

## Introduction : les silences du *Renvoi relatif à la réforme du Sénat*

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## INTRODUCTION : LES SILENCES DU *RENOI RELATIF* À LA RÉFORME DU SÉNAT

*Daniel Jutras\**

Les avis exprimés par la Cour suprême du Canada sur les questions posées dans un renvoi par le gouverneur en conseil constituent toujours des moments forts de la vie juridique au Canada. Lorsque les questions touchent directement la Constitution du Canada elle-même, plutôt que la validité d'un texte législatif proposé, l'avis de la Cour acquiert vite le statut de jalon ou de point de repère incontournable sur le terrain accidenté où se croisent le droit et la politique. Ceci dit, ces avis comportent une large part de non-dit, de silences et de mots couverts. La Cour suprême balise elle-même ce qu'elle accepte de discuter, et ce qu'elle laissera dans la pénombre. Dans ce contexte, il faut se réjouir que des auteurs et des experts du droit constitutionnel prennent la plume pour rendre explicite ce que la Cour ne veut pas, ou ne peut pas dire. Les textes réunis dans ce numéro spécial de la *Revue de droit de McGill* apportent un éclairage essentiel sur certains enjeux fondamentaux touchant la réforme du Sénat canadien, et sur la contribution de la Cour suprême à ce débat récurrent. Ce faisant, ils comblent les vides laissés par la Cour et rendent explicites le contexte du Renvoi et son plein potentiel jurisprudentiel et politique.

One significant set of issues that is left in the penumbra of this *Reference* is identified explicitly by the Court itself. Early in its opinion, the Court notes that its task is not to address the substance of any proposed reform to the Senate, but to “determine the legal framework for implementing” whatever Canadians and their legislatures decide to do.<sup>1</sup> In this sense, although this opinion is indexed as *Reference Re Senate Reform*, it could have been identified as a *Reference Re Constitutional Amendment Rules*. This reluctance to address the substance and desirability of the reforms is unsurprising: there was no proposed legislation before the Court, as all of the bills invoked by the Attorney General of Canada to “illus-

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<sup>1</sup> *Reference re Senate Reform*, 2014 SCC 32 at para 4, [2014] 1 SCR 704 [*Reference*].

trate” the content of proposed changes considered by Parliament had died on the Order Paper. More fundamentally perhaps, it is quite characteristic of the Court’s constitutional discourse that it will cast itself in the less politically intrusive role of the umpire who merely sets the rules of the game, allowing the participants to decide their own fate. The last major constitutional reference was addressed in the same manner.<sup>2</sup>

Stepping into the void, several papers in this collection provide a rich picture of the political context in which the opinion of the Court was sought. **Adam Dodek**, in particular, tells the story of the strategies, steps and missteps that brought the federal government and the provinces to turn their political debate on the Senate into a set of legal issues to be resolved by the Supreme Court. Others consider the substantive issues that the Court placed beyond its gaze. **Yasmin Dawood** acknowledges that the Court’s opinion rests on a deep, process-driven commitment to democracy as the governing principle of constitutional change, but concludes that the Court’s approach nonetheless locks into place a dysfunctional, anti-democratic Senate. **Noura Karazivan**, for her part, examines the Court’s formal idea of constitutional structure or architecture, and points to the distance between reality and the idealized Senate that is represented in the decision. Most of this was predictable as necessary outcomes of the Court’s self-imposed restraint in respect of its role in shaping viable constitutional solutions for Canada. Freed from these constraints, **Allan Hutchinson** and **Joel I. Colón-Ríos** propose a new role for Senate, in which “sober second-thought” focuses on constitutional validity, and senators join Supreme Court judges—and eventually displace them?—as arbiters of Canada’s fundamental values.

In the end, try as it might, the Court cannot not completely avoid dealing with the substance and politics of the Senate reforms, to the extent that determining the rules applicable to each constitutional change rests in some measure on what these reforms seek to accomplish. In doing so, the Court stays more or less within the boundaries that it sets for itself, in respect of most questions. It comes to the conclusion that, whether abolishing the Senate is a good idea or not, it is a change of such significance that it requires the highest level of consensus in the political realm. It states that determining the appropriate duration of a fixed term for senators is “at heart a matter of policy” on which the Court does not pass judgment, but which remains important enough that it “engages the interests of the provinces as stakeholders in Canada’s constitutional design,” who must consent in significant numbers.<sup>3</sup> But on the matter of re-

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<sup>2</sup> *Reference Re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385.

<sup>3</sup> *Reference*, *supra* note 2 at para 82.

sorting to consultative elections in the selection of senators, the Court moves closer to a substantive opinion, coming to the conclusion that this reform would “weaken the Senate’s role of sober second thought” and “give it the democratic legitimacy to systematically block the House of Commons, contrary to its constitutional design.”<sup>4</sup> In his paper, **Emmett Macfarlane** underlines this substantive conclusion and a few other logical inconsistencies in the Court’s opinion, suggesting that they create ambiguities that will render future constitutional change far more complex.

The *Reference* is replete with allusions to implicit structures, hidden architectures and all that lies behind the text of the *Constitution*. The opinion is ambiguous in this respect, moving back and forth between the idea of an embedded structure of the constitutional *order*—in which each institution, including an unelected Senate, exists in a complementary relationship to other sites of constitutional authority—and the distinct idea of an embedded structure of constitutional *text*—in which the overall organization and arrangement of Part V of the *Constitution Act* has normative significance in the determination of the process of constitutional amendment in Canada. And yet, the Court is only concerned here with the final stages of amendment to the formal constitution. It is not giving an account of the negotiations that lead to it, or the implicit rules guiding constitutional consensus, or the realities of a “living” constitution, or the ways in which the constitution can be altered through convention or other political practices and customs. Indeed, much of the implicit and the tacit is left out of the judgment, creating another penumbra that is fortunately explored in other papers. **Richard Albert** gives shape to a concept of “constitutional amendment by stealth”, and offers along the way a wider typology of constitutional change that extends far beyond the process of formal amendment that is addressed by the Court. **Kate Glover**, for her part, reasons from a pluralist grid to give alternative readings of the *Reference*, shining a new light on the Supreme Court itself. And **Catherine Mathieu** and **Patrick Taillon** uncover the fundamental role played by the unwritten principle of federalism in the Court’s analysis of Part V of the *Constitution Act*, and connect it to the Court’s interpretation of its own constitutive act in the related “*Nadon Reference*”<sup>5</sup>—neither of which are acknowledged explicitly in the *Senate Reference*.

En somme, pour mieux percevoir tous les mécanismes de la transformation continue de nos cadres constitutionnels, explicites et implicites, politiques et juridiques, il faut impérativement lire en aller-retour les motifs de la Cour et les commentaires incisifs que nous offrent les auteurs

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<sup>4</sup> *Ibid* at para 60.

<sup>5</sup> *Reference Re Supreme Court Act, ss 5 and 6*, 2014 SCC 21, [2014] 1 SCR 433.

invités à participer à ce numéro spécial. Ils offrent une riche contribution à la meilleure compréhension possible des structures complexes qui organisent la vie politique au Canada.

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