The Supreme Court of Canada. where the justices have heard arguments in the Harper government's reference on the Senate. Adam Dodek writes of the degree of difficulty in amending the Constitution. *Policy* photo

Amending the Constitution:
THE REAL QUESTION BEFORE THE SUPREME COURT

Adam Dodek

To the extent that Canadians think about the patriation of the Constitution in 1982, they tend to think about the Canadian Charter of Rights and Freedoms. But the Charter was not what made the deal between the provinces (except Quebec) and the federal government. For most of the provinces, the Charter was the cost of the deal; the deal was about the amending formula.The real issue before the Supreme Court in the Senate reference is how rigid those amendment procedures are.

For three days last November, the Supreme Court heard arguments from lawyers for the federal and provincial governments about which constitutional amendment rules apply for reforming the Senate. In the Senate reference, the Supreme Court will determine the relevant amending procedure for potential reforms including: Creating fixed terms for senators; establishing "consultative elections" for senators; repealing the requirements that senators must own $4,000 in property in the province for which they are appointed; and abolishing the Senate. A decision is not expected for months, perhaps not until next fall.

The Senate reference is about much more than whether Stephen Harper

can proceed with his plans to impose term limits and institute "consultative elections" for the Senate. It is about how, and perhaps if, we can amend our Constitution.

When it comes to amending the Canadian Constitution, there is a paradox: it is remarkably easy to amend some matters and remarkably difficult to amend others.

This is because there are actually five different amendment procedures in the Constitution: (1) the general procedure also known as the "7/50 formula" because it requires the consent of Parliament and two-thirds of the provinces (*i.e.* 7) having at least fifty percent of the population; (2) federal unilateral, *i.e.* Parliament acting alone; (3) provincial unilateral, *i.e.* a province acting alone to amend its own constitution; (4) Parliament plus affected provinces on certain matters; and (5) unanimity of Parliament and the legislatures of all the 10 provinces. The territories are completely shut out from the formal amendment procedures.

Some of these are relatively easy. When the federal government is able to amend the Constitution alone, all that is required is ordinary legislation passed through Parliament. The most amended provision of the Constitution has always been the provision relating to the distribution of seats in the House of Commons: section 51 of the *Constitution Act, 1867*. This provision has been amended six times since Confederation, including twice since 1982. Similarly, provinces can make changes to their own affairs (with the exception of the office of the lieutenant governor). Thus, if any province wanted to create its own Senate, it would be free to do so (Quebec abolished its upper chamber in 1968).

Similarly, provisions that require only bilateral agreement between a province and the federal government, such as education, have not proven difficult to amend. When then-Ontario PC leader John Tory challenged the unfairness of Ontario's policy of funding Catholic schools but not other religious schools, some responded by claiming that Ontario's hands were tied because any change would require a "constitutional amendment". These were meant to be scare quotes but in reality all that would be required to end public funding of Catholic Schools would be a simple majority vote in the Ontario Legislative Assembly and a request to the federal government to introduce a resolution in the House of Commons to do the same. (And some political courage).

Since patriation over 30 years ago, it has proven difficult, if not impossible, to amend the Constitution. The failed attempts of Meech Lake and Charlottetown serve as a powerful deterrent to those who would ponder the possibility embarking on constitutional change. Since those efforts failed, no one has dared to try.

Politically, Canadians don't really think of the above items as constitutional amendments. We consider constitutional amendment not in strict legal terms but in political terms as changes to the basic structures of our parliamentary democracy: the House of Commons, the Senate, the monarchy, the governor general, the Supreme Court, the Charter and so on.

For many of these big-ticket items, the default procedure is the general amending formula or "7/50". The Constitution also prescribes specific items that may only be amended by using the general procedure. Importantly for the Senate reference, these include "the powers of the Senate and the method of selecting Senators" and "the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators".

Additionally, amendments to the Constitution relating to the following require unanimity of the federal government and all the provinces: (*a*) the office of the Queen, the governor general and the lieutenant governor of a province; (*b*) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented when the Constitution Act, 1982 came into force; (*c*) the use of English or French in certain circumstances; (*d*) the composition of the Supreme Court of Canada; and (*e*) an amendment to the amending formula.

On this basis, since patriation over 30 years ago, it has proven difficult, if not impossible, to amend the Constitution. The failed attempts of Meech Lake and Charlottetown serve as a powerful deterrent to those who would ponder the possibility embarking on constitutional change. Since those efforts failed, no one has dared to try.

It wasn't supposed to be this way. The enactment of the *Constitution Act, 1982* was simply supposed to be the completion of the first round of constitutional reform. It is now largely forgotten that the 1970s was a decade of almost continuous frenetic constitutional negotiations that culminated in patriation and the enactment of the *Charter of Rights and Freedoms* in 1982. After patriation, it was anticipated that other issues such as Senate reform, aboriginal rights and constitutional entrenchment of the Supreme Court would soon be addressed.

Unusually for a constitution, the *Constitution Act, 1982* itself entrenched a framework for continuing negotiations leading to potential constitutional amendments.

Section 37 required the prime minister to convene a constitutional conference within one year of the new Constitution coming into force. It required that aboriginal rights be on the agenda and that aboriginal leaders be invited to participate in these discussions. It also required the prime minister to include representatives of the territories in discussions that directly affected them. That conference was held in March, 1983 and nothing came of it.

Section 38 then required the PM to convene two additional constitutional conferences, one within three years of April 17, 1982 and the second within five years after that date. Again, aboriginal issues were required to be on the agenda for these conferences and aboriginal leaders and territorial leaders were required to be invited to participate in these discussions. Nothing came of these conferences, either.

Finally, section 49 required that the prime minister convene a constitutional conference within 15 years to

review the constitutional amendment provisions. A first ministers' conference was duly held in June 1996. Again, no progress was made.

In constitutional terms, these provisions are now "spent", an apt term to describe the used up political energy of constitutional amendment. They are now nothing but constitutional fossils.

As Paul Wells has explained in his book *The Longer I'm Prime Minister: Stephen Harper and Canada, 2006-*, Stephen Harper has convened exactly zero first ministers' conferences over the past eight years. The interesting question will be whether he will be able to maintain his perfect record if the Supreme Court does not rule in the federal government's favour in the Senate Reference.

In arguing that it does not need the consent of the provinces to proceed with its proposed reforms to the Senate of term limits and consultative elections, the federal government has argued for a strict textual interpretation of the amendment provisions. Most provinces asserted that the 7/50 formula should apply to such reforms.

If the Supreme Court rules that 7/50 applies, Prime Minister Harper will have to choose between pursuing his asserted goal of Senate reform and maintaining his disdain for negotiating with the first ministers as a group.

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Further, if the Supreme Court rules that unanimity is required to abolish the Senate, it will essentially kill any momentum for abolition and shelter the Senate from discussion over its demise for the foreseeable future.

Yet much more is at stake in the Senate reference than just reforming the Senate. The rules that the Supreme Court lays down in the Senate reference will apply to all future constitutional amendments.

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Will we ever amend our Constitution again? The federal government didn't ask the Supreme Court that question, but it may get the answer nonetheless. P

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