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Breaking the Bargain: A Comment on the Constitutional Validity of Bill C-7, the Proposed Senate Reform Act

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Breaking the Bargain: A Comment on the Constitutional Validity of Bill C-7, the proposed Senate Reform Act

Douglas Sarro
BREAKING THE BARGAIN: A COMMENT ON THE CONSTITUTIONAL VALIDITY OF BILL C-7, THE PROPOSED SENATE REFORM ACT

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Abstract

In the Constitution Act, 1982, the federal government and the provinces made a bargain regarding Senate reform: while Parliament may generally make minor changes to the Senate unilaterally, certain specified changes, including changes to the method of selecting Senators, require provincial consent. This bargain reflects the fact that Senate reform would affect both federal and provincial interests, given the Senate’s dual role as a house of the federal Parliament and, at least ideally, as a means by which provincial and regional interests are represented in Ottawa. The Harper government’s efforts to unilaterally provide for the election of “Senate nominees,” most recently via Bill C-7, would subvert this bargain. This article argues that this proposal is unconstitutional and will likely be held as such by the Supreme Court of Canada in the upcoming Senate reform reference. It also argues, however, that the Harper government’s proposal to impose non-renewable term limits on Senators is constitutional and would not upset the bargain laid out in the Constitution Act, 1982. Finally, this article argues more broadly that preserving the role that the Constitution Act, 1982 guaranteed to the provinces in shaping Senate reform is the best way to uphold not only the text of the Constitution, but the principles of democracy and federalism that undergird it.
1. INTRODUCTION

In the Constitution Act, 1982 (the "1982 Act"), the federal government and the provinces made a bargain regarding Senate reform: while Parliament may generally make minor changes to the Senate unilaterally, certain enumerated changes, including changes to the method of selecting Senators, require provincial assent. This bargain reflects the fact that Senate reform would affect both federal and provincial interests, given the Senate's dual role as a house of the federal Parliament and, at least ideally, as a means by which provincial and regional interests are represented in Ottawa.

But in an attempt to sidestep perennial disagreements between the federal government and the provinces over how the Senate should be reformed, the Harper government has repeatedly requested that Parliament enact changes without prior provincial approval, most recently via Bill C-7. Bill C-7 would have imposed nine-year, non-renewable term limits on newly appointed Senators (subject to mandatory retirement at age 75) and sanctioned provincially-organized elections for "Senate nominees", whom the Prime Minister would need to consider before recommending Senate appointments to the Governor General. Facing serious questions as to the constitutionality of these proposals, the Harper government has initiated a reference to the Supreme Court of Canada (the "Reference").

This article focuses on the constitutionality of the reforms that have been proposed in both Bill C-7 and the Reference, in light of the federal-provincial bargain made in the 1982 Act. It argues that, while Parliament has the power to impose the term limits proposed in Bill C-7, it lacks the power to authorize the election of Senate nominees by the provinces. This latter reform would have the effect of transforming the Senate into an elected body, and as such may only be effected by constitutional amendment with the consent of the provinces as provided by paragraph 42(1)(b) of the 1982 Act.

This article proceeds as follows. Part II places Bill C-7 in context by reviewing the structure and roles of the Senate, along with recent proposals for Senate reform. Part III reviews the constitutionality of the reforms proposed in Bill C-7. Part IV departs from the strictly legal discussion in Part III to consider the broader principles of federalism and democracy (which have been held to undergird Canada’s constitutional and political traditions), and the implications

2 Bill C-7, An Act respecting the selection of Senators and amending the Constitution Act, 1867 in respect of Senate term limits, 1st Sess, 41st Parl, 2011 (1st reading 21 June 2011) [Bill C-7].
4 PC 2013-70.
the reforms proposed in Bill C-7 may have for these principles. It argues that the best means of upholding both of these principles is to preserve the role that the 1982 Act guaranteed to the provinces in shaping Senate reform.

II. SENATE REFORM IN CONTEXT

This section places Bill C-7 in context by describing the structure and roles of the Senate. It also discusses the adoption of elected Senates by the United States and Australia, two countries with strong historical ties to Canada. Finally, it describes some of the Canadian Senate reform proposals that preceded Bill C-7.

i. The Structure of the Senate

The Senate has been a part of the Parliament of Canada since Confederation in 1867. Modeled partly on the appointed Legislative Councils that existed in the pre-Confederation provinces and the UK House of Lords, the Senate consists of members appointed by the Governor General pursuant to the Constitution Act, 1867 (the "1867 Act"). To be eligible for appointment to the Senate, one must have attained the age of 30 and meet certain citizenship, residency, and property requirements. Initially, Senators could serve for life, but the 1867 Act was later amended to provide that Senators could serve only until reaching the age of 75.

Senators enjoy the same privileges, powers, and immunities as members of the House of Commons, except for the capacity to introduce money bills. The Senate carries an absolute veto over all ordinary legislation, but it has only a suspensive veto of 180 days in respect of constitutional amendments (unless the amendment is made by Parliament unilaterally, in which case the Senate maintains an absolute veto).

Seats in the Senate are distributed according to the principle of equality of regions. The four "Divisions" of Canada—Ontario, Québec, the Maritimes, and the western provinces—hold 24 seats each; a further six seats are reserved.
for Newfoundland and Labrador, and the three territories each hold one Senate seat.\textsuperscript{14}

\section*{ii. Roles of the Senate}

The Senate has been said to fulfill three primary roles: to represent and protect regional interests, to revise legislation, and to investigate matters of public interest.\textsuperscript{15} Senators also play a fourth, more partisan role, in furthering the political interests of the Prime Minister who recommends their appointment.\textsuperscript{16}

\subsection*{a. The Representative Role}

At the pre-Confederation Québec Conference of 1864, several delegates expressed a hope that the Senate would play a role in upholding the balance of power between the federal government and the provinces.\textsuperscript{17} The Senate is widely seen as having failed to play this role, which is today carried out by the provincial premiers, and to some extent by the federal Cabinet.\textsuperscript{18} Given the potential for a reformed Senate to reassume this role, and in so doing either amplify or dilute premiers’ political influence (depending on the nature of such reform), it comes as little surprise that provincial premiers have shown a consistent interest in Senate reform.\textsuperscript{19}

\subsection*{b. The Legislative Role}

The drafters of the 1867 \textit{Act} intended that the House of Commons would be the primary originator of legislation and that the Senate’s legislative role would be limited to the refinement and revision of such legislation.\textsuperscript{20} This division of labour

\begin{footnotesize}
\begin{enumerate}
\item Ibid, ss 21-22. Sections 26-27 also permit the Governor General to appoint one or two additional Senators from each division; this provision was likely intended to allow the Prime Minister to force House of Commons bills through the Senate in the event of a deadlock between the two Houses. See Reference Re Constitutional Question \textit{Act}, (1991) 53 BCLR (2d) 335 at 353, 78 DLR (4th) 245 (CA).
\item See Senate, Standing Committee on Internal Economy, Budgets and Administration, \textit{The Senate Report on Activities 2010} (Ottawa: Senate Standing Committee on Internal Economy, Budgets and Administration, 2010) at 39.
\item See Part II-B-4, below.\textsuperscript{16}
\item Sir John A Macdonald, for example, argued that the Senate would “protect local interests” See \textit{Parliamentary debates on the subject of the confederation of the British North American provinces}, 3rd sess, 8th Provincial Parliament of Canada (Québec City: Hunter, Rose & Co, 1865) at 35 (Québec Conference).
\item See Part II-D below.
\item George Brown, for instance, called for a “thoroughly independent” Senate that could “canvass dispassionately” measures passed by the House of Commons. Macdonald agreed that an appointed Senate should provide “the sober second thought in legislation”; Québec Conference, \textit{ supra} note 17 at 35, 90.
\end{enumerate}
\end{footnotesize}
BREAKING THE BARGAIN

prevents legislative deadlock and reflects the principle of responsible government, whereby the government must enjoy the confidence of, and is therefore ultimately controlled by, the representative house of Parliament. Delegates to the Québec Conference believed that, if the Senate were elected, Senators would feel they had a political mandate to frustrate the work of the House of Commons—if so, the will of a house selected on the basis of regional representation could thwart that of a house chosen on the basis of representation by population, and the principle of responsible government would be undermined. An appointed Senate with no mandate from the electorate, on the other hand, could be relied upon to defer to the considered will of the House of Commons, much like the UK House of Lords. The Senate has not strayed far from this role. Although it has occasionally obstructed government initiatives, the Senate rarely rejects House of Commons bills outright; in fact, it has done so only five times since 1990.

\[c. The Investigative Role\]

In practice, the Senate's most valuable work is likely the investigative and policy development work undertaken by its committees. This function is similar to that of Royal Commissions, however the Senate is able to carry out such work at a lower cost because it employs permanent research staff. Senators are also seen as better-fitted to this role than Members of Parliament ("MPs") because

22 See e.g., Québec Conference, *supra* note 17 at 88-90.
25 These were (1) Bill C-43 (1990) on abortion; (2) Bill C-93 (1993), which would have merged the Canada Council with the Social Sciences and Humanities Research Council; (3) Bill C-28 (1996), which would have cancelled a government contract regarding Pearson International Airport; (4) Bill C-220 (1998), an attempt to prohibit profiting from authorship respecting a crime that critics alleged was overbroad; and (5) Bill C-311 (2010), which would have set carbon emissions reduction targets the government argued were impossible to meet. See Parliament of Canada, "PARLINFO," online: Parliament of Canada <http://www.parl.gc.ca/ParlInfo> [PARLINFO] (Navigate to: Legislation > Bills sent to the other House that did not receive Royal Assent).
they tend to have more legislative experience, more time to develop expertise in a particular policy area (since Senate committee membership is relatively stable and Senators do not have to carry out the constituency and political work expected of MPs), and more institutional freedom to question the positions of their parties (as they have little chance of being appointed to Cabinet and no fear of being removed from office by their party leaders). 27

d. The Partisan Role

Although he or she cannot remove Senators from office, the Prime Minister can use Senate appointments to further the interests of the governing party by appointing party organizers and other loyal partisans. The partisan nature of most appointments is often cited as evidence that the Senate is in desperate need of reform. 28 But not all Senate appointments are partisan—Prime Ministers have often recommended the appointment of independent or opposition Senators, either out of a desire to improve the caliber of the Senate’s membership or out of a desire to deflect criticism of their more partisan appointments. 29 In fact, every Prime Minister since Louis St. Laurent who has served more than one year in office (with the exception of Prime Minister Harper) has appointed at least one independent or opposition Senator, apparently to boost the ranks of the Senate opposition when it became unacceptably small. 30

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27 As of 2013, the average Senator had 8 years, 4 months of federal legislative experience, while the average MP had 6 years, 6 months of federal legislative experience. Of current MPs, 7% (24 of 308) had served in a provincial legislature, compared to 19% of current Senators (19 of 102). A larger proportion of MPs have, however, served in municipal government (64 of 308 MPs, or 21%, compared to 18 of 102, or 17%, of Senators). See PARLINFO, supra note 25 (Navigate to: Senate > Political Information; House of Commons > Political Information).

28 O’Neal, supra note 26 at 2.

29 See e.g. Richard J Breman, “Harper dubbed ‘patronage king’”, Toronto Star (28 August 2009) A6 (quoting Prime Minister Harper’s Conservative party leadership campaign as stating that “[d]espite the fine work of many individual senators, the upper house remains a dumping ground for the favoured cronies of the Prime Minister”).

30 For a list of the more highly regarded historical appointees, see Senate, Committees Directorate and Private Legislation, The Canadian Senate in Focus: 1867-1993 (Ottawa: Senate, Committees Directorate and Private Legislation, 1993) at 26-36. For views as to which of the more recent appointees to the Senate can be seen as highly-regarded, see Tyler Dawson, “Five things to love about Canada’s Senate”, The [Montréal] Gazette (25 May 2013) A8; “Reasons to reflect on Senate choices”, Toronto Star (21 December 2010) A22.

31 PARLINFO, supra note 25 (Navigate to: Senate > Senators). Though Prime Minister Harper has yet to follow in this tradition, one could argue that the Conservatives do not yet hold enough seats in the Senate to make opposition appointments necessary. For instance, when Prime Minister Martin first appointed opposition members, the governing Liberals held 64 of 98 Senate seats (seven seats remained vacant after the appointments). The present Conservative government matched this threshold in 2013. As of June 2013, the Conservatives held 60 of 102 Senate seats that were not vacant; there are also five independent senators who have caucused with the Conservatives in the past. See Senate, Senate of Canada: Annual Report 2004-2005 (Ottawa: Senate of Canada, 2005) at 12-16; PARLINFO, ibid (Navigate to: Senate > Representation > Party Standings).
iii. Possible Models for Reform: The United States and Australia

Nonetheless, the public’s evident distaste for the use of public funds to support the Prime Minister’s partisan interests, together with the apparent incompatibility of an appointed legislative house with a democratic society, have spurred calls for Senate reform.32 Senate reform advocates can look to at least two possible models for elected Senates in federal states that enjoy strong historical and cultural ties with Canada: the Senates of the United States and Australia.

a. The United States Senate

The bicameral United States Congress, which includes a House of Representatives elected based on the principle of representation by population and a Senate elected based on the principle of equality of states, was the product of the Connecticut Compromise of 1787. This satisfied large states’ demand for representation in Congress in proportion to their share of the population of the new country while addressing smaller states’ fear that their interests would be disregarded by the larger states.33

The Connecticut Compromise was more than a political compromise. It was also an attempt to reconcile the principle of representative democracy with that of federalist democracy.34 The House of Representatives would represent the United States as a single people and a single country, while the Senate would represent the states as autonomous communities, each of which had made a sovereign decision to join the United States and so were entitled to be treated as sovereign equals within the new federation.35 The Senate’s role as the representative of states’ interests in Washington is reflected in the fact that, before enactment of the Seventeenth Amendment providing for a directly elected Senate, Senators were elected by state legislatures rather than by the public at large.36

While some continue to argue that the Senate gives small states a disproportionate degree of power, the United States Congress as presently constituted reflects the ideal of “checks and balances” that pervades that


35 Ibid at 280-86.

36 The United States Senate only became a directly elected body after the enactment of the Seventeenth Amendment in 1913. See Beeman, supra note 33 at 80-81.
country's Constitution. By providing a federal check on the representative power of the House, it ensures that a national majority will not be able to run roughshod over the wishes of a discrete minority of states.

b. The Australian Senate

Australia also sought a balance between federal and representative democracy but, like Canada, it also had to reconcile this balance with the principle of responsible government. The Australian framers achieved this balance by designing a mechanism to prevent legislative deadlock between the Senate and the House of Representatives, ensuring that, where the two houses cannot come to agreement on legislation, the will of the House of Representatives will generally control.

This mechanism is found in section 57 of the Australian Constitution. It provides that where the House of Representatives passes the same piece of legislation twice within a three-month interval, and where that legislation is both times either rejected by the Senate or passed with amendments to which the House will not agree, the Governor General may dissolve both houses and call elections for each (a process called “double dissolution”). If the newly elected houses fail to agree on the same legislation, it is considered at a joint session of both houses, at which point the House of Representatives, with its larger membership, would likely control the outcome of the vote.

iv. Senate Reform Initiatives and the 1979 Reference

Calls for reform of the Canadian Senate date back over a century. Modern proposals can be roughly divided into two groups. First, the “House of the Federation” model would have allowed provincial governments a role in selecting Senators similar to that played by American state legislatures prior to the enactment of the Seventeenth Amendment. The Trudeau government’s attempt to unilaterally reform the Senate in accordance with this model gave rise to the Reference Re Authority of Parliament in relation to the Upper House (1979) (the “1979 Reference”), which resulted in the Supreme Court of Canada’s only statement on the constitutionality of unilateral Senate reform to date. The second model for reform is the elected Senate model, which will be addressed in the ongoing Reference.

39 Ibid.
40 Commonwealth of Australia Constitution Act, 1900 (UK), 63 & 64 Vict, c 12, s 57.
42 Reference Re Authority of Parliament in relation to the Upper House [1980] 1 SCR 54, (sub nom Reference Re Legislative Authority of Parliament to Alter or Replace the Senate) 102 DLR (3d) 1 [1979 Reference].
a. The House of the Federation Model

In 1978, the Trudeau government introduced Bill C-60, which proposed that the Senate be replaced by a “House of the Federation,” whose members would be elected by members of provincial legislatures and of the House of Commons via a form of proportional representation.\(^{43}\) The House of the Federation would exercise only a suspensive veto of 120 days over ordinary bills passed by the House of Commons (rather than the current absolute veto).\(^ {44}\) The Trudeau government argued that the 1867 Act granted Parliament authority to effect these changes without provincial consent, as it permitted Parliament to unilaterally amend the “Constitution of Canada.”\(^ {45}\)

However, the Supreme Court rejected this argument in the 1979 Reference. The Supreme Court read the phrase “Constitution of Canada” narrowly, so as to mean only “the constitution of the federal government, as distinct from the provincial governments.”\(^ {46}\) On this reading, Parliament’s unilateral amendment power extended only to those provisions of the 1867 Act that were “of interest only to the federal government.”\(^ {47}\) Since the Senate was intended to safeguard regional and provincial interests, changes to the “fundamental character” of the Senate would necessarily concern the provinces and thus fall outside Parliament’s unilateral amending power.\(^ {48}\) Accordingly, Bill C-60 was abandoned.

In defining the “fundamental character” of the Senate, the Supreme Court relied on statements made by delegates to the Québec Conference along with the preamble to the 1867 Act, which provides that the Constitution was intended to be “similar in Principle to that of the United Kingdom ... [and to] conduce to the Welfare of the Provinces.”\(^ {49}\) It concluded that any change that would affect the Senate’s ability “to afford protection to the various sectional interests in Canada in relation to the enactment of federal legislation” (i.e., its representative role) or to be “a thoroughly independent body which could canvass dispassionately the measures of the House of Commons” (i.e., its legislative role) would constitute a change to the Senate’s “fundamental character.”\(^ {50}\) Such changes were held to include reforms that would reduce Senators’ perceived independence by requiring them to stand for election or serve significantly shorter terms.\(^ {51}\)

When the Constitution was patriated in 1982, a new set of amending formulae was introduced. These formulae reflected the basic principle laid out in the 1979 Reference: while minor changes to the Senate can be made by Parliament alone, specific changes likely to affect provincial interests cannot. But

\(^{43}\) Bill C-60, An Act to amend the Constitution of Canada with respect to matters coming within the legislative authority of the Parliament of Canada, and to approve and authorize the taking of measures necessary for the amendment of the Constitution with respect to certain matters, 3rd Sess, 30th Parl (1st reading 20 June 1978), cl 63.

\(^{44}\) Ibid, cl 67.

\(^{45}\) 1979 Reference, supra note 42 at 60.

\(^{46}\) Ibid at 70.

\(^{47}\) Ibid at 70.

\(^{48}\) Ibid at 78.

\(^{49}\) Ibid at 66-67.

\(^{50}\) Ibid at 77.

\(^{51}\) Ibid at 76-78.
the authors of the 1982 Act abandoned the Supreme Court's broad "fundamental character" test for a more specific bargain: while amendments in relation to the Senate may generally be made by Parliament alone, changes to the "method of selecting Senators and the powers of the Senate," and "the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators," may only be enacted with the approval of Parliament and at least seven provincial legislatures representing at least 50 percent of the population of Canada.52

The Mulroney government attempted to forge federal-provincial agreement on Senate reform with the 1987 Meech Lake Accord.53 The Accord would have required the Prime Minister to recommend the appointment of Senators selected from a list of nominees compiled by the government of the province where a vacancy occurred, until the federal and provincial governments could unanimously agree on more comprehensive Senate reform.54 The Accord failed because the Mulroney government could not attract the level of provincial support required under the 1982 Act.

b. The Elected Senate Model

In the 1980s, a series of federal and provincial commissions recommended that the Constitution be amended so that Senators could be directly elected.55 In 1992, the Mulroney government tried to bring an elected Senate into being with the Charlottetown Accord.56 The Accord addressed the possibility of legislative deadlock by providing that revenue and expenditure bills passed by the House of Commons would be subject only to a 30-day suspensive veto, while other bills would still be subject to an absolute veto.57 The Accord was abandoned, however, after it was rejected in a referendum held that year.

Senate reform efforts largely lay dormant until the election of the Harper government in 2006. Unlike Prime Minister Mulroney, who sought to reform the Senate with the consent of the provinces, Prime Minister Harper has argued that Parliament has the authority to implement limited reforms unilaterally. To this end, the Harper government has introduced seven different Senate reform bills prior to Bill C-7, all of which died on the order paper before they could be passed into law.58 Bill C-7's fate will depend on the Reference.

52 1982 Act, supra note 1, s 42(1)(b)-(c). Part III-C, below, addresses the argument that the 1982 Act did not override the "fundamental character" test.
54 Ibid.
57 Ibid.
III. THE CONSTITUTIONALITY OF THE BILL C-7 REFORMS

Bill C-7 remains relevant in determining the constitutionality of the reforms advanced in the Reference. Reference Questions 1(a) and 3 ask the Supreme Court of Canada to determine the constitutionality of both the term limits and provision for Senate nominee elections proposed in Bill C-7. These questions also refer the Supreme Court of Canada to particular provisions of Bill C-7. Finally, as the Harper government’s most recent legislative proposal for Senate reform, Bill C-7 offers the best insight into the intentions underlying the proposals discussed in the Reference.

To determine the constitutionality of the reforms proposed in Bill C-7, it is necessary to (a) identify the pith and substance of the reforms by examining their legal and practical effects, and (b) determine whether this pith and substance can only be enacted by constitutional amendment, and (c) if so, determine which amending formulae would apply.

i. The Pith and Substance of the Bill C-7 Reforms

To determine the pith and substance of the reforms advanced in Bill C-7, it is necessary to examine their legal effects. These can be determined by looking at the wording of the questions advanced in the Reference, interpreted in light of the text of Bill C-7.59 Where a reform’s purpose remains unclear, it will be necessary to examine any relevant practical effects of the reform.60

I argue that the practical effects of the reforms advanced in Bill C-7 are relevant to determining their purpose and that, together with the text of Bill C-7, they indicate that the pith and substance of these reforms is not merely the creation of a consultative framework that may be used by the Prime Minister when recommending Senate appointees to the Governor General, but the transformation of the Senate into an elected body.

a. Provision of term limits for Senators

Question 1(a) of the Reference asks whether Parliament has the authority to provide for “a fixed term of nine years for Senators, as set out in clause 5 of Bill C-7.” Clause 5 of Bill C-7 provides that Senators appointed after Bill C-7 comes into force would be appointed for one non-renewable nine-year term, subject to mandatory retirement at age 75. The text of this clause is sufficiently clear that no further analysis is necessary to determine the intent of the clause.


60  The practical effects of legislation are not relevant if they merely show that the legislation is likely to be ineffective in meeting its stated objective. It is relevant only to the extent that it reveals an alternative purpose to the legislation. Ibid at 485-88.
b. Elections of Senate Nominees

(a). Relevant Reference Questions and Text of the Bill

Question 3 of the Reference asks whether Parliament has the authority to "establish a framework setting out a basis for provincial and territorial legislatures to enact legislation to consult their population as to their preferences for potential nominees for appointment to the Senate as set out in the schedule to Bill C-7." The schedule to Bill C-7 provides that "Senate nominees for a province or territory [are] to be determined by an election held in the province or territory." Part I of Bill C-7 indicates how this reform could work. It provides that, where a province or territory has enacted legislation substantially in accordance with the framework described in the schedule, "the Prime Minister, in recommending Senate nominees to the Governor General, must consider names from the most current list of Senate nominees selected for that province or territory." Where a province or territory does not enact such legislation, Senators from that province or territory would be appointed in the same way they are now.

The key issue is whether this reform is intended to implement a consultative framework, which the Prime Minister may choose to follow or ignore when recommending Senate nominees to the Governor General, or for all practical purposes bind the Prime Minister's recommendatory power and thus gradually transform the Senate from a largely appointed body into a wholly elected body. The text of Bill C-7 is especially relevant in weighing this issue given that, as noted above, Reference Question 3 refers directly to Bill C-7, and the Government of Canada has suggested that the SCC respond to this question in light of Bill C-7.

The preamble of Bill C-7 indicates that these reforms are intended to do the latter:

Whereas it is appropriate that those whose names are submitted to the Queen's Privy Council for Canada for summons to the Senate be determined by democratic election by the people of the province or territory that a senator is to represent; ... [and]

Whereas the tenure of senators should be consistent with modern democratic principles;

The preamble also states that "it is important that ... the Senate, continue to evolve in accordance with ... the expectations of Canadians." If a province...
were to organize an election for Senate nominees, it would almost certainly be
the “expectation” of those who voted in that election that the Prime Minister
would recommend the appointment of the winners of that election.67

Further evidence of an intention to convert the Senate into an elected body
can be found in the schedule to Bill C-7, which provides that “Senators to be
appointed for a province or territory should be chosen from a list of Senate
nominees submitted by the government of the province or territory ... determined
by an election held in the province or territory.”68

(b). Practical Effects

Though Reference Question 3 refers to Senate nominee elections as a
“consultation” process and Bill C-7 states that the Prime Minister would need
only “consider” the outcomes of such a consultation, it is almost certain that
a Prime Minister would feel bound to recommend the appointment of any
person who wins a Senate nominee election held by a provincial government in
accordance with federal legislation.69

The consultation process contemplated above has been said to be, in legal
terms, indistinguishable from a poll or any of the other informal means of
consultation of which a Prime Minister may take advantage before recommending
appointments to the Governor General.70 In fact, several significant differences
are immediately apparent. Individuals voting to elect Senate nominees would
make definite choices amongst competing candidates about whom they have
acquired a great deal of information via both the candidates themselves and the
media. Voters may have had the opportunity to watch the candidates debate
substantive issues. In addition, voters would demonstrate their commitment to
their choices by taking time to visit polling stations to cast ballots. Finally, such
elections would be sanctioned by federal legislation.

On the other hand, individuals participating in a poll express tentative
opinions, which, if not expressed during an election campaign, would not be
well-informed by media coverage of the platforms and agendas that would be
pursued by prospective Senators in office. A tentative opinion expressed by
a sample of individuals based on little or no information does not carry the
same weight as the informed, considered opinion of the whole of an electorate
expressed in an election. Informal consultation with a provincial government
is also unlikely to carry the same weight as a formal election, given that
individuals recommended pursuant to such a mechanism would also lack the
clear democratic mandates that would be enjoyed by individuals who succeed in
federally-sanctioned Senate nominee elections.

Finally, because Senate nominee elections would be sanctioned by federal
legislation, they are also distinguishable from the elections held pursuant

67 House of Commons, Legislative Committee on Bill C-20, Evidence, 39th Parl, 2nd sess,
No 5 (16 April 2008) at 3 [Hogg Evidence].
68 Bill C-7, supra note 1, Schedule, cls 1-2.
69 Hogg Evidence, supra note 67 at 3.
70 Ibid at 2.
to Alberta’s Senatorial Selection Act,” which have generally not led to the appointment of successful candidates.\(^\text{72}\) The constitutional validity of this legislation, as noted below in part III-B-2, is dubious at best. Furthermore, two of the major parties in Alberta—the Liberals and the NDP—have boycotted every Alberta Senate election since 1989.\(^\text{73}\) A federally sanctioned election that is deemed constitutionally valid, and which as a result would likely attract candidates from all major political parties, would enjoy far more political legitimacy—and impose a far stronger political obligation on the Prime Minister to recommend the appointment of successful candidates—than the process currently in place in Alberta.

In summary, the likely practical effects of the “consultation” process described in Bill C-7 and Reference Question 3 would be to bind the discretion of the Prime Minister with respect to the appointment of Senators. Therefore, the pith and substance of Reference Questions 1(a) and 3, as reflected in Bill C-7, appears to be to transform the Senate into an elected body.

ii. To what extent must the Constitution be amended before Bill C-7 may be enacted?

It is now necessary to determine to what extent the Constitution would need to be amended before Parliament could achieve the objectives associated with Bill C-7’s pith and substance. This requires examination of both the text and purpose of those provisions of the Constitution that define the basic structure of the Senate.\(^\text{74}\) As Bill C-7 already makes clear that the government accepts that Senate term limits would require amendments to the 1867 Act, I will focus on the proposals for the election of Senate nominees and the delegation of responsibility for holding these elections to the Senate described in Bill C-7 and Reference Question 3.\(^\text{75}\)

I argue that neither of these reforms could be implemented without amending the 1867 Act. The creation of a process for the election of Senate nominees—which would, as argued in the previous section, have the effect of transforming the Senate into an elected body—contradicts the purpose of section 24 of the 1867 Act, which was to provide for the appointment of non-elected Senators so that the Senate could “canvass dispassionately” measures passed by the House of Commons.\(^\text{76}\) The delegation of responsibility for the organization of Senate nominee elections to the provinces would also require an amendment to the constitutional division of powers, as Parliament currently has exclusive jurisdiction over parliamentary elections.\(^\text{77}\)

\(^{71}\) RSA 2000, c S-5.

\(^{72}\) GoC Factum, supra note 64 at paras 132-33.


\(^{74}\) See e.g. 1867 Act, supra note 6, ss 21-36. See also Part II-A above.

\(^{75}\) Bill C-7, supra note 2, cls 4-5.

\(^{76}\) 1979 Reference, supra note 42 at 77.

\(^{77}\) McKay v The Queen, [1965] SCR 798 at 806, 53 DLR (2d) 532 (McKay); 1979 Reference, ibid at 77.
a. Elections of Senate Nominees

Section 24 of the 1867 Act specifies that "[t]he Governor General shall from Time to Time ... summon qualified Persons to the Senate." No provision of the 1867 Act explicitly requires that the Governor General undertake any particular process prior to summoning an individual to the Senate. The Governor General is only bound by the convention that he or she appoint qualified persons recommended by the Prime Minister.

It has been argued that in the absence of textual provisions that define how the Governor General must appoint Senators or how the Prime Minister must go about recommending Senators, section 24 should be read as permissive, allowing Parliament to prescribe any process that it deems desirable without necessitating a constitutional amendment. But a reading of section 24 of the 1867 Act together with other provisions of the Constitution, including the preamble to the 1867 Act and the amending formulae set out in Part V of the 1982 Act, indicates that section 24 was intended not merely to provide that Senators would be appointed, but also to exclude the possibility that Senators would be elected, whether directly or indirectly.

Such a reading indicates that the selection process set out in section 24 was intended not merely to provide that Senators would be appointed, but also to exclude the possibility that Senators would be elected, whether directly or indirectly (just as must be the case with the Governor General). On this reading, the election process provided for in Bill C-7 could only be enacted if section 24 is amended to permit the election of Senators or Senate nominees.

The preamble to the 1867 Act provides that Canada is to have a Constitution "similar in principle to that of the United Kingdom". The SCC has interpreted as an indication that the Senate, like the UK House of Lords, must be appointed and not elected:

78 See also 1867 Act, supra note 6, s 32. This provision duplicates s 24, providing that "When a Vacancy happens in the Senate by Resignation, Death, or otherwise, the Governor General shall by Summons to a fit and qualified Person fill the Vacancy."

79 See Heard, Conventions, supra note 21 at 34-40 (noting that all of the Governor General's powers are by convention exercised only on the Prime Minister's recommendation, save for decisions to summon, dissolve, or possibly prorogue Parliament, and decisions to appoint or dismiss the Prime Minister). Conventions are constitutional rules that may be recognized, but not enforced, by a court. They are political in nature, created by political acts and enforced through political processes. These political acts include consistent practice and explicit agreement, either of which may give rise to a convention if they are regarded as binding by political actors and there is a principled reason why they should be enforced. See Reference Re Resolution to amend the Constitution, [1981] 1 SCR 753 at 898, "sub nom Reference Re Amendment of the Constitution of Canada (Nos 1, 2 and 3)" 125 DLR (3d) 1.

80 See e.g. Debates of the Senate, 40th Parl, 3rd Sess, Vol 147, No 40 (17 June 2010) at 846 (Hon Bob Runciman).

81 Section 24 should also be read in light of the convention that the Governor General must appoint whomever is recommended by the Prime Minister. See supra note 77; Heard, Conventions, supra note 1 at 3-4, 18 (discusses the distinction between the interpretation of a statute in light of a convention, which courts are permitted to do, from enforcing a convention, which courts are not permitted to do).
The substitution of a system of election for a system of appointment ... would involve a radical change in the nature of one of the component parts of Parliament. As already noted, the preamble to the Act referred to "a constitution similar in principle to that of the United Kingdom", where the Upper House is not elected.\(^{82}\)

The Supreme Court has similarly relied on the preamble in other cases where it was necessary to clarify the powers, privileges, or characteristics of the House of Commons and the Senate.\(^{83}\)

Paragraph 42(1)(b) of the 1982 Act lends further support to a reading of section 24 that excludes the possibility of holding Senate elections (whether directly or indirectly through the election of Senate nominees). Paragraph 42(1)(b) refers to amendments to the Constitution concerning the "method of selecting Senators." In so doing, it implies that the method of selecting Senators is prescribed by the Constitution—if this were not the case, paragraph 42(1)(b) would be meaningless.\(^{84}\)

In summary, a contextual reading of section 24 of the 1867 Act indicates that Senators are to be appointed and not elected, therefore any legislation that has the effect of converting the Senate into an elected body cannot be enacted without an amendment to section 24. The preamble to the 1867 Act states that

\(^{82}\) 1979 Reference, supra note 42 at 77.

\(^{83}\) See e.g. New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly), [1993] 1 SCR 319 at 378-85, 118 NSR (2d) 181 [NB Broadcasting] (Where McLachlin J, as she then was, relied on it the preamble in holding that Canadian legislatures are entitled to parliamentary privileges similar to those enjoyed by the UK Parliament); Authorson v Canada (AG), 2003 SCC 39 at para 41, [2003] 2 SCR 40 (where Major J relied on the preamble in rejecting a claim that the Canadian Bill of Rights requires Parliament to consult affected individuals before enacting legislation). Preambles have no legal force in themselves, and it should be noted that courts are generally reluctant to use the preamble to import unwritten constitutional provisions that limit Parliament’s authority. See Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island, [1997] 3 SCR 3 at para 104, 156 Nfld & PEIR 1; Babcock v Canada (AG), 2002 SCC 57 at paras 53-57, [2002] 3 SCR 3.

\(^{84}\) A similar argument has been advanced with respect to amendments to the composition of the Supreme Court of Canada. Several scholars argue that because paragraph 41(d) of the 1982 Act states that any amendment regarding “the composition of the Supreme Court of Canada” must be approved by Parliament and all of the provincial legislatures, the composition of the Supreme Court must be part of the Constitution of Canada, even though the Supreme Court Act has not been included in the schedule of Acts deemed to have constitutional status. See e.g. RJ Cheffins, "The Constitution Act, 1982 and the Amending Formula: Political and Legal Implications" (1982) 4 Sup Ct L Rev 43 at 53; WR Lederman, "Canadian Constitutional Amending Procedures: 1867-1982" (1984) 32 Am J Comp L 339; SA Scott, "The Canadian Amendment Process: Mechanisms and Prospects" in CJ Backton & AW Mackay, eds, Recurring Issues in Canadian Federalism (Toronto: University of Toronto Press, 1986) 77. These provisions would be incorporated into the Constitution via section 52(2) of the 1982 Act, which states that the Constitution of Canada "includes," and is therefore not limited to, the statutes listed in the Schedule; supra note 1. The meaning of "composition" is far from clear; it may mean that some provisions of the Supreme Court Act, but not others, hold constitutional status. See Peter Oliver, "Canada, Quebec, and Constitutional Amendment" (1999) 49 UTLJ 519 at 579-583.
Canada is to have a constitution similar to that of the United Kingdom, whose upper house is not elected; the 1982 Act also indicates that the current method of selecting Senators may only be changed by constitutional amendment.

b. Delegation of authority over Senate nominee elections to the provinces

The division of powers between Parliament and the provincial legislatures imposes a second constitutional hurdle to the kind of Senate reform described in Reference Question 3 and Bill C-7. In both McKay and the 1979 Reference, the SCC stated that Parliament has sole jurisdiction over the organization of Parliamentary elections, whether to the House of Commons or the Senate. This means that even if the Constitution of Canada permitted elections relating to the Senate, the provinces would not have jurisdiction to organize them absent a Constitutional amendment explicitly authorizing them to do so. This calls into question not only the constitutional validity of the reforms proposed in Bill C-7, but of existing provincial legislation purporting to provide for Senate elections.

In McKay, the Supreme Court addressed the question of whether a municipal by-law prohibiting the erection of billboards applied to signs advertising candidates for Parliament. This required the Supreme Court to answer the broader question of whether elections for Parliament fall under exclusive federal jurisdiction. Justice Cartwright, writing for the majority, answered in the affirmative: “the subject matter of elections to Parliament appears to me to be from its very nature one which cannot be regarded as coming within any of the classes of subjects assigned to the legislatures of the provinces.”

In the 1979 Reference, the Supreme Court reached the same conclusion when considering whether Parliament could enact legislation permitting the provinces to select Senators. It stated that the selection of Senators was a matter of federal jurisdiction and that, as a result, the delegation of responsibility for the selection of Senators to the provinces “would involve an indirect participation by the provinces in the enactment of federal legislation,” which would be contrary to the general constitutional rule that one legislature cannot delegate its powers to another.

If the provinces are to be involved in the selection of Senators to the degree contemplated in Bill C-7, it will be necessary not only to amend the Constitution to provide for an elected, term-limited Senate, but also to provide the provinces with jurisdiction to organize elections to the Senate. Though one could argue that legislation providing for the selection of Senators is distinguishable from legislation providing for the selection of “Senate nominees” as contemplated in Bill C-7, this argument is likely to fail for the same reasons offered in Part III-A.

85 McKay, supra note 77.
86 Ibid at 806; 1979 Reference, supra note 42 at 77.
87 See Senatorial Selection Act, supra note 71. As of August 2013, the constitutional validity of this statute has not been challenged in court.
88 McKay, supra note 77 at 806.
89 1979 Reference, supra note 42 at 77.
iii. If the Constitution must be amended, which amending formula would apply?

Though Part III(ii) argued that constitutional amendments are necessary before Parliament could implement the reforms described in Bill C-7, this does not necessarily mean that Parliament must attain provincial approval before making these amendments. Parliament is generally permitted to unilaterally amend provisions of the Constitution “in relation to ... the Senate and House of Commons” under section 44 of the 1982 Act, subject to exceptions listed in sections 41-42. The exception most relevant here is paragraph 42(1)(b), which requires that an amendment to “the powers of the Senate and the method of selecting Senators” be approved under the section 38 formula—that is, by Parliament and at least seven provincial legislatures representing at least 50% of the population of Canada. Changes to the division of powers between Parliament and the provincial legislatures are also subject to this formula.

a. Election of Senate nominees and delegation of authority to the provinces

As discussed in Part III(i), the Senate nominee election process described in the Reference and Bill C-7 would have the effect of transforming the Senate into an elected body. It is therefore a change in the method of selecting Senators that engages paragraph 42(1)(b) of the 1982 Act and requires provincial approval. As discussed in Part III(ii), delegation of the power to enact legislation providing for elections for Senate nominees to provincial legislatures would amend the division of powers; it therefore would also be invalid without the approval of the provinces as provided in the formula described in section 38 of the 1982 Act.

b. Provision of term limits for Senators

Even if the SCC holds that Parliament cannot unilaterally provide for the Senate nominee elections described in Question 3 of the Reference, the SCC can separately consider whether the term limit contemplated Question 1(a) and Bill C-7 could be enacted by Parliament alone, pursuant to its unilateral amending power under section 41 of the 1982 Act. I argue that this term limit, considered alone, would not require provincial approval, as it would affect neither the powers of the Senate nor the means by which Senators are selected.

The key issue here is whether the central holding of the 1979 Reference, that the “fundamental character” of the Senate cannot be changed unilaterally by Parliament, has any bearing on this issue.91 Proponents of the fundamental character test argue that the 1979 Reference retains force, either because it sets out an unwritten amending formula, or because it aids in the interpretation of s 42(1)(b) of the 1982 Act.92

91 This holding is separate from its discussion of federal jurisdiction over the selection of Senators, which does not depend on the “fundamental character” test and was not ousted by the 1982 Act. Hence, the discussion in this Part does not affect the arguments made with respect to the provinces’ lack of jurisdiction over the selection of Senators as discussed in Part III-B.

92 Bill S-4 Observations, supra note 3 at 1670-72.
The "fundamental character" test appears to have been extinguished entirely by the 1982 Act. As noted in Part III above, this test hinged on the interpretation of the phrase "Constitution of Canada." Section 52 of the 1982 Act now makes clear that the "Constitution of Canada" includes the 1867 Act in its entirety, effectively reversing the 1979 Reference on this point. Furthermore, the Supreme Court has confirmed that the amending formulae set out in Part V of the 1982 Act "contains a new procedure for amending the Constitution of Canada which entirely replaces the old one." It has been argued that there may be unwritten checks on Parliament's power to unilaterally enact amendments in relation to the House of Commons and the Senate in addition to sections 41-42 of the 1982 Act (e.g. to prevent Parliament from unilaterally extending the House of Commons' usual maximum term beyond five years). Even if such checks were necessary, which is doubtful at best, this does not lead to the conclusion that the "fundamental character" test must remain valid.

In addition, the "fundamental character" test is likely of little value in interpreting paragraph 42(1)(b) of the 1982 Act. That the authors of the Constitution chose not to incorporate the broad phrase "fundamental character" into s 42(1)(b), and instead used the more specific phrase "method of selecting Senators and the powers of the Senate," indicates an intention to bring precision to this amending formula that would only be frustrated by reading in the "fundamental character" test.

The phrase "powers of the Senate" most likely refers to changes to the Senate's legal powers to review, amend, and veto bills passed by the House of Commons. But it is possible that the Senate's "powers", read broadly to include the "rights and privileges" enjoyed by Senators, also include Senators' institutional independence from the government of the day. If this is the case, a term limit that effectively prevents Senators from acting independently—from exercising their responsibility to "canvass dispassionately" the work of the House of Commons—would require provincial consent.

But there is little evidence that any of the non-renewable term limits proposed in the Reference, including the term limit proposed in Bill C-7, would have this effect. In fact, the evidence that does exist suggests the contrary. For example, a recent study indicates that Senators who have served eight years or fewer in

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93 Reference re Objection by Quebec to a Resolution to amend the Constitution [1982] 2 SCR 793 at 806, (Sub nom Quebec (AG) v Canada (AG)) 140 DLR (3d) 385. See also Hogan v Newfoundland (AG), 2000 NFCA 12 at para 73, 189 Nfld & PEIR 183.
94 Bill S-4 Observations, supra note 3 at 1672.
95 The changes described above could only be made if the Canadian Charter of Rights and Freedoms is amended to abrogate the democratic rights guaranteed under sections 3-4. It is doubtful that any such amendment could be characterized as an amendment solely in relation to the House of Commons or the Senate that could be made unilaterally by Parliament. See Canadian Charter of Rights and Freedoms, being Part I of the 1982 Act, supra note 1, ss 3-4.
96 Patrick Monahan, Constitutional Law, 3d ed (Toronto: Irwin Law, 2006) at 203-204.
97 Daphne Dukelow, ed, Pocket Dictionary of Canadian Law, 5th ed (Toronto: Carswell, 2011) sv "power".
office are as likely to vote independently of their party as more senior Senators. Given that Prime Ministers have traditionally appointed Senators who are not members of their party when necessary to ensure that there is a minimum level of opposition representation in the Senate, it is doubtful that the entire Senate could be populated by members of the governing party (as some have predicted). On this basis, the nine-year, non-renewable term limit proposed in Bill C-7 and Question 1(a) of the Reference should not be problematic. The non-renewable term limits of ten and eight years, proposed in Questions 1(b) and (c) of the Reference, respectively, should also pass muster.

But the renewable eight-year term proposed Question 1(e) of the Reference would likely raise difficulties, to the extent that it creates a possibility that Senators will seek to curry favour with the Prime Minister of the day to secure reappointment. This possibility was one of the reasons that the delegates to the Québec Conference ultimately decided not to give Senators limited, renewable terms. Given that, over the past thirty years, two Prime Ministers have served for more than eight years (and that Prime Minister Harper will also pass this threshold if he serves past February 2014), this possibility cannot be dismissed.

In summary, the only amending formulae that apply to the reforms described in the Reference and Bill C-7 are those set out in Part V of the 1982 Act, which replaced the fundamental character test stated in the 1979 Reference. These amending formulae allow for the unilateral enactment of the term limits contemplated in Bill C-7 and Question 1(a) of the Reference, but not the elections for Senate nominees contemplated in Bill C-7 and the Reference.

IV. SENATE REFORM, FEDERALISM, AND DEMOCRACY

Many would likely view the outcome of the analysis described above as intolerable. Polls show that Canadians’ support for the status quo in the Senate


99 See supra note 32 and accompanying discussion.

100 See e.g. House of Commons Debates, 40th Parl, 3rd Sess, Vol 145, No 36 (29 April 2010) at 2144 (Joyce Murray).

101 These Reference questions are phrased as follows: “In relation to each of the following proposed limits to the tenure of Senators, is it within the legislative authority of the Parliament of Canada, acting pursuant to section 44 of the Constitution Act, 1982, to make amendments to section 29 of the Constitution Act, 1867 providing for (a) a fixed term of nine years for Senators, as set out in clause 5 of Bill C-7, the Senate Reform Act; (b) a fixed term of ten years or more for Senators; [or] (c) a fixed term of eight years or less for Senators.”

102 This reference question refers to the term limit set out in Bill S-4, which is a renewable term of eight years. See Bill S-4, An Act to amend the Constitution Act, 1867 (Senate tenure), 1st Sess, 39th Parl, 2005, cl 2 (1st reading 30 May 2005).

103 Québec Conference, supra note 17 at 90.
is almost non-existent. Given that the provinces’ constitutional jurisdiction to hold Senate nominee elections is questionable at best, as indicated by McKay and the 1979 Reference, it is unlikely that many provinces will join Alberta in organizing such elections. How does it serve the principles of federalism and democracy—principles that the SCC has concluded underlie the Constitution of Canada—to prevent Parliament from converting an unelected Senate incapable of effectively representing regional interests into a democratically elected Senate that would likely emerge as a strong voice for regional interests?

In brief, this outcome is justified because the principle of federalism implies that the provinces will have some influence on important constitutional changes likely to affect their interests. In addition, it is far from clear that democracy would be served by creating an elected house with a political mandate (and legal power) to frustrate the work of the House of Commons and possibly undermine the principle of responsible government, particularly when Canadians have not had a chance to make clear what form of Senate reform they prefer (or whether they want a Senate at all).

i. The Principle of Federalism

According to former Chief Justice Richard of the Federal Court of Appeal, the adoption of federalism in Canada was a natural consequence of its “large geographic size, the presence of two founding languages, and the diversity and distinctiveness of its regional cultures and economies.” The SCC has added that federalism provides a “political mechanism by which diversity could be reconciled with unity”—a mechanism that increasingly requires that “complex governance problems” be resolved “not by the bare logic of either/or, but by seeking cooperative solutions that meet the needs of the country as a whole as well as its constituent parts.”

The path to Senate reform charted by the Harper government is difficult to reconcile with this conception of federalism. The Senate nominee elections proposed by Bill C-7, if implemented, would affect the interests of the provincial governments by diluting the influence that comes from their current role as the primary spokespersons for regional and provincial interests. Though Bill C-7 provides provincial legislatures with a formal choice as to whether to hold Senate nominee elections, this choice is designed to force a particular outcome. Provincial legislatures would be required to choose between (a) ceding some of their governments’ political clout to elected Senate nominees, and (b) being seen as helping to uphold an unpopular appointed Senate and denying their electors


105 Secession Reference, Supra note 5 at para 32.


107 Secession Reference, supra note 5 at para 43.

the same chance to influence federal politics enjoyed by electors in provinces that do provide for the election of Senate nominees. Provincial legislatures would have little practical choice but to choose option (a).

It has long been recognized that the provincial governments have a legitimate interest in influencing the course of Senate reform. The 1979 Reference protected this influence by placing limits on Parliament’s capacity to unilaterally change the Senate—limits that were given more specificity with the 1982 Act. It is also of note that neither the elected American Senate nor the elected Australian Senate came about as a result of unilateral federal action. Both were the result of intense lobbying campaigns by the representatives of these countries’ state governments, followed by agreement between these states.\(^{109}\)

Though the Senate nominee elections proposed in Bill C-7 are intended to support federalism by lending regional and local interests a stronger voice in the course of Canadian government, the unilateral implementation of this reform would seem to be incompatible with federalism. It would disregard the provincial governments’ legitimate interest in the course of Senate reform, and it would preclude a federal-provincial conversation regarding what reforms would best serve both federal and provincial interests.

### ii. Democracy

It might seem to be common sense that the principle of democracy would strongly favour federal action to enact an elected Senate. But “democracy” means more than elections, particularly when read in light of Canada’s particular political and constitutional traditions. The SCC’s Secesssion Reference offers useful guidance on the nature of these traditions. One of the traditions it cites is “representative and responsible government.”\(^{110}\) This tradition, together with the principle of federalism, provide for a system whereby a national legislative majority exercises control over national concerns, while different provincial legislative majorities exercise control over local concerns.\(^{111}\) In addition to majority rule, the Secesssion Reference notes that democracy contemplates “a continuous process of discussion” that allows for a true “marketplace of ideas.”\(^{112}\) This process of “discussion … compromise, negotiation, and deliberation” is intended to ensure that the majorities that do develop are reasoned, informed, and show due concern for the interests of minorities.\(^{113}\)

The reforms described in Bill C-7 could effect a departure from these traditions. First, the conversion of the Senate from an appointed body to an elected one would likely affect the Senate’s ability to investigate and report on public policy issues, a role that helps further the kind of discussion and deliberation that contributes to our democracy. This is because elected Senators would likely be

\(^{109}\) Beeman, supra note 33 at 154-56; Aroney, supra note 38 at 200-201.

\(^{110}\) Secesssion Reference, supra note 5 at para 65.

\(^{111}\) Ibid at para 66.

\(^{112}\) Ibid at para 68.

\(^{113}\) Ibid.
subject to many of the same constraints that currently compromise elected MPs’ ability to carry out this role, such as more significant political and constituency responsibilities. The second and more important departure, however, would result from the possibility that elected Senators would feel they had a mandate to exercise their legislative powers in the same way as MPs, and as such would be less likely to defer to the considered will of the House of Commons. This raises the possibility of legislative deadlock, whereby the will of a house where seats are distributed on the basis of equality of regions could frustrate the will of a house where seats are distributed on the basis of representation by population.

This situation poses little problem for the American Senate because American democracy is guided by different principles, namely the principles of checks and balances and separation of powers. Under this system, the executive does not require the legislature’s support to remain in office, and as a result legislative deadlock does not threaten the government’s survival. Checks and balances are seen as essential to the accountable operation of government rather than as a threat to the effective operation of government.

But legislative deadlock does pose a significant problem for democracies guided by the principle of responsible government. While the Australian Constitution addresses this problem by providing for double dissolution in the event of deadlock, and the Charlottetown Accord would have addressed this problem by limiting the Senate’s power to veto bills passed by the House of Commons, Bill C-7 does not (and constitutionally could not) address this problem by modifying the powers of the Senate. As a result, the reforms contemplated in Bill C-7 could threaten the representative house’s control over the course of government, along with the principle of responsible government that has guided Canada’s democratic institutions since Confederation.

Of course, traditions should not be followed for their own sake. If Canadians want these traditions to change in the way contemplated by Bill C-7, then these changes should be brought about. But it is far from clear that Canadians want an elected Senate—polls indicate that almost as many Canadians would prefer that the Senate be abolished altogether. More importantly, the Constitution of Canada sets out a precise framework whereby the views of Canadians regarding changes to means of selecting Senators can be ascertained and effected—via the process of constitutional deliberation and amendment described in paragraph 41(1)(b) of the 1982 Act. The implications an elected Senate would have for the nature of our democracy are too significant to be brought about via the “Senate nominee” shortcut contemplated in Bill C-7.

114 See generally Part II-ii-c above.
115 Grenier, supra note 104.
V. CONCLUSION

In McKay, Justice Cartwright wrote, “just as the legislature cannot do indirectly what it cannot do directly, it cannot by using general words effect a result which would be beyond its powers if brought about by precise words.”116 The “Senate nominee” elections proposed in Bill C-7 are an attempt to effect just such a result by just those means, and it is for this reason that this aspect of the Bill is unconstitutional.

With the 1982 Act, the federal government and nine of ten provincial governments agreed that if the method of selecting Senators is to be changed, a substantial majority of the provinces must consent to this change. By trying to evade this agreement by the means provided in Bill C-7, the Harper government risks undermining the principles of federalism and democracy that undergird Canada’s political and legal culture. It would disregard the provinces’ significant, legitimate interest in the future of the Senate. It would create an elected upper house that would inevitably come into conflict with the House of Commons, without providing for a means by which deadlock between the two houses would be resolved, and as a result put the principle of responsible government (a key component of Canadian democracy) at risk.

Plainly, the status quo in the Senate is unacceptable. But both the provisions and the principles of our Constitution require that, if Senate reform is to be carried out, it must be carried out with the agreement of the federal and provincial governments. If we try to avoid this requirement by relying on half-measures that try to exploit imagined loopholes in the Constitution, we risk doing even greater harm to our federal democracy than is arguably caused by an unelected Senate.

116 McKay, supra note 77 at 806.