modern relevance, the Senate still needs power to develop clearer rules to have a satisfactory way of dealing with chronic absence for whatever reason. Section 33 of the constitution states that any question respecting the qualification of a senator or a vacancy in the Senate shall be heard and determined by the Senate. I would propose that the Senate be able to determine, from time to time, the attendance requirements necessary for a Senator to retain his or her place pursuant to section 33. Inscribed in any such

requirements would have to be certain protections so they could not be abused for political or personal reasons. I would suggest that if any doubt was raised about a senator's compliance as to meeting attendance requirements, an extraordinary-majority, for example 60% of senators, would be needed to render a decision on the loss of a senator's place.

Subsection 31(2)[9] essentially states that a Senate seat should be vacated if a sitting senator becomes a dual citizen. The prohibition does not apply to senators who are dual citizens prior to being appointed. It seems clear to me that if dual citizenship is allowed under the laws of Canada, it should not be an impediment to Senate membership as it is not now an impediment to membership in the House of Commons. If dual citizenship is disallowed by federal legislation, then clearly the rules of vacating a seat in the Senate should follow any such legislation. In any event, the matter needs to be clarified.

As for subsection 31(3),[10] 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". As W.H. McConnell noted in his Commentary on the *British North America Act* (Toronto: Macmillan, 1977), this could have applied, for example, to a hypothetical senator from the prairies in the 1930s, who applied for 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. The wording of this section can be modernized and improved by adopting current terminology.

Subsection 31(4)[11] which specifies that the seat of a senator attainted of treason or convicted of felony or any infamous crime must be vacated. The concepts of "felonies" and "misdemeanors" were replaced in the original Canadian *Criminal Code* by indictable offenses and summary offences. Generally speaking, in 1867 felonies were graver crimes perhaps punishable with death resulting in the forfeiture of the perpetrator's lands and goods to the Crown. It would seem reasonable to replace the word "felony" by "indictable offence".

The concept of an "infamous crime" found in subsection 31(4) is even harder to translate into modern circumstances, but 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 is found to have violated the public trust, his or her seat should be vacated.

Subsection 31(5)[12] also 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 suggested in discussion of section 23, the qualifications of senators, it is interesting that section 31(5) refers to "property OR residence qualifications". Consideration must be given to removing the outdated reference to "property".

The Oath

Finally, with respect to the Fifth Schedule[13] of the Act, there is the language of the oath of allegiance. 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.

Conclusion

Proposals for Senate reform have usually tried to deal directly with comprehensive change, such as amending the method of selecting senators, distributing the number of Senate seats, and a restatement of Senate powers.[14] Such changes however are very difficult to achieve as they clearly fall under the amending formula described in section 42 of the *Constitution Act, 1982* which requires approval as is set out in section 38 (requiring support from seven of the provinces with at least 50% of the population).

In the last parliament, the Government brought forward Bill S-4, dealing with Senate tenure and providing for fixed eight-year terms for new senators. In June 2007, the Senate adopted the report of its Legal and Constitutional Affairs Committee which recommended that Bill S-4 "not be proceed with at third reading until such time as the Supreme Court of Canada has ruled with respect to its constitutionality". I believe this was a mistake. Senators should have passed an amended bill establishing non-renewable Senate tenure at fifteen years for new senators, a proposal I understand to have been noted as acceptable in the report. The Senate has power to defeat or amend to their satisfaction any constitutional proposal put forward as a section 44 amendment with which they disagree. The effect of the decision was to support the status quo. If that was intended the bill should simply have been defeated. It is my opinion that the Senate

missed an opportunity to support an improvement to the constitutional basis of their institution.

While not foregoing about or taking away from their importance other significant changes which do not require provincial consent – such as creating an appointments commission or establishing a convention where by the Prime Minister shares Senate appointments with the Leader of the Opposition and appoints independent senators as well – the recommendations set out in this paper to revise the antiquated sections of the old *British North America Act* are much more modest. These changes would improve how Canadians are governed and are doable, requiring parliament alone to adopt a *Senate Modernization Act*. Its adoption could be an important step in encouraging the federal and provincial governments, parliament and the provincial legislatures, and all relevant stake-holders to renew Senate in a more in-depth way and providing it with a new institutional design to better serve Canadians in the twenty-first century.

Notes

1. Section 23 of the *Constitution Act, 1867*, reads as follows:

   "The Qualifications of a Senator shall be as follows:

   (1) He shall be of the full age of Thirty Years;

   (2) He shall be either a natural-born Subject of the Queen, or a Subject of the Queen naturalized by an Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of One of the Provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, before the Union, or of the Parliament of Canada after the Union:

   (3) He shall be legally or equitably seised as of Freehold for his own Use and Benefit of Lands or Tenements held in Free and Common Socage, or seised or possessed for his own Use and Benefit of Lands or Tenements held in Franc-alleu or in Roture, within the Province for which he is appointed, of the Value of Four thousand Dollars, over and above all Rents, Dues, Debts, Charges, Mortgages, and Incumbrances due or payable out of or charged on or affecting the same:

   (4) His Real and Personal Property shall be together worth Four thousand Dollars over and above his Debts and Liabilities:

   (5) He shall be resident in the Province for which he is appointed:

   (6) In the Case of Quebec he shall have his Real Property Qualification in the Electoral Division for which he is appointed, or shall be resident in that Division."

2. Section 42 (amendment by general procedure) reads:

   "(1) An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with subsection 38(1)

   (a) the principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada;

   (b) the powers of the Senate and the method of selecting Senators;

   (c) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators;

   (d) subject to paragraph 41(d), the Supreme Court of Canada;

   (e) the extension of existing provinces into the territories; and

   (f) notwithstanding any other law or practice, the establishment of new provinces."

3. Section 31 of the *Constitution Act, 1867* states:

   "The Place of a Senator shall become vacant in any of the following Cases:

   (1) If for Two consecutive Sessions of the Parliament he fails to give his Attendance in the Senate:

   (2) If he takes an Oath or makes a Declaration or Acknowledgment of Allegiance, Obedience, or Adherence to a Foreign Power, or does an Act whereby he becomes a Subject or Citizen, or entitled to the Rights or Privileges of a Subject or Citizen, of a Foreign Power:

   (3) If he is adjudged Bankrupt or Insolvent, or applies for the Benefit of any Law relating to Insolvent Debtors, or becomes a public Defaulter:

   (4) If he is attainted of Treason or convicted of Felony or of any infamous Crime:

   (5) If he ceases to be qualified in respect of Property or of Residence; provided, that a Senator shall not be deemed to have ceased to be qualified in respect of Residence by reason only of his residing at the Seat of the Government of Canada while holding an Office under that Government requiring his Presence there."

4. Section 43 relates to amendment of provisions relating to some but not all the provinces.

5. Section 29 in its entirety reads: "(1) Subject to subsection (2), a Senator shall, subject to the provisions of this Act, hold his place in the Senate for life.

   (2) A Senator who is summoned to the Senate after the coming into force of this subsection shall, subject to this Act, hold his place in the Senate until he attains the age of seventy-five years."

6. Section 26 reads: "If at any Time on the Recommendation of the Governor General the Queen thinks fit to direct that Four or Eight Members be added to the Senate, the Governor General may by Summons to Four or Eight qualified Persons (as the Case may be), representing equally the Four Divisions of Canada, add to the Senate accordingly."

7. I have expanded on the importance of conferences in my article "Reviving Conference Committees", *Canadian Parliamentary Review*, Autumn, 2008, Volume

31, No.3, pp. 8-10.

8. The first criteria for vacating a Senator's seat as states in Section 31 (1) is: "If for Two consecutive Sessions of the Parliament he fails to give his Attendance in the Senate"

9. The second criteria for vacating a seat, as described in 31(2) is: " If he takes an Oath or makes a Declaration or Acknowledgment of Allegiance, Obedience, or Adherence to a Foreign Power, or does an Act whereby he becomes a Subject or Citizen, or entitled to the Rights or Privileges of a Subject or Citizen, of a Foreign Power"

10. The third criteria described in 31(3) is: If he is adjudged Bankrupt or Insolvent, or applies for the Benefit of any Law relating to Insolvent Debtors, or becomes a public Defaulter:

11. The fourth criteria described in Section 31(4) is "If he is attainted of Treason or convicted of Felony or of any infamous Crime."

12. The fifth criteria is: "If he ceases to be qualified in respect of Property or of Resience; provided, that a Senator shall not be deemed to have ceased to be qualified in respect of Residence by reason only of his residing at the Seat of the Government of Canada while holding an Office under that Government requiring his Presence there."

13. The Oath of Allegiance described in the Fifth Schedule to the *Constitution Act*, 1867 reads: "I A.B. do swear, That I will be faithful and bear true Allegiance to Her Majesty Queen Victoria."

14. I have put forward my own view on comprehensive change in my discussion paper "Renewing the Senate of Canada: A Two-Phase Proposal" tabled in the Senate on May 25, 2007, and in my article "A New Senate for Canada: A Two-Step Process for Moving Forward on Senate Reform", Canada West Foundation, September, 2008.