

Two Paths to Senate Reform

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Introduction

The *Constitution Act, 1982* (the “1982 Act”)¹ offers two paths to Senate reform. Incremental reforms can be made by Parliament unilaterally.² But changes to the method of selecting Senators or the powers of the Senate can be made only by federal-provincial consensus.³ The Harper government seeks to straddle these paths by proposing that Parliament unilaterally provide for the election of “Senate nominees”, who would subsequently be considered for appointment to the Senate.⁴ The constitutionality of this proposal is the subject of references presently before the Supreme Court of Canada (“SCC”) and the Québec Court of Appeal.⁵

This article argues that because the practical effect of this reform would be to change the method of selecting Senators – Prime Ministers would invariably recommend the appointment of nominees elected pursuant to federal legislation – this reform cannot be made by Parliament unilaterally. There are both historical and principled reasons for limiting Parliament’s amending power in this way. First, the basic characteristics of the Senate were the product of a deliberate compromise between the various pre-Confederation provinces, and, prior to the patriation of the Constitution, the SCC had recognized that the provinces should be consulted before the basic elements of this compromise are changed.⁶ Second, a change in the method of selecting Senators could

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¹ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 1 [1982 Act].

² *Ibid*, s 44.

³ *Ibid*, s 42(1) (b).

⁴ 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]; *In the Matter of a Reference by the Governor in Council concerning reform of the Senate, as set out in Order PC 2013-70, dated February 1, 2013* (35203) (SCC) (Factum of the Attorney General of Canada) [Canada (AG) Factum].

⁵ Canada, PC 2013-70; Québec, OIC 346-2012.

⁶ See text accompanying notes 34-40, below.

significantly affect the provincial governments' current position as the primary spokespersons for regional interests, and as such they continue to have a legitimate interest in shaping the course of Senate reform. Third, these limits ensure that a significant change to the nature of our democracy – one that could affect how the principle of responsible government is applied federally – cannot be made without a meaningful national discussion.

Such a national discussion could produce consensus: polls show that an overwhelming majority of Canadians want a change to the *status quo*.⁷ A consultative referendum, held in conjunction with a general election (like several recent provincial referenda on democratic reform),⁸ could provide a guidepost for future federal-provincial negotiations. In the meantime, there are incremental improvements that Parliament can make unilaterally, such as depoliticizing the appointments process and ensuring that nominees for appointment are independently vetted, which would result in a more credible and effective Senate.

This article has four parts. Part 1 looks at the history of the Senate and of proposals for Senate reform, with the aim of showing how the *1982 Act's* amending formulae fit within the context of these histories. Part 2 focuses on the constitutional validity of the Harper government's proposal to straddle the two paths to Senate reform set out in the *1982 Act* by providing for the election of "Senate nominees" (it does not address the validity of the term limits and other reforms proposed in the SCC Reference). This Part argues that the "Senate nominees" proposal, if implemented, would have the effect of changing the method of selecting Senators and, as such, could not be implemented unilaterally by Parliament under the *1982 Act*. Part 3 argues that the limits that the *1982 Act* places on Parliament's ability to unilaterally implement Senate reform have a basis not only in history, but in principle. This Part focuses on the principles of federalism and democracy, which have been held to undergird Canada's Constitution, and why they favour federal-provincial collaboration on major Senate reform.⁹ Part 4 looks forward, and argues that it is more than possible for Parliament and the provinces to improve the Senate while acting in accordance with the *1982 Act*. A brief conclusion follows.

⁷ Éric Grenier, "Canadians want to reform or abolish Senate: polls", *The Globe and Mail* (30 May 2013) online: The Globe and Mail <<http://www.theglobeandmail.com/news/politics/canadians-want-to-reform-or-abolish-senate-polls/article12260094/>>.

⁸ See *infra* note 86.

⁹ *Reference Re Secession of Québec*, [1998] 2 SCR 217 at para 32, 161 DLR (4th) 385 [*Secession Reference*].

1. The *1982 Act* formulae in historical context

According to the *1982 Act*, an amendment to the Constitution respecting the Senate may be made by Parliament unilaterally, unless the amendment concerns the method of selecting Senators, the powers of the Senate, the number of Senators selected to represent each province, or the residency qualifications for Senators.¹⁰ These types of amendments may only be made with the approval of Parliament and seven of ten provinces totalling at least 50% of the population of Canada.¹¹ The *1982 Act* thus contemplates two paths to Senate reform: a first path, by which Parliament can unilaterally reform the Senate within certain limits; and a second path, whereby Parliament, in cooperation with the provinces, can implement a broader range of reforms. To understand the logic behind these formulae, it is necessary to first look at the historical context in which the Senate developed.

The role and composition of the Senate were largely decided at the Québec Conference of 1864.¹² Delegates took a variety of positions on this matter, but two basic agreements emerged from the conference. The first was that the Senate should represent regional interests in the federal Parliament, and as such representation in the Senate would be based on the principle of regional equality. In this way, the Senate would ensure that the interests of smaller provinces are heard in the federal Parliament.¹³

The second (and in retrospect contradictory) agreement was that the Senate's legislative role should be tightly circumscribed – limited largely to “regulating”, “revising”, and “canvass[ing] dispassionately” the legislative work of the House of Commons.¹⁴ The principle of responsible government, which had long been applied in the United Kingdom and had solidified in pre-Confederation Canada by the 1850s, required that the house selected on the basis of representation by population – the House of Commons – have ultimate control over the government of the day.¹⁵ This principle would have been endangered if a Senate selected on the basis of regional equality possessed both the power and legitimacy to frustrate the House of Commons' legislative agenda. The solution the conference agreed on was to limit both the power and the legitimacy of the Senate – the Senate would not be capable of introducing

¹⁰ *1982 Act*, *supra* note 1, s 42(1)(b)-(c).

¹¹ *Ibid*, ss 38(1), 42(1).

¹² *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) [Québec Conference].

¹³ *Ibid* at 35.

¹⁴ *Ibid* at 90.

¹⁵ JMS Careless, *Canada: A Story of Challenge*, 2d ed (New York: Cambridge University Press, 1963) at 188-89, 203-204.

money bills, and it would be appointed rather than elected.¹⁶ It was hoped that an appointed Senate, relatively insulated from political pressure but also lacking in political legitimacy, would be well-placed to perform the “regulating” and “revising” role intended for it, and would not use its power to frustrate the legislative work of the House of Commons.¹⁷

Though the provisions of the *Constitution Act, 1867* (the “1867 Act”)¹⁸ that describe the composition and method of selecting Senators have been amended several times since Confederation, they continue to reflect the basic contours of the agreement reached at the Québec Conference. Section 24 of the *1867 Act* provides that Senators are to be selected by the Governor General and may serve until reaching the age of 75 (they were initially permitted to serve for life).¹⁹ Section 18 gives Senators the same privileges, powers, and immunities as members of the House of Commons, though section 53 states that Senators may not introduce money bills. Sections 21-22 describe the composition of the Senate: 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. Also relevant is the preamble to the *1867 Act*, which states that it was intended that Canada have a Constitution “similar in principle to that of the United Kingdom”, where the upper house is not elected, and the House of Commons controls the government and the legislative agenda.

This arrangement satisfied few – in fact, calls for Senate reform date back to only a few years after Confederation.²⁰ Robert MacKay’s remark that “[p]robably on no other public question in Canada has there been such unanimity of opinion as on that of the necessity for Senate reform”,²¹ published in 1926, has lost none of its currency. The reasons for this dissatisfaction were manifold. First, the fact that the Senate was appointed on the recommendation of the federal Prime Minister rendered the Senate

¹⁶ Québec Conference, *supra* note 12 at 1027-28, 1030. In these resolutions, the Senate is referred to as the “Legislative Council”.

¹⁷ Québec Conference, *supra* note 12 at 35, 90.

¹⁸ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 17, reprinted in RSC 1985, App II, No 5 [1867 Act].

¹⁹ See *Constitution Act, 1965*, 14 Eliz II, c 4, Pt I (Can), s 1.

²⁰ See Andre Barnes et al, *Reforming the Senate of Canada: Frequently Asked Questions* (Ottawa: Library of Parliament, 2011) at 6.

²¹ Robert MacKay, *The Unreformed Senate of Canada* (London: Oxford University Press, 1926) at 206.

incapable of effectively representing regional interests.²² This void would instead be filled by the provincial premiers and, to some extent, the federal Cabinet.²³

Second, the notion that an appointed Senate could veto bills passed by the House of Commons is difficult to reconcile with the principle of representative democracy.²⁴ This concern is partly, but not wholly, addressed by the fact that the Senate in practice rarely vetoes bills passed by the House of Commons.²⁵ The fact that the Senate arguably carries on valuable work through its committees – particularly by investigating and reporting on important public policy issues (much in the way that a Royal Commission does) and suggesting revisions to House bills based on submissions from the public and the legislative experience of its membership – also does not address this basic concern about the Senate’s legal power to veto House bills.²⁶

Proponents of reform have tended to look to examples set by other federations in designing an upper house.²⁷ As such, it is helpful to briefly review two of these examples.

The United States Senate, whose membership consists of two Senators from each state, was initially elected by state legislatures; today, pursuant to the Twenty-Sixth Amendment, Senators are directly elected by voters.²⁸ The U.S. Senate thus has both

²² CES Franks, “The Canadian Senate in Modern Times” in Serge Joyal, ed, *Protecting Canadian Democracy: The Senate You Never Knew* (Ottawa: Canadian Centre for Management Development, 2003) 151 at 151; Daniel J Savoie, *Governing from the Centre: the concentration of power in Canadian politics* (Toronto: University of Toronto Press, 1999) at 348.

²³ *Ibid.*

²⁴ See e.g. Colin Campbell, *The Canadian Senate: A Lobby from Within* (Toronto: Macmillan, 1978) at 14; David E Smith, *The Canadian Senate in Historical Perspective* (Toronto: University of Toronto Press, 2003) at 58.

²⁵ The Senate has vetoed only five bills passed by the House of Commons since 1990: (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>> (Navigate to: Legislation > Bills sent to the other House that did not receive Royal Assent).

²⁶ On the investigative and legislative work of Senate committees, see Brian O’Neal, *Senate Committees: Role and Effectiveness* (Ottawa: Library of Parliament, 1994) at 24-25; Senator John Lynch-Staunton, “The Role of the Senate in the Legislative Process” (2000) 23(2) *Can Parl Rev* 10 at 10-12.

²⁷ See the discussion of Bill C-60 and other historical reform proposals below.

²⁸ Richard Beeman, *The Penguin Guide to the United States Constitution* (London: Penguin, 2010) at 80-81.

the power and the legitimacy to block legislation passed by the House of Representatives and pursue its own legislative agenda. As a result, the ability of the larger states to use their superior numbers in the House of Representatives to impose their will on the smaller states is strictly limited. While this framework is easy to reconcile with the principle of checks and balances that guides American democracy,²⁹ it is more difficult to reconcile with the principle of responsible government in place in Canada and other Commonwealth countries.

Australia, however, found a way to bring about an elected Senate without compromising responsible government. Australia's Constitution provides for an elected Senate, but it also includes a deadlock mechanism (under section 57) to deal with a scenario where the elected House of Representatives and the elected Senate cannot agree on legislation.³⁰ If the House of Representatives passes the same piece of legislation twice within a three-month interval, and that legislation is both times either rejected by the Senate or passed with amendments to which the House will not agree, the Governor General can dissolve both houses and call an election, thus giving voters a chance to resolve the deadlock. If the deadlock persists subsequent to this election, the House and the Senate are required to vote on the bill in joint session, at which point the House, with its superior numbers, would likely control the outcome of the vote. In this way, legislative deadlock is avoided and the principle of responsible government is preserved.³¹

In 1978, the Trudeau government introduced a Senate reform bill that would have incorporated aspects of both the American and Australian models. Bill C-60 proposed that the Senate be replaced by a "House of the Federation", with a membership elected by the provincial legislatures and the House of Commons (similar to how U.S. Senators were initially selected).³² Like the Australian model, Bill C-60 proposed a deadlock mechanism: while the House of the Federation could veto House of Commons legislation, this veto would not be an absolute one. Rather, it would only be a suspensive veto, lasting 120 days.³³ The Trudeau government argued that the *1867 Act* granted Parliament authority to effect these changes without provincial consent, since

²⁹ *Ibid* at 154-56; Akhil Reed Amar, "Of Sovereignty and Federalism" (1987) 96 Yale LJ 1425 at 1494.

³⁰ Commonwealth of Australia Constitution Act, 1900 (UK), 63 & 64 Vict, c 12.

³¹ Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (New York: Cambridge University Press, 2009) at 189.

³² 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.

³³ *Ibid*, cl 67.

subsection 91(1) of the *1867 Act* permitted Parliament to unilaterally amend the “Constitution of Canada.”³⁴ The Trudeau government initiated a reference to the SCC (resulting in the *1979 Reference*³⁵ decision), requesting the Court’s view of the merits of this argument.

The SCC concluded that Bill C-60 could only be enacted with provincial consent. It reached this result by adopting a narrow reading of the phrase “Constitution of Canada”, so that the phrase referred only to “the constitution of the federal government, as distinct from the provincial governments”.³⁶ As such, while Parliament could unilaterally amend the Constitution only if the amendment, by its nature, was “of interest only to the federal government”.³⁷ Because the Senate was initially intended as a means of protecting provincial and regional interests, the Senate could not be classified as a matter of interest only to the federal government – as a result, Parliament’s power to reform the Senate unilaterally must be limited. The SCC defined these limits as follows: it stated that, while incremental changes to the Senate (such as the requirement that Senators retire at age 75) could be enacted by Parliament alone, changes to the “fundamental character” of the Senate would require provincial consent.³⁸ It defined “fundamental character” as including the basic tenets of the bargain struck by the delegates to the Québec Conference: that the Senate have an absolute veto over House of Commons legislation, that its seats be apportioned on the basis of regional equality, and that Senators be appointed and not elected.³⁹ The SCC found further support for recognizing this last characteristic in the preamble to the *1867 Act*, which states that Canada is to have a Constitution similar in principle to that of the United Kingdom, where the upper house is not elected.⁴⁰

The SCC thus contemplated two separate paths to Senate reform: one path, involving changes that would not affect the “fundamental character” of the Senate, which may be undertaken by Parliament alone; and a second path that permits change to the “fundamental character” of the Senate, but which may only be undertaken with

³⁴ *Reference Re Authority of Parliament in relation to the Upper House* (1979), [1980] 1 SCR 54 at 60, (*sub nom Reference Re Legislative Authority of Parliament to Alter or Replace the Senate*) 102 DLR (3d) 1 [1979 Reference cited to SCR]. The *1867 Act* was then titled the *British North America Act, 1867*.

³⁵ *Ibid.*

³⁶ *Ibid* at 70.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ The SCC listed additional fundamental characteristics that were relevant to the Trudeau government’s proposal to impose term limits on Senators. The SCC gave no indication that the fundamental characteristics listed in the *1979 Reference* were exhaustive. *Ibid.*

⁴⁰ *Ibid.*

provincial consent. The amending formulae introduced in the *1982 Act* reflect this basic framework, though they lend greater precision to the limits this framework places on Parliament's amending power by replacing the SCC's "fundamental character" test with a list of specific classes of amendments that would require provincial consent.

The *1982 Act* replaced the "fundamental character" test in three steps. First, it repealed the amending formula described in subsection 91(1) of the *1867 Act*. Second, it stated at subsection 52(2) of the *1982 Act* that the "Constitution of Canada" includes the *1867 Act* in its entirety – thus removing the doctrinal basis for the "fundamental character" test.⁴¹ Third, it stated at section 44 that, generally, all amendments to the Constitution of Canada in relation to the Senate may be made by Parliament unilaterally. As a result, the only exceptions to this general rule that remain in force today are the exceptions enumerated in the *1982 Act*. This has been confirmed by the SCC, which has stated that Part V of the *1982 Act* constitutes a complete code for the amendment of the Constitution of Canada, which entirely replaces any rules and conventions that predated the *1982 Act*.⁴² For this reason, in the legal analysis below, I address only the amending formulae laid out in the *1982 Act*.

2. The constitutionality of the "senate nominee" reform proposal

The Harper government's proposal for the election of Senate nominees comes after several failed attempts to forge federal-provincial consensus on Senate reform, including the Meech Lake and Charlottetown Accords.⁴³ Since coming into office in 2006, the Harper government has introduced eight different bills proposing Senate reform.⁴⁴ Prime Minister Harper has also recommended the appointment of elected

⁴¹ Subsection 52(2) states that the Constitution of Canada includes all of the statutes listed in the schedule to the *1982 Act*. The *1867 Act* is one of the statutes listed in the schedule. See *1982 Act*, *supra* note 1, schedule, item 1.

⁴² *Reference re Objection by Québec to a Resolution to amend the Constitution* [1982] 2 SCR 793 at 806, (*sub nom Québec (AG) v Canada (AG)*) 140 DLR (3d) 385. See also *Hogan v Newfoundland (AG)*, 2000 NFCA 12 at para 73, 189 Nfld & PEIR 183.

⁴³ Canada, *Constitutional Amendment, 1987* (Ottawa: Government of Canada, 1987), Schedule, s 2; Canada, *Consensus Report on the Constitution: Charlottetown* (28 August 1992, Final Text) (Ottawa: Supply & Services Canada, 1992) at 6-7.

⁴⁴ Canada, Parliamentary Information and Research Service, *Legislative Summary of Bill C-7: An Act respecting the selection of senators and amending the Constitution Act, 1867 in respect of Senate term limits* (Publication No 41-1-C7E) by Sebastian Spano (27 June 2011) at 2-3 [*Bill C-7 Legislative Summary*].

Senate nominees,⁴⁵ who won elections held in Alberta pursuant to that province's *Senatorial Selection Act*.⁴⁶

The Harper government's most recent set of proposals for Senate reform are set out in Bill C-7. One of these proposals provides for the election of "Senate nominees" by the provinces; the Prime Minister would be required to consider recommending the appointment of nominees elected in accordance with this proposal. This is an attempt to straddle the two paths to reform prescribed in the *1982 Act* – the Harper government argues that this reform would encourage the selection of elected Senators without changing the method of selecting Senators in a "formal constitutional sense" (as Prime Minister Harper put it), thus avoiding the need for provincial consent.⁴⁷

Arguments as to whether this proposal constitutes a constitutional amendment, and whether, if so, Parliament may enact it unilaterally, hinge on two key questions. These questions are (a) whether the pith and substance of the reform is to transform the Senate into an elected body, and (b) whether section 24 of the *1867 Act* requires that Senators be appointed and not elected. If the answers to both of these questions are "yes", as I argue below, then the proposal constitutes a constitutional amendment respecting the method of selecting Senators, and as a result may only be enacted with provincial consent.

a. The pith and substance of the "Senate nominee" reform proposal

In determining whether a measure constitutes a constitutional amendment, it is necessary to first identify the pith and substance of the measure – in other words, it is necessary to determine what the measure is intended to accomplish.⁴⁸ This can be done by first examining the text of the measure to determine its legal effects.⁴⁹ This text can be found in both the Reference and in Bill C-7, which is referred to in both the

⁴⁵ Canada, Minister of State (Democratic Reform), "Backgrounder – Senate Reform Act" (1 February 2013), online: Government of Canada <<http://www.democraticreform.gc.ca/eng/content/backgrounder-senate-reform-act>>. Prime Minister Harper was not the first Prime Minister to recommend the appointment of an elected Senate nominee – Prime Minister Brian Mulroney had also recommended the appointment of Stan Waters, who won an Alberta Senate election held in 1989. Waters served from 1990 to 1991. See *Bill C-7 Legislative Summary*, *ibid* at 4.

⁴⁶ RSA 2000, c S-5.

⁴⁷ Canada, Senate, *Proceedings of the Special Committee on Senate Reform*, 39th Parl, 1st sess (7 September 2006) at 2:13.

⁴⁸ *R v Morgentaler*, [1993] 3 SCR 463 at 482-85, 107 DLR (4th) 537.

⁴⁹ *Ibid*.

Reference itself and the Government of Canada's factum.⁵⁰ If the legal effects of the measure indicate more than one possible intention, it will be necessary to try and determine the practical effects of the measure.⁵¹

As briefly outlined above, Question 3 of the Reference and Bill C-7 describe a framework by which (i) the provinces would enact legislation providing for the election of "Senate nominees", and (ii) if the provincial legislation is in substantial accordance with model legislation set out in the schedule to Bill C-7, the Prime Minister will be required to consider recommending the elected nominees to the Governor General for appointment to the Senate. If a province does not enact such legislation, Senate appointments would continue to be carried out in the same way that they are now.⁵²

Is this measure intended to establish a non-binding consultative framework, or is it intended to transform the Senate into an elected body? The preamble to Bill C-7 indicates that the government's intent is to accomplish the latter. It notes that "it is appropriate that those whose names are submitted ... for summons to the Senate be determined by democratic election", and that "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." Presumably, if a province were to organize an election for Senate nominees, voters would expect that the Prime Minister would recommend the appointment of the winners of that election.

Furthermore, the schedule to Bill C-7 states 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" (emphasis added). Finally, even the Attorney General of Canada has conceded that Bill C-7 discloses a "strong preference that Senators be summoned from lists compiled in accordance with provincial or territorial legislation".⁵³ In other words, despite the formally non-binding nature of the framework described in Bill C-7, the preamble and schedule to the Bill strongly indicate that this measure is intended to impose a political obligation on the Prime Minister to appoint only elected Senate nominees.

Because the text of Bill C-7 indicates an alternative purpose for the "Senate nominee" framework, it is necessary to examine the likely practical effect of this framework. The Attorney General of Canada, in its SCC Reference factum, points to the record of

⁵⁰ Canada (AG) Factum, *supra* note 4 at paras 18-19.

⁵¹ *Ibid* at 485-88.

⁵² Bill C-7, *supra* note 4, cl 3.

⁵³ Canada (AG) Factum, *supra* note 4 at para 142.

Alberta's *Senatorial Selection Act* in arguing that Bill C-7 would not have the practical effect of transforming the Senate into an elected body. This factum points out that only five of the nine individuals elected under this statute have gone on to be appointed to the Senate.⁵⁴

The likely effects of federal legislation sanctioning Senate nominee elections cannot be determined by looking at the effects of the Alberta *Senatorial Selection Act*. The process is not sanctioned by federal legislation, and its constitutionality is dubious – the SCC has repeatedly held that elections to Parliament fall within exclusive federal jurisdiction.⁵⁵ In the *1979 Reference*, the SCC made clear that if provision is made for Senate elections, jurisdiction over these elections would fall to Parliament by default.⁵⁶ These apparent shortcomings seem to have influenced the actions of both politicians and voters in the province. Two of the major parties in Alberta – the Liberals and the NDP – have boycotted every Alberta Senate election since 1989.⁵⁷ In the last Alberta Senate election, held in 2012, nearly 15% of the ballots issued were spoiled, declined, or rejected (compared to less than 1% of the ballots issued in the provincial election held on the same day).⁵⁸

If Parliament were to sanction provincial Senate nominee elections, it would in effect be taking the position that these elections are a valid exercise of provincial power. With Parliament's stamp of approval, these elections would also be likely to attract candidates from all parties, and be viewed as legitimate by a far greater segment of the public. In other words, candidates elected pursuant to such a process would enjoy far more political legitimacy than candidates elected under the process currently in place in Alberta. As a result, a Prime Minister would feel a far stronger political obligation to recommend the appointment of candidates elected pursuant to such a process.

In summary, the pith and substance of the Harper government's proposed framework for the election of "Senate nominees" is the transformation of the Senate into an

⁵⁴ The Government of Canada's factum states that only five of *ten* individuals successfully elected have gone on to be appointed. The factum appears to have counted Bert Brown twice. Brown was elected in 1998 and 2004, and appointed in 2007. Brown's term ended after he turned 75 in March 2013. *Ibid* at para 132.

⁵⁵ *1979 Reference*, *supra* note 34 at 77; *McKay v The Queen*, [1965] SCR 798 at 806, 53 DLR (2d) 532 [McKay].

⁵⁶ *1979 Reference*, *ibid*.

⁵⁷ Alfie Mfilean, "Alberta to hold another nominee selection vote" *Edmonton Journal* (30 January 2010) A3.

⁵⁸ Elections Alberta, *The Report of the Chief Electoral Officer on the Senate Nominee Election: Monday, April 23, 2012* (Edmonton: Elections Alberta, 2012) at 14; Elections Alberta, *The Report of the Chief Electoral Officer on the 2012 Provincial General Election for the Twenty-eighth Legislative Assembly* (Edmonton: Elections Alberta, 2010) at 87-517.

elected body. The text of Bill C-7 discloses an intention to bend the Prime Minister's discretion towards the recommendation of Senate nominees. The practical effect of the framework described in Bill C-7 would be to significantly boost the legitimacy of candidates elected pursuant to provincial Senate nominee elections, again with the aim of ensuring that the Prime Minister feels obligated to recommend the appointment of successful candidates.

b. The scope of section 24 of the 1867 Act

The next issue is whether a measure intended to bind the Prime Minister's discretion in this way could be enacted without a constitutional amendment. As noted above, section 24 of the *1867 Act* provides that Senators are appointed by the Governor General. By convention, the Governor General is bound to appoint only persons recommended by the Prime Minister.⁵⁹ The Government of Canada has submitted that, so long as the Prime Minister's formal discretion in recommending candidates for appointment to the Senate is preserved, Parliament is free to enact whatever consultation process it chooses, without necessitating an amendment to section 24.⁶⁰

A reading of section 24 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 the scope of section 24 is somewhat broader than the Government of Canada claims. This reading indicates that section 24 was intended both to provide that Senators would be appointed and to exclude the possibility that Senators would be elected, whether directly or indirectly.

As noted above, 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 this as an indication that the parties to Confederation intended that the Senate, like the UK House of Lords, be appointed and not elected:

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.⁶¹

⁵⁹ Robert E Hawkins, "Constitutional Workarounds", (2010) 89 Can Bar Rev 513 at 522, citing Minute of a Meeting of the Committee of the Privy Council, PC 3374, 25 October 1935.

⁶⁰ Canada (AG) Factum, *supra* note 4 at para 140.

⁶¹ 1979 Reference, *supra* note 34 at 77.

The SCC 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.⁶²

Furthermore, paragraph 42(1)(b) of the *1982 Act* states that amendments to the Constitution concerning the “method of selecting Senators” require provincial consent. In so doing, it implies that the method of selecting Senators is prescribed by the Constitution, and therefore cannot be changed, either directly or indirectly, through ordinary legislation – if this were not the case, paragraph 42(1)(b) would be meaningless.⁶³

The unreasonableness of the narrow reading of section 24 proposed by the federal government is made clear when we examine the implications such a reading would have for the interpretation of similar provisions of the *1867 Act*. For example, section 58 of the *1867 Act* provides that the Lieutenant Governors of the provinces are to be appointed by the Governor General in Council.⁶⁴ Like section 24, section 58 does not explicitly state how these appointments are to be made. Therefore, if Parliament is permitted to establish a process for electing “Senate nominees” without amending section 24, it would follow that Parliament is also permitted to establish a process for electing provincial “Lieutenant Governor nominees” without amending section 58.

⁶² 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 (Where Justice McLachlin relied on the preamble in holding that Canadian legislatures are entitled to parliamentary privileges similar to those enjoyed by the UK Parliament); *Authorsson v Canada (AG)*, 2003 SCC 39 at para 41, [2003] 2 SCR 40 (where Justice Major relied on the preamble in rejecting a claim that the *Canadian Bill of Rights* requires Parliament to consult affected individuals before enacting legislation).

⁶³ A similar argument has been advanced with respect to amendments to the composition of the SCC. 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 SCC 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. Ronald I. Cheffins, “The Constitution Act, 1982 and the Amending Formula: Political and Legal Implications” (1982) 4 Sup Ct L Rev 43 at 53. These provisions would be incorporated into the Constitution via s 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.

⁶⁴ The formal powers of the Lieutenant Governor of a province include the power to grant or withhold royal assent from bills passed by the provincial legislature and to appoint members of the provincial cabinet. By convention, most of the Lieutenant Governor’s powers may be exercised only on the recommendation of the provincial premier or cabinet. See Ronald I. Cheffins, “The Royal Prerogative and the Office of the Lieutenant Governor” (2000) 23(1) Can Parl Rev 14 at 15-17, 19.

The unreasonableness of such a reading becomes clear upon considering its implications. The installation of an elected “Lieutenant Governor nominee”, who would presumably feel he or she had a political mandate to exercise discretion when appointing cabinet ministers and determining whether to give royal assent to bills passed by the provincial legislature, could result in radical changes to the political conventions that control the operation of government in the provinces. These changes may include the effective abrogation of the principle of responsible government as it applies to the provinces.⁶⁵ The only reasonable reading of section 58 is one that includes an implicit requirement that the Lieutenant Governors be appointed and *not* elected, so that any scheme providing for the election of Lieutenant Governors, whether directly or indirectly, would necessitate an amendment to the Constitution (which, according to the amending formulae set out in the *1982 Act*, would require provincial consent).⁶⁶ Section 24, by implication, must be given the same interpretation with respect to the appointment of Senators.

In summary, section 24 of the *1867 Act* provides not only that Senators are to be appointed by the Governor General, but also that Senators are *not* to be elected, whether directly or indirectly. Since the Harper government’s proposal for the election of “Senate nominees” would have the practical effect of transforming the Senate into an elected body, it constitutes an amendment to section 24. Since this amendment concerns the “selection of Senators”, it is an amendment falling within the scope of paragraph 42(1)(b), and therefore may only be made on provincial consent.

3. A principled basis for the *1982 Act* formulae

The previous parts of this article looked at the historical context in which the *1982 Act*’s approach to Senate reform was developed, and how the “Senate nominee elections” proposal advanced by the Harper government runs afoul of this approach by trying to straddle the two distinct paths to Senate reform contemplated in the *1982 Act*. The next question is whether this framework is merely a product of history, or whether it retains some principled basis today. I argue that there remains a principled basis for restricting Parliament’s ability to unilaterally bring about Senate reform, which can be found by examining two of the principles that the SCC has held underlie the Constitution of Canada: federalism and democracy.⁶⁷

⁶⁵ For a description of the relevant conventions as they operate in the provinces, see *ibid.*

⁶⁶ *1982 Act*, *supra* note 1, s 41(a).

⁶⁷ *Secession Reference*, *supra* note 9 at para 32.

a. Federalism

It has been argued that the adoption of federalism in Canada was likely 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”.⁶⁸ Federalism, the SCC notes, provides a “political mechanism by which diversity could be reconciled with unity”⁶⁹ – and in Canada it 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.”⁷⁰

It has long been recognized that the provincial governments have a legitimate interest in influencing the course of Senate reform. As the *1979 Reference* notes, the basic character of the Senate was the result of a carefully-crafted compromise between the representatives of the various pre-Confederation provinces.⁷¹ The formulae set out in the *1982 Act* reflect the provinces’ ongoing interest in Senate reform. This interest is legitimate because, depending on the kind of reform implemented, a reformed Senate would have the capacity to significantly amplify or dilute the provinces’ influence over federal politics.

For instance, a reform that allows the provincial legislatures to nominate Senators would significantly increase the provinces’ influence in Ottawa. In contrast, a reform that provides for the direct election of Senators would tend to dilute the influence of the provincial governments, since elected Senators would have an equally legitimate claim to speak on behalf of regional interests. The experience of the United States and Australia with Senate reform further supports the legitimacy of the provinces’ interest in such reform – neither the elected American Senate nor the elected Australian Senate came about as a result of unilateral federal action. Rather, they were the result of intense lobbying campaigns by the representatives of these countries’ state governments, followed by agreement between these states.⁷²

One might argue that the Senate nominee elections proposed by Bill C-7 incorporate an element of federal-provincial cooperation: a Senate nominee election will only occur if

⁶⁸ Chief Justice John D Richard, “Federalism in Canada” (Address delivered at an international seminar for United States lawyers, 12-13 November 2004), online: Federal Court of Appeal <http://www.fca-caf.gc.ca/bulletins/speeches/federalism_e.shtml>.

⁶⁹ *Secession Reference*, *supra* note 9 at para 43.

⁷⁰ *Reference Re Securities Act*, 2011 SCC 66 at para 132, [2011] 3 SCR 837.

⁷¹ *1979 Reference*, *supra* note 34 at 66-67.

⁷² *Beeman*, *supra* note 28 at 154-56; *Aroney*, *supra* note 31 at 200-201.

provincial legislation provides for such an election.⁷³ The difficulty here is that while 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 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 select option (a).

In summary, while it might appear at the principle of federalism would favour the election of Senate nominees because it would give regional interests a stronger voice in Parliament, this principle also requires that such a reform be brought about in a way that respects the provinces' historical and legitimate interest in determining the course of Senate reform. This principle therefore requires that, if the kind of fundamental Senate reform proposed by the Harper government is to be brought about, it should be brought about – as it has in other federal democracies – through a meaningful conversation and agreement between representatives of both levels of government.

b. Democracy

It might seem common sense that the principle of democracy would favour federal action to enact an elected Senate. But democracy means more than the holding of elections. The most fundamental concept underlying democracy is that of majority rule.⁷⁴ In Canada, this concept is given life through the creation of legislatures elected on the principle of representation by population and through the principle of responsible government.⁷⁵

Canadian democracy contemplates a number of checks on majority rule. One of these checks is the federal system, which allows “different provinces to pursue policies responsive to the particular concerns and interests of people in that province” without interference from a national majority.⁷⁶ Another is the principle that democracy “requires a continuous process of discussion”, by which minority views are considered and addressed.⁷⁷ A third constraint is the principle of constitutionalism and the rule of law, which limits untrammelled majority rule by setting out “an orderly framework

⁷³ Bill C-7, *supra* note 4, cl 3.

⁷⁴ *Secession Reference*, *supra* note 9 at para 63.

⁷⁵ *Ibid* at para 65.

⁷⁶ *Ibid* at para 66.

⁷⁷ *Ibid* at para 68.

within which people may make political decisions” in a way that protects the rights and interests of the minority.⁷⁸

The imposition of a democratically-elected Senate, however, would introduce a new and significant limit on the principles of majority rule and responsible government that has not previously been contemplated in Canada. Elected Senators would naturally feel they had a mandate and a responsibility to express their views on bills passed by the House of Commons and to vote against bills with which they disagreed.⁷⁹ Absent a mechanism like Section 57 of the Australian Constitution, such a reform 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. As a result, the House of Commons would be required to share control over the government with the Senate, since the government would require the confidence of both houses to ensure that its bills are enacted into law.

Of course, the principle of responsible government should not be followed for their own sake. Other countries, like the United States, have built democracies on the basis of different principles, which could be imported into Canada if Canadians desire it. But this is where some of the recognized limits on pure majority rule come into play – federalism, constitutionalism and the rule of law, and the need for a process of discussion and consensus. These limits highlight the need for a meaningful, national discussion before this kind of fundamental change is brought about – a discussion between the Canadian people through their federal and provincial representatives over whether the Senate should be appointed, elected, or abolished.

4. Looking forward: possibilities for reform

The Harper government’s unilateral “Senate nominee” initiative is not the only politically viable proposal for Senate reform. Given that public opinion strongly favours Senate reform,⁸⁰ it is reasonable to expect that meaningful improvements can be made using either of the paths to Senate reform described in the *1982 Act*.

⁷⁸ *Ibid* at para 78.

⁷⁹ For example, Senator Bert Brown, in his maiden speech in the Senate, stated that elected Senators (like himself) should (and would) “truly represent the wishes of the people of their home provinces, not the political philosophy of past prime ministers” and act as “an effective counterbalance to the other place [the House of Commons]”. Canada, *Debates of the Senate*, Vol 144, No 10 (13 November 2007) at 192 (Hon Bert Brown).

⁸⁰ Grenier, *supra* note 7.

For example, Parliament (or the Cabinet, by enacting an order-in-council) can act unilaterally to depoliticize the appointment of Senators. The UK's House of Lords Appointments Commission, established in 2000, offers an example of how such a reform could work. The Commission conducts an open, competitive recruiting process for non-partisan life peers, making recommendations for appointment based on objective selection criteria. It also vets partisan nominations made by political parties to ensure the nominees are "in good standing in the community" and "would not reasonably be regarded as bringing the House of Lords into disrepute".⁸¹ The Commission consists of seven members, three of whom are selected by the major political parties, and four of whom (including the Chair) are required to be non-partisan.⁸² The Commission is best known for its role in exposing the 2006 "Cash for Honours" scandal – after the Commission rejected a number of political appointees nominated by Prime Minister Tony Blair, it was revealed that each of the rejected nominees had loaned significant amounts to the governing Labour Party.⁸³

The establishment of a Senate appointments commission in Canada, responsible for nominating non-partisan candidates to fill a prescribed proportion of Senate vacancies and vetting partisan candidates nominated by the Prime Minister, would not affect the appointed nature of the Senate. As such, it would not require a change to section 24 of the *1867 Act*, since the Senate would remain appointed and not elected. Even if Parliament decided, for greater certainty, to incorporate the Commission into the *1867 Act*, this reform would not constitute a change in the "method of selecting Senators" that would require provincial consent, since, again, the Senate would remain an appointed body. Such a reform would improve the quality of Senate appointments, leaving the Senate better placed to suggest improvements to bills passed by the House of Commons and to investigate matters of public policy. This reform would not affect the primacy of the House of Commons, nor would it affect the provinces' role as the primary spokespersons for regional interests. For those who believe that more radical Senate reform, or Senate abolition, is necessary, this reform would at least ensure that, while such reform is debated, some of the most controversial aspects of the Senate and its appointment process are addressed.

One could argue, however, that more radical reform is unattainable. Some have pointed to the unsuccessful attempts at constitutional reform made at Charlottetown and Meech Lake as evidence that a federal-provincial consensus on Senate reform would be

⁸¹ UK, House of Lords Library, *House of Lords Appointments Commission* (Library Note LLN 2012/016) by Heather Evennett (9 May 2012) at 8.

⁸² See *ibid* at 1-3, 8.

⁸³ UK, House of Commons Library, *Loans to political parties* (Standard Note SN/PC/3960) by Isobel White & Paul Lester (27 February 2007) at 3-4.

impossible to reach.⁸⁴ But it is important to keep in mind that neither of these accords failed as a result of proposals for Senate reform,⁸⁵ and that there is a clear pathway by which the federal government can marshal public opinion to help forge a consensus on more broad-reaching reform. In recent years, a number of provinces have held referenda, in tandem with provincial general elections, on various democratic reforms.⁸⁶ The federal government, acting through Elections Canada, could just as easily hold a referendum in tandem with the next federal general election asking Canadians a basic question on Senate reform: would they prefer (a) that Canada retain an appointed Senate, (b) that Canada have an elected Senate, or (c) that the Senate be abolished? This referendum would offer the federal government and the provinces clear guidance in negotiating a subsequent agreement on Senate reform. It would also create political pressure on the various parties to deliver an agreement that accords with the wishes expressed in the referendum.

Conclusion

It has long been a legal maxim that “the legislature cannot do indirectly what it cannot do directly”.⁸⁷ The *1982 Act* places clear limits on Parliament’s power to reform the Senate. These limits include the requirement that constitutional amendments respecting the method of selecting Senators receive provincial consent. The Harper government’s proposal for the election of “Senate nominees” is an attempt to achieve indirectly what the *1982 Act* states Parliament cannot do directly.

The limits placed on Parliament’s power to reform the Senate – in effect, prescribing two paths to Senate reform – have a historical basis, in that they protect the basic characteristics of the Senate that the provinces agreed upon at the Québec Conference of 1864. These limits also have a principled basis: they recognize the provinces’ legitimate interest in the future of Senate reform, and ensure that a major change to the nature of our democracy cannot be made without a meaningful national dialogue.

These limits do not preclude the possibility of meaningful Senate reform. A national referendum, held in conjunction with the next federal election, could help guide future federal-provincial negotiations on Senate reform and pressure all parties to these

⁸⁴ See e.g. Andy Walker, “Recall mechanism needed to turf wayward senators” *Winnipeg Free Press* (04 June 2013) A9.

⁸⁵ See e.g. Robert Bothwell, *Canada and Quebec: One Country, Two Histories*, rev ed (Vancouver: UBC Press, 1998) at 254-55.

⁸⁶ See Canada, Parliamentary Information and Research Service, *Electoral Reform Initiatives in Canadian Provinces* (Document PRB 04-17E) by Andre Barns & James R Robertson (18 August 2009).

⁸⁷ *McKay*, *supra* note 55 at 806.

negotiations to make some progress along the path to more radical Senate reform as contemplated in the *1982 Act*. In the meantime, Parliament can address some of the most heavily criticized aspects of the Senate by depoliticizing and vetting Senate appointments – both incremental reforms that fall well within Parliament’s unilateral amending power under the *1982 Act*.