The Federal Senate Proposals: A Challenge to Canada's Constitutional Principles.

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1. The *Senate Reform Act*

The *Senate Reform Act* (Bill C-7) [2] was introduced in the House of Commons in June, 2011. It contains two major reforms. They relate to the method by which persons are selected for Senate appointment and to the duration of such an appointment. The Bill provides that the Prime Minister in making recommendations for Senate appointments must consider persons who have been selected for nomination for a Senate appointment through a provincially enacted scheme of election for identifying nominees. This element of Bill C-7 does not alter the text of the Constitution of Canada and, more particularly, the text of section 24 of the *Constitution Act, 1867*[3] which vests the power of appointment to the Senate in the Governor General. (In essence and, by convention, this means that persons are summoned to the Senate on the advice of the Cabinet and, in particular, on the direction of the Prime Minister.) Bill C-7 does, however, add constitutional text relating to the making of Senators.

Bill C-7 also establishes a nine year term limit on a Senate appointment. This change is an alteration to the text of the Constitution of Canada, specifically, section 29(2) of the *Constitution Act, 1867* which states that a Senate appointment is held until the person who has been appointed reaches 75 years of age. This age-based term limit in the *Constitution Act, 1867* was enacted by an Act of the Parliament of Canada[4] acting under the authority conferred on it by the now repealed *British North America (No. 2) Act, 1949*, which in turn was enacted by the United Kingdom Parliament.[5] Bill C-7 not only alters the term limit of all future senatorial appointments, it imposes a nine year term limit on all senatorial appointments that have been made since October 15, 2008, such nine year terms to commence from the day that the provision imposing a nine year term limit on all Senators appointed from

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[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.

[3] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 24.

[4] *Constitution Act, 1965*, S.C., 1965, c. 4.

[5] *British North America (No.2) Act, 1949*, 13 Geo. VI, c. 32 (U.K.).

October 15, 2008 comes into force. A consequence of the retroactive imposition of this nine year term limit is that the number of Senators retiring on a common date nine years from the coming into force of *the Senate Reform Act* the will be significant – more than half of current Senators will be caught by this rule. Of course, many of these – possibly, as many as 20 Senators will have reached the 75 year age limit before the ninth anniversary of the coming into force of the retroactive term limit. Nevertheless, it appears that about one-third of Senate appointments will come to an end at one time.

It is evident that changes to the Senate brought about by Bill C-7 are highly significant. Not only will Senators, in effect, become elected Parliamentarians, they will be elected within the structures of provincial elections and the context of provincial politics. The changes to senatorial political accountability brought about by these two features are considerable. Second, from the moment the *Senate Reform Act* comes into force a clear majority of Senators will hold office for a limited non-renewable term.[6] This will represent a radical alteration of terms and general expectations relating to Senate appointments at the time they were made. It also raises the question of whether Senators' constitutionally prescribed entitlements to office are properly removed through ex post facto alteration of the terms of office that have been conferred. (Of course, constitutional amendments are always possible and they will frequently change the nature of an office; perhaps, there is no vested entitlement to the terms of an office in place at the time of appointment.) While term limits could well be an attractive reform, they may create new political incentives. Finally, a nine-year cycle of substantial senatorial turnover may alter the course of political accommodation and deliberation.

2. Changing Federalism, Changing Parliament and Changing Democracy

The Government of Canada has taken the position that its current[7] proposals to establish a nine-year tenure for Senate appointments and to enact a constitutional

[6] There are nine Senators who were appointed before October 15, 2008 whose terms will continue beyond nine years from the date that the *Senate Reform Act* is likely to come into force, for these purposes estimated to be mid-2014.

[7] Governments under Prime Minister Stephen Harper have repeatedly initiated reforms to the Senate. In the years from 2006 to 2010, three previous bills have been introduced to mandate that attention be paid to senatorial elections in making recommendations for appointment to the Senate and four previous bills have been introduced that set term limits on senatorial appointments. The government has consistently maintained that both the creation of elections to identify persons for appointment and the imposition of term limits on Senators are constitutional reforms that fall within the power of the Parliament of Canada under section 44 if the *Constitution Act, 1982* to make unilateral constitutional amendments. None of these bills, apart from Bill S-4 (1st Sess. 39th Parl.) creating eight year terms for Senators, proceeded past first reading.

provision with respect to the making of Senate appointments can be implemented by the Parliament of Canada acting alone under the amending authority contained in section 44 of the *Constitution Act, 1982*.[8] The key legal argument against the federal government's claim for constitutional authority will be based on interpretation defining the scope of authority under section 44, and, in particular, interpretation of the express restrictions placed on Parliament's power to alter the constitution with respect to the Senate that are found in section 42(1)(b) of the *Constitution Act, 1982*: "An amendment […] in relation to the following matters may be made only in accordance with subsection 38(1) [the amending rule requiring consent of the House of Commons, the Senate – subject to Commons override – and legislative assemblies of seven provinces with 50% of the population of provinces]; […] (b) the powers of the Senate and the method of selecting Senators." While the scope of these two categories of Senate amendment are central to the question of the constitutionality of Bill C-7, there is, in addition, a case against the federal claim based on broader constitutional principles and grounded on the scale and effects of the constitutional alteration that will be put into effect by the federal proposals. This claim is that the alteration of basic constitutional structures that relate to the structure of national governance, especially when those structures are, in part, based on the fundamental constitutional principle of federalism, cannot be put into effect by one legislative body only – by just one of the governmental orders of Canadian federalism.

Interpretation of the terms of Part V of the *Constitution Act, 1982* (Procedure for Amending Constitution of Canada) should be made in accordance with an idea of limited federal Parliamentary capacity to impose constitutional changes that significantly alter fundamental, nationally constructed constitutional arrangements. In the case of the federal proposals for Senate reform, they touch directly on the constitutionally created mechanisms of federalism and the Parliament of Canada, both of which were designed to meet the core political interests of all of the political communities that joined at confederation to form Canada.

The two areas of constitutional effect – the effect on the Parliament of Canada and the effect on Canadian federalism – are not separate elements of the constitutional order. The structure and operation of the Parliament of Canada are, amongst other things, elements of the Canadian federal arrangement. Parliament was constructed by the *Constitution Act, 1867* to reflect, in its structure and operation, the federal character of Canada. There are both implicit and explicit manifestations of this notion of intra-state federalism. For example, responsible government allows both of the Houses of Parliament to hold the Cabinet to account and one result of this regime of executive

[8] House of Commons Debates, vol. 146, no. 024, 1st Sess., 41st Parl. (September, 20, 2011) 1706-1707 (Hon. Tim Uppal).

accountability is that provincial and regional representation in the Cabinet has become essential. An explicit instance of federalism policy in the structure of Parliament is the province-based allocation of Senators so that provincial and territorial representation (and not representation based on population) is used in order to enhance the power in the Senate (and, hence, in Parliament) of provinces with smaller populations.[9] To alter the dynamics of the Senate, and its political capacity as one of the national legislative chambers, will have the effect of revising the operation of provincial representation in Parliament and will bring about an alteration in the dynamics of Canadian federalism.

Basic arrangements formed at Confederation represent a moral foundation for Canada and should be subject to alteration only through engagement by the classes of interest that agreed to their creation, or, with respect to interests found in later provinces, have become part of the national structure after Confederation. Presumptively, this means that changes to constitutional structures that bear on that accommodation can be made only through the participation of both orders of government. This restraint on federal amending power is not based on a compact theory of Confederation, since Canada's amending rule is not that the participant provinces control constitutional change. Rather this restraint on unilateral federal power is based on the more general principles of complex nationhood – the principle that when political communities join to form a nation there is a conception of national self-determination that is based on the representative consent of the nation's diverse peoples and their political communities. But the partners at Confederation (and later provinces) do not, in aggregate, represent the sum total of political interests in the nation. The national government itself has a separate and discreet political interest identified primarily through constitutional powers conferred on it by the originating constitution. Furthermore the people of the nation have a national identity and interest that is not represented through provincial and territorial governments. However, this hardly means that the constitutional structure

[9] "Equality of representation in the Senate for the states in the United States and the 'divisions' in Canada was essential for the success of the respective federation schemes at both Philadelphia in 1787 and Quebec in 1864. The Senates in both cases were to serve as a kind of counterweight to forestall with its veto power hasty, ill-considered, or 'demagogic' legislation from the other house which might prove injurious to provinces or states possessing only a weak voice in the popularly elected chamber […]." W.H. McConnell, *Commentary on the British North America Act*, (Toronto: Macmillan, 1977) 65. It is not relevant to the analysis of the effect of the current federally proposed Senate reforms to discuss whether those reforms will have the effect of producing a "better" Parliament or a "better" nation, or a Parliament or nation that more successfully captures current political values, or even, whether the proposed reforms will better achieve the purposes behind the original plan than the original plan has done. The only point that is being made is that the original constitutional arrangement would be significantly altered by the federal proposals and, as a result, original constitutional purposes, and the constitutional structures that were adopted to achieve those purposes, would be compromised.

for the national government is not also a reflection of the political interests that reside in all of the political communities found in the nation. Between "compact theory" under which national governance is beholden to regional governments and, on the other hand, a fully autonomous polity at the national level, there is a form of constitutional interdependence that demands either unanimous consent, or a substantial consent, of all of the nation's governments to make changes that alter the basic constitutional arrangements under which the state exercises political authority.

The Supreme Court of Canada explicitly recognized this spirit of interdependence in the Canadian constitution in its opinion in *Reference re the Secession of Quebec*[10]. Quoting the Saskatchewan submission, it said:

> A nation is built when the communities that comprise it make commitments to it, when they forgo choices and opportunities on behalf of a nation […] when the communities that comprise it make compromises, when they offer each other guarantees, when they make transfers and , perhaps most pointedly, when they receive from others the benefits of national solidarity.[11]

The Court adopted this specific principle:

> In interpreting our Constitution, the courts have always been concerned with the federalism principle, inherent in the structure of our constitutional arrangements, which has from the beginning been the lodestar by which courts have been guided.[12]

From these observations, the Court established in this reference case a rule of broad national participation in constitutional changes that affect the way that basic constitutional principles are reflected in the political life of the nation.

Constitution-making is a form of higher law-making and sensibly requires a process in which the whole of the citizenry, as measured through both of the constitutionally recognized major facets of its political representation, gives consent. Constitutional amendment is the considered judgment of the *nation*, an expression of its political sovereignty in its various manifestations. Constitution making is a politics based on restraint in order to ensure that every aspect of political identity is engaged. It is true that in Canada there are some matters of constitutional reform that can occur without widespread consultation and consent, but it does not accord with constitutional principles of national self-determination to include within this category the idea that the

[10] [1998] 2 S.C.R. 217.
[11] *Ibid.* at para. 96.
[12] *Ibid.* at para. 56.

basic legislative structure for the nation is amendable solely through exercise of the will of that structure.

While constitutional rules must be arrived at through precise legal arguments, those arguments are derived from the constitutional text and the moral vision that the text represents. In this instance, that moral vision is that agreements, undertakings, calculations and expectations leading to the formation of national political structures and institutions must be given weight in considering the question of the extent of limits on the federal government and Parliament in altering the central national political structures. Canada has a section 91 side and a section 92 side (and now a section 35 side) and national integrity depends on not obliterating the interests that are represented in these basic allocations of authority under which we are governed. The national government of Canada can certainly pursue section 91 interests without provincial concurrence, but the structure of national governing power flows from much broader political interests – the interests that reach into how all political communities are represented in the processes of national government and how their integrity is respected in national political life.[13]

3. Lessons from *Reference re Secession of Quebec*[14]

In *Reference re the Secession of Quebec*, the Supreme Court of Canada derived constitutional principles that served as the basis for its description of constitutionally appropriate governmental action with respect to a constitutional amendment that would bring about the secession of a province from Canada. Most of the Court-prescribed processes for secession were not discovered in the amending rules contained in Part V of the *Constitution Act, 1982*. Furthermore, there is no explicit recognition in the text of these constitutional amendment processes that lie outside Part V's text. But in light of the impact of provincial secession on the matters listed in section 42, the section that identifies some of the amendments that must be made under the general amending rule,

[13] While Shakespeare is hardly a legal authority, in Troilus and Cressida Act 1, scene 3, Shakespeare has Ulysses, the wisest of the Greeks, counsel Agamemnon, King of the Greeks, on the need to temper political enthusiasm with restraint based on preserving the order of the state, which is the very idea which constitutionalism represents.

> *Observe degree, priority and place.*
> *Insisture, course, proportion, season, form,*
> *Office and custom, in all line of order; …*
>
> *The unity and married calm of states*
> *Quite from their fixture! O, when degree is shaked,*
> *Which is the ladder of all high designs,*
> *The enterprise is sick!* (lines 540 - 556)

[14] *Supra* note 10.

it could not be the case that secession is a constitutional reform that exists entirely apart from the provisions of Part V. Although there is no suggestion that in the text of Part V that the rules contained therein are not meant to be exhaustive, the Court inferred from constitutional principles additional constitutional rules. This element of the decision was not a matter of inventing new rules but, rather, a matter of inferring rules that met the purposes expressed in constitutional principles. It was a matter of reading a constitution between its lines, or seeing, in its text, its subtext. The Court was seeking to be faithful to the constitution through avoiding literalism.[15]

The Court declined either to label provincial secession as extra-legal or to consider the language of Part V as a fully exhaustive regime for making every possible amendment. Instead, it adopted two guidelines that allowed it to recognize a regime for effecting a constitutionally based secession of a province. First, it considered the broad constitutional significance of provincial secession – that is, it assessed secession in light of foundational constitutional ideas. Second, it judicially constructed both a formal path for effecting secession and it placed constitutional limits on that process.

For the Court, the broad constitutional significance of secession was located in two realities. The first was that when a part of the nation's population forms a discreet and distinctive political community, as for instance a province does, it should not be denied the right to pursue terms of secession with Canada's other governments if the province's population has expressed unequivocally its desire to separate from the nation of which the province has been a part.[16] This reality could be a reflection of a moral right of a distinct people and distinct political community for political self-determination or, in the alternative, it could reflect the simple fact that a mature and stable nation should not hold a distinct element of its population hostage. Whether it is morality or prudence that requires a province's pursuit of independence to be engaged with by a host nation, it is the case that Canada's statecraft principles include the presence of processes when sub-national self-determination has been clearly chosen.

The second state reality that the Court factored into its opinion is that the nation in which the province sits will inevitably have considerable vested interests that can best be served through maintaining the integrity of the nation. As the Court said, breaking

[15] The Court did not place constitutional principles in a subordinate normative position. It said: "Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations […] which constitute substantive limitations upon governmental action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding on both courts and governments." *Ibid.* at para. 54.

[16] *Ibid.* at paras. 87-92.

up a nation in recognition of the self-determination right of one part of the nation requires negotiation and broad consent so that the legitimate interests of the nation from which secession is sought can, at least in part, be satisfied.[17]

These basic conditions that shaped the opinion in the *Secession Reference* were not derived from social science or political theory, but came from four constitutional principles. They were drawn from the whole body of Canadian constitutional law with particular attention paid to the Canadian constitution's originating purposes and the constitutional strategies for their realization. In the Court's description they represent the constitution's "internal architecture", [18] or quoting from its opinion in *OPSEU v. Ontario (Attorney General)*,[19] its "basic constitutional structure." The Court recognized that these principles carried normative effect that were not just general ideas about how the nation ought to be governed, but specific constitutional rules about precise issues such as how a provincial initiative to secede should be handled.

The principles of Canadian constitutionalism that the Court inferred from the *Constitution Acts,* constitutional practices and conventions and from case-law were these: federalism, democracy, constitutionalism and the rule of law and the protection of minorities.[20] Federalism recognizes that the formal political communities within Canada have a distinct political identity that protects them from the oppression of national majorities. They are, in many respects, self-governing and self-determining. Provinces are also established political communities with recognition that each speaks with single political voice. Provincial secession does not require the fabrication of a new political entity or recognition of a myriad of new diverse political interests. Secession is an expansion of self-determination that is not based on an invented people or discovery of a novel political structure. The provincial political communities that exist must be recognized as speaking for their peoples. On the other hand, Canadian federalism does engender a nation of common interests and common structures and its dismantling will inflict losses on national capacity and character. The constitutional rules that Canada follows in processing provincial secession needs to reflect these competing aspects of federalism.[21]

Democracy is the chief way in which political power in Canada is held accountable and the process through which governmental action finds its legitimacy. The power of states must be exercised with the consent of their populations, sometimes measured after the fact in elections, but in moments of high politics, or moments of high

[17] *Id.*
[18] *Ibid.* at para. 50.
[19] [1987] 2 S.C.R. 2, at 57.
[20] *Supra* note 10 at para. 49.
[21] *Ibid.* at paras. 55-59.

statecraft, as a matter of gaining express licence for action from the population. A province seeking to secede must, as a matter of democratic legitimacy, find this consent before imposing on the population irreversible difficulties that inevitably attend not just secession itself, but the process for settling the terms of secession. Furthermore this consent must be obtained unequivocally through fair and open means.[22]

Constitutionalism and the rule of law stand for the proposition that when governments act they must do so in accordance with the rules of the constitution. There is no good case for unilaterally declared independence since that mechanism does not follow the nation's laws about making changes to the constitutional structure of the nation. Secession could well become a time for conflict conducted through power and force, but the rule of law is designed to drive us to the resolution of differences – even deeply felt differences – through following the rules under which the political communities of Canada have committed themselves to act.[23]

The constitutional project of protecting minorities, which is evident throughout both the *Constitution Act, 1867* and the *Constitution Act, 1982,* leads to recognition that the rule relating to secession cannot be a flat rejection of a distinct population's desire to secede. But, at the same time the constitutional principle of protecting minorities means that many of the interests that must, to some degree, be engaged in secession negotiations are the interests of minority communities throughout Canada – possibly francophone communities outside Quebec – and minority communities within Quebec. Those groups – Aboriginal peoples, allophones, English speaking people– have protections that can be either specific constitutional protections or general ones.[24]

The Court's formula for constitutionally sanctioned secession drew on these four principles. From each of them there is a direct track to the rules and standards that the Court established as essential for the realization of a constitutionally valid provincial secession.

This analysis of the *Secession Reference* is relevant to the question of whether the Senate reforms that the federal government plans to implement through ordinary parliamentary enactment are unconstitutional. The question of constitutionality is based on interpretation of constitutional rules that seek first and foremost to vindicate the

[22] *Ibid.* at paras. 61-69.

[23] *Ibid.* at paras. 70-78. Admittedly, in the case of the possibility of Quebec secession, the imposition of the constitutional amendment rule is not an instance of the seceding party being bound by rules to which it agreed. The moral and legal claim for Quebec's being bound to those rules would need to rest on a constitutional amending theory of general – or substantial – consent, arising from a different, or longer, historical context.

[24] *Ibid.* at paras. 79-82.

constitution's basic principles. The analog to the *Secession Reference* for Senate reform would be the claim that wholesale unilateral reform lies outside interpretations of constitutional texts when those interpretations are based on the basic principles of democracy, federalism and constitutionalism.

It can be noted that unwritten, but implied, constitutional principles are not an effective basis of attack for every piece of legislation that represents harsh or unfair regulation. These principles do not give courts a roving mandate to enforce general regulatory decency or the general precept of governmental fairness; there are a number of forms of legislative high-handedness – retroactivity, deemed liability, regulatory takings with neither adequate compensation or rational purpose – that are not vulnerable to attack on the basis of the "unwritten constitution" (although, of course, may be vulnerable to attack on other more determinate constitutional standards). In *British Columbia v. Imperial Tobacco Limited*[25] the Court declined to find retrospective legislation violated the unwritten constitution principle of rule of law, apart from the Charter of Rights' specific proscription of retroactive criminal law. Also, in *Charkaoui v. Canada (Citizenship and Immigration)*[26], the Court held that detention following an executive order without any right of an appeal of the designated judge's review of the reasonableness of the security certificate did not violate the unwritten constitutional principle of rule of law since the constitutional limits relating to arrests and detention are those that are set out specifically in the *Charter of Rights*.

The context of proposed reforms to the term and method of selection of Senate appointments, however, is distinguishable from these cases of what might be considered legislative unfairness and is, instead, analogous to the context of the Supreme Court's decision in *Reference re the Secession of Quebec*. In that case the constitutional principles did not, in themselves, constitute new or free-standing rules of constitutional limitation. Instead, they were sources for guiding the interpretation of the range, scope and purposes of Part V of the *Constitution Act, 1982* – the provisions relating to constitutional amendment. They served as specific descriptors of constitutional purpose and grounded a claim that these purposes could not be denied or subverted through interpretations of the constitutional text that are inconsistent with them. Nor could they be denied simply because the precise proposal (of provincial secession) for constitutional amendment was not specifically anticipated in the constitutional text. The difference in the current instance of Senate reform and in the *Secession Reference* opinion, as distinct from the cases of *Imperial Tobacco* and *Charkaoui,* is that the former cases are based on principles of constitutionalism that are unequivocally and unavoidably engaged in the decisions the Court must make. The constitutional

[25] [2005] 2 S.C.R. 473.
[26] [2007] 1 S.C.R. 350.

principles had to be (or in the case of Senate reform, must be) factored into interpretation if they are to be sustained or preserved. If the constitutional principles were not a factor of interpretation and application then the underlying condition of the principles would be compromised. The application of amending rules must satisfy basic precepts of the constitutional order or, otherwise, those precepts are lost. In the latter two cases, on the other hand, basic constitutional principles were neither denied nor lost their force through allowing the legislated arrangements to proceed; those arrangements fell outside the explicitly constitutionalized conceptions of rule of law.

This is not just a claim that constitutional principles come into play in instances of constitutional ambiguity or uncertainty, although given the elastic possibilities of the language of sections 41(a) and 42(1)(b), there certainly are indeterminacies relating to their scope that need to be resolved through resort to interpretive principles, including, of course, the principle that indeterminacy should be resolved in accord with basic constitutional principles. The deeper claim is that these provisions were written in light of, and are expressions of, basic constitutional principles in the expectation that those principles shall be sustained in the application of the provisions.

In the proposed Senate reforms constitutional principles are abridged in three significant ways. First, the structures of federalism that permeate the formation and text of the Constitution of Canada would be defeated, at least in Part IV ("Legislative Power") of the *Constitution Act, 1867*, if the explicit federalist aetiology of Senate provisions were to be ignored and if the constitutional arrangement by which the federalism elements in this context were secured were simply to be ignored. While the national Parliament is frequently able (through declaratory powers, national emergency jurisdiction or federal paramountcy) to exercise its capacity to alter the operation of provincial powers and impact the section 92 interests of citizens, it is beyond reasonable interpretive possibility that the conditioning of power to reflect federalist interests in Parliament could be amended unilaterally by Parliament itself, without the participation of its partners in Canadian federalism

Second, the explicit constitutional adoption of a specific form of parliamentary bicameralism – a form that was created on distinctive bases of representation and appointment – would be defeated if the terms of the Constitution that secured these specific forms could be unilaterally changed. It would be mistaken to see these elements of parliamentary structure as inevitable, or largely thoughtless manifestations of conventional ideas relating to wealth, or property, or mistrust of democracy, and then conclude that they can now be cast aside through a simple legislative process that fails to engage both sides of Canadian federalism simply because they seem to fit poorly with modern political sensibilities. The idea of an appointed Senate reflected a then dominant political thought, advanced chiefly by John Stuart Mill, a thinker whose

influence on statecraft and state policy was at its zenith at the time of Canadian confederation – in Canada, as well, of course, elsewhere – that the legislative process ought to be a careful marriage between electoral legitimacy and dispassionate prudence.[27] Mill's defence of an appointed upper chamber was based on its value in checking tyranny - the capacity of an elected majority to always have its own way too easily becomes overbearing and despotic. He also saw the appointed Upper House as promoting compromise and conciliation – the give and take of overcoming division. Finally he saw this appointed chamber as introducing merit and achievement in public service and practical experience into the legislative process – characteristics that Mill believed would blunt partisanship.[28]

The original conception of, and carefully planned structure for, Canadian deliberative democracy at the national level would be abridged by amendment of Part IV of the *Constitution Act, 1867*. It is certainly possible that some of the conceptions of this Part may have run their useful course for the Canadian state but it does not follow that these principles of the national legislative structure course are suitable for jettisoning through Parliament's own decision about how it might be better structured. The principles in the constitution of federalism and democracy were secured through specific arrangements. Parliament through its own will cannot decide for the nation the arrangements that it considers superior. To do so would be to allow appropriation of authority over the structure of constitutional values to the body that has been designed to carry forward those constitutional values in a very specific way.

Constitutionalized bodies created under clear conceptions of constitutional justice are not free on their own to declare otiose either those values or the structures that were designed to achieve them. The constitutional structure of major institutions, such as Parliament, reflected the choices and purposes of Confederation participants. They are aspects of the Confederation agreement and were entrenched in the constitution. They expressed a national commitment to a specific structure for exercising national political power. This structure was not arrived at without the widespread deliberation, and the

[27] See, Michael K. MacKenzie, "House of Competence: John Stuart Mill and the Canadian Senate" delivered to the Canadian Political Science Association Annual Conference, Victoria, B.C., June 4-6, 2013. MacKenzie describes the extent to which Canada's constitutional founders were familiar with the work of John Stuart Mill and; many considered themselves "disciples" (at 2). MacKenzie's paper advances the claim that John Stuart Mill "influenced the design of Canada's Senate" (at 2).

[28] *Ibid.* at 3-6.

general consent, of those pre-Confederation communities that participated in the formation of the nation.[29]

There are a number of constitutionally altering actions that are not explicitly forbidden by the amending rules, but that cannot be performed because of the injury to the constitutional order. The federal government could not alter the Parliament of Canada through failing to appoint Senators, nor could it undermine the rule of law, or the constitutionally entrenched inherent jurisdiction of superior courts,[30] by declining to make appointments to the Supreme Court of Canada, nor could it alter the exercises of parliamentary authority through declining to enforce federal law it no longer agreed with, but none of these constitutional conditions is expressly guaranteed by the Constitution. So, too, the powers of Parliament to modify the Senate must be understood as limited by the constraint that in any changes to it similar basic constitutional structures must be preserved. In the same way, although political speech was not protected by the constitutional text prior to the *Charter of Rights,* suppression of it by a province was nevertheless disallowed by the Supreme Court of Canada on the basis that it defeated the fundamental constitutional structure of a democratically elected legislature.[31]

The appeal to basic constitutionally protected structures and principles raises an interpretive issue. Is the claim that the continued entrenchment of these structures (by which is meant placing their significant alteration beyond the reach of simple Parliamentary action) is based on an idea of a trumping constitutional norm that renders constitutional text, whatever it might seem to say, subordinate to preservation of the core structure? Or is the claim that basic structures and principles are conditions of constitutionality that must weigh on the interpretation of the text of Part V of the *Constitution Act, 1982*? Although the opinion in *Reference re the Secession of Quebec* seems to set aside the text of the amending rules, in fact the Court did not express priority for basic principles over constitutional text. It seems a more appropriate understanding of the *Secession Reference* case to see the Court's decision as a gloss – or an interpretive condition – on the actual text of the amending rules and not as a constitutional

[29] See, Janet Ajzenstat, *The Once and Future Canadian Democracy: An Essay in Political Thought* (Montreal & Kingston: McGill-Queen's University Press, 2003) at 83-88. Professor Ajzenstat points out that the Confederation agreement was endorsed through an undoubtedly valid form of Canadian popular sovereignty.

[30] See, W.R. Lederman, "The Independence of the Judiciary" (1956) 34 Canadian Bar Review 769 (Part I), 1139 (Part II). Lederman describes the scope of constitutional protection for superior courts' original and review jurisdiction that arises, not from explicit protection of jurisdiction, but from the mere recognition of an independent judiciary in Part VII ("judicature") of the *Constitution Act, 1867*.

[31] See, eg., *Reference re Alberta Statute – The Bank Taxation Act; The Credit of Alberta Regulation Act; and The Accurate News and Information Act*, [1938] S.C.R. 100.

exception.[32] It is firmly established that basic constitutional principles, although not directly expressed, do form part of the justiciable constitutional order. Their role is not to correct or suppress the constitutional text but to allow it to be applied in a manner consonant with the constitutional plan as fully developed and understood.[33]

4. Constitutional Amending Power before 1982

Prior to the coming into force of the constitutional amending formula contained in "Procedure for Amending Constitution of Canada", in Part V of the *Constitution Act, 1982* on April 17, 1982 there were a number of amendments to sections 21 to 36 of the *Constitution Act, 1867,* the sections dealing with the Senate. Those amendments changing provincial or territorial representation (either establishing or decreasing representation) were effected, except in the case of Alberta, Saskatchewan, and two of the three territories, through United Kingdom parliamentary amendment of the *Constitution Act, 1867*. For those four jurisdictions representation was altered by the Parliament of Canada. All other amendments relating to the Senate, apart from changing the term of a senatorial appointment from life to attaining age 75, were relatively insignificant housekeeping changes, but were implemented through British legislation or, in the case of a change relating to the Speaker, by federal legislation that had been expressly warranted by an Act of the United Kingdom Parliament. Only the 1965 federal legislation placing an age limit on senatorial appointments could be said to represent an alteration to the character of the Senate as a chamber of the Canadian Parliament.

Federal parliamentary authority for making this significant change came from the conferral by the United Kingdom Parliament in 1949 of a new federal "jurisdiction" under then section 91(1) of the *Constitution Act, 1867*. The jurisdiction conferred was:

> The amendment from time to time of the Constitution of Canada, except as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces, or as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a province, or to any class of persons with respect to schools or as regards the use of the English or the French language or as regards

[32] *Supra* note 10 at para. 148. The Court said, "A superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading. It is necessary to make a more profound investigation of the underlying principles that animate the whole of our Constitution […]."

[33] See, Mark D. Walters, "Written Constitutions and Unwritten Constitutionalism" in Grant Huscroft (ed.), *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge: Cambridge University Press, 2011) 245.

> the requirements that there shall be a session of the Parliament of Canada at least once each year, and that the House of Commons shall continue for more than five years from the day of the return of the Writs for choosing the House: provided, however, that a House of Commons may in time of real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such continuance is not opposed by the votes of more than one-third of the member's of such House.

This federal parliamentary power over constitutional amendment is broad, excluding from its ambit the capacity to interfere with core democratic limitations and protections and political powers that the 1867 constitution conferred on constitutionally recognized minority communities (for example, timely elections, powers of provinces, and rights of language minorities with respect to education). But what are not expressly excluded from federal jurisdiction over "the amendment of the Constitution of Canada" are the instruments of the federal political structure." In June 1978, the federal government issued an ambitious plan of constitutional amendment and later that year, it tabled a Constitutional Amendment Bill that among other things contained amendments to the structure and power of the Canadian Senate. Many provinces objected to this unilateral initiative to alter the Upper House of the Canadian Parliament. In response to this protest, the federal Cabinet, in November, 1978, referred to the Supreme Court of Canada the question of Parliament's constitutional authority to make the proposed changes to the Senate. The federal government's argument in favour of parliamentary authority to make the proposed changes was based on the broad amending power contained in the constitutional amendment that added section 91(1) to the *Constitution Act, 1867*.

The reference questions asked were: is it within the authority of the Parliament of Canada to repeal the sections of the *Constitution Act, 1867*, that deal with the Senate and replace them with proposals for a new Upper House based on altered proportions of representation from the provinces and territories, changed qualifications for members, changed tenure for members, changed methods of appointment, including election, and changed powers in the sense that the new Upper House's legislative authority would be limited to the exercise of a suspensive veto? The Supreme Court's unanimous opinion (delivered forcefully as an opinion "of the Court") in *Re Authority of Parliament in Relation to the Upper House*,[34] was that, with respect to those changes that were presented to the Court with sufficient specificity to allow analysis of their constitutional validity, they were beyond the power of Parliament under section 91(1). In no instance did the Court find there to be constitutional support for the federal government's reforms.

[34] [1980] 1 S.C.R. 52.

Specifically, the Court did not interpret the grant of federal amending power over "the Constitution of Canada" – a power that was subject to expressly designated restrictions – to be a general amending power. The Court's opinion was that "the Constitution of Canada" referred to "the constitution of the federal government as distinct from provincial governments." The Court, however, made a complementary determination that, while Parliament had some authority to alter the Senate and its functioning, it could not alter its essential features and its essential characteristics. The Court noted two fundamental aspects of the Senate – it served as a part of the constitutionally constructed federal legislative process and, second, it brought to that legislative function a means of ensuring regional and provincial representation. On the latter point, the Court quoted the speech by George Brown reported in the Parliamentary Debates on the Subject of the Confederation, Quebec, 1865, in which he tied the proposals for the Upper House to the express condition for Confederation relating to preservation of provincial capacity to protect local interests. Both through the structure of the national Parliament and through the federal principle that "in maintaining existing sectional boundaries and in handing over the control of local matters to local bodies we recognize […] the diversity of interests",[35] provinces would be protected in Confederation. The Court said, "[…] the system of regional representation in the Senate was one of the essential features of that body when it was created."[36] In other words, the structure and operation of the Senate reflects a deep historical constitutional accommodation and the Court was unwilling to venture lightly into the easy assumption that just because the proposed changes amounted to an alteration of a federal institution its reform fell within the unilateral authority of the federal government.

The opinion of the Court, therefore, has two aspects. The first is recognition that significant changes to the structure and operation of the Senate touch on the foundations of the constitution. The other, more limited, aspect is that the phrase in section 91(1)'s conferral of unilateral federal power – "the Constitution of Canada" is to be read narrowly. It is perfectly clear that the Court gave no weight to the argument of the Attorney General of Canada that the listing of topics and matters that the amending power does not reach gave rise to the implication that, otherwise, the amending power is broad – or plenary.[37] The reason why this inference was not drawn in this case is that the Court defined the class of amendments to which the power attaches in a limited way saying, "In our opinion, the power of amendment given by

[35] *Ibid.* at 67, quoting the Honourable George Brown.
[36] *Ibid.* at 87.
[37] *Ibid.* at 69.

s. 91(1) relates to the constitution of the federal government in matters of interest only to that government."[38]

This is, of course, a wrong characterization of the section's *apparent* scope since the first two of the exceptions to the power listed in section 91(1) fall outside the Court's narrow conception of "the constitution of the federal government in matters of interest only to that government." The class of amendments that are exempted from the federal amending power in section 91(1) is broader than "of interest only to the [federal] government" and so one would normally conclude that the general class to which the power is attached is, likewise, a broad class. But this was not the Court's conclusion. The Court took the position that, regardless of specific language of the provision from which inferences of broad federal power can be drawn, there is operating on the process of interpretation the general constitutional principle that unilateral amending powers must be construed so as not to permit unilateral revisions of the foundational constitutional structures of federalism and the national Parliament. This latter reading of the *Senate Reference* opinion supports the idea of there being normative principles of Canadian constitutional law and it adopts a view of constitutional interpretation that survives the coming into force of the *Constitution Act, 1982*.

This reasoning with respect to the now repealed section 91(1) can apply to the interpretation of section 44 of the *Constitution Act, 1982* with its apparent plenary power to amend the constitution with respect to the Senate and the House of Commons. Section 44 is the mechanism for carrying forward the federal unilateral amending power that was expressed in section 91(1) but it does so without interruption of the limits on that power that were established in the Court's opinion in *Re Authority of Parliament in Relation to the Upper House*. That opinion expressed the idea that constitutional interpretation resists broad unilateral powers in favour of preserving a balanced process of constitutional reform in which the integrity of the whole constitution is maintained. This view recognizes constitutional "common law" that operates to restrain the broad words of section 44 following the precedent of the Court's 1980 opinion. And this approach holds that the description of "the Constitution of Canada" found in section 52(2) must be overlaid by the concept of constitutional principles that are drawn from the texts specifically identified in section 52(2), including, of course, the text of the *Constitution Act, 1867*. In this way the challenge of establishing constitutional coherence between the diverse texts of our constitution can be realized.

[38] *Ibid.* at 71.

5. Engaging the Amending Process

Apart from the aspect of the proposed reforms relating to how federalism will be altered through changing the nature of provincial representation in the structures of Parliament, there is a further federalism significance of the federal proposals. This effect flows from the manner by which significant constitutional changes to national structures and institutions are made. Canada's general amending formulae (as opposed to the amending rules that require only unilateral action or other limited approvals) presumptively bears on the making of fundamental changes to the nation's central institutions and structures. The general amending formulae normally (and in Canada's case, certainly do) preserve all political communities' interests in eminent national structures through the requirement that there be consents from the representatives of those communities. In a federal state, in particular, both the national government and the sub-state political communities – states, provinces, etc. – hold central constitutionally recognized interests and all changes that bear on the national structures normally require the consent of the two orders of government. This is especially so when the proposed changes alter (as they do here) the actual and overt mechanisms of federalism within national structures.

A constitution, including the rules for constitutional amendment, is a legal text and the exact reach of the general amending formulae (in Canada there are two general formulae – some matters require approvals, including those of seven provinces with 50% if the population, and some matters require approval based on the consent of all provinces) will be determined by interpretation of the *Constitution Act, 1982's* amending rules. However, the words of the amending rules are imprecise and do not establish either clear or exclusive categories of constitutional amendment.[39] In deciding on the exact reach of amending powers under the constitution rules, a purposive interpretation needs to be adopted. What this means is that the interpretation of constitutional provisions should reflect the political accommodations – which is to say, the range of political consent – behind the making of the various terms of the constitution. Interpretation of the amending rules should satisfy the basic constitutional sense as discerned through reference to general constitutional purposes. These purposes, and the principles they give rise to, express the basis of national consent in constitutional formation and describe essential conditions for national consent to significant alterations to the way political authority is structured.

[39] This is usual in national constitutions. For an illustration of this, see, Akhil Reed Amar, *America's Unwritten Constitution: Precedents, and Principles We Live By* (New York: Basic Books, 2012), c. 1 "Reading Between the Lines: America's Implicit Constitution" 1-47.

An element in the argument against Parliament's authority to enact these Senate reforms is to note the scale of impact on Parliament and on the practices of federalism produced by these reforms. There are (at least) six transformative features of the reforms. These arise from the election of persons to be nominated for appointment to the Senate, the likelihood that most of the elections for choosing persons to be nominated for appointment to the Senate will take place in the context of provincial general elections, or, even, the context of municipal elections in those provinces that have a common election day for all municipalities, the possibility that some Senators will obtain appointments as a result of participating in an election process while some Senators will be appointed without first engaging in an election process, the holding of a senatorial appointment for nine years as opposed to until a person holding a senatorial appointment turns 75 years of age, the one-term limitation on a senatorial appointment, and, finally, the termination of over one-third the members of the Senate on a single day nine years from the date that the *Senate Reform Act* comes into force.[40]

The effects of these changes are these. First, the power of the Senate generally and of individual Senators will undoubtedly increase as Senators hold legislative office under the legitimating condition of being elected. The lower number of Senators as compared to the number of members of the House of Commons, when coupled with electoral participation in Senate elections, will likely elevate the political prestige of those Senators who have won an election victory.[41] The election of Senators in a process detached from a national general election may confer on Senators both a high level of legislative independence and, without doubt, a far greater independence from national political parties. Second, the phenomenon of a single election for an entire career in the Senate may radically weaken the role of party and caucus and, instead, create a much stronger representation imperative with respect either to interests that were instrumental in producing the election victory or, what would be worse, to interests that match extra-senatorial ambitions. Third, the holding of elections in the context of provincial general elections, which will be the usual case, will build strong bonds

[40] Section 4 of the proposed *Senate Reform Act* states: "Subject to sections 29A and 31 of the *Constitution Act, 1867* [provisions relating to the termination of Senate appointments at age 75 or for reasons for disqualification], a person who was summoned to the Senate after October 14, 2008 but before the coming into force of this section remains a senator for one term, which expires nine years after the coming into force of this section."

[41] The Canadian Senate has had five "elected" Senators – Stan Waters (deceased), Bert Brown (retired March 22, 2013), Betty Unger (appointed in January 2012), Doug Black (appointed in January 2013) and Scott Tannas (appointed in March 2013). All were from Alberta. Electoral support for their appointments has not yet led to additional political influence in the Senate. While there are special circumstances that can explain this, the most obvious reason for limited influence may be that all of these Senators have been closely aligned with the government of Prime Minister Stephen Harper and have felt no incentive to adopt a distinctive political voice.

between provincial political parties and the Senators who have been successful in such elections, and these bonds will diminish the influence of national political institutions, such as federal political parties and national political platforms. The political obligations to provincial political parties and, one assumes, provincial governments, may, in many cases, alter the nature of the interests that will guide Senators' legislative choices. It could well weaken senatorial commitment to policies that promote national interests. In this way, the reforms would enhance the federalization of Parliament which, in a complex and diverse nation, may be valuable. The key point, however, is that the proposed reforms alter the operation and dynamics of intra-state federalism without the consent of the federal partners.

The holding of a senatorial appointment for a fixed nine year term will also enhance political independence from national parties and platforms and give rise to less party and caucus discipline. Shortening the senatorial term to nine years could cause Senators to give consideration to post-Senate careers while serving in the Senate. The effect of this could be damaging to the exercise of legislative responsibilities. In short, the combination of political power through enhanced legitimacy, the lack of federal political party discipline, stronger identification with local or regional interests and the impact of limited terms will have a significant effect on the politics that is at work in in the operation and practices of Canada's upper legislative chamber.[42]

Another significant effect may be on the Senate's vital role of providing a check on the power of the Prime Minister, the executive and the parliamentary majority. This checking function will be re-structured. In some ways, the checking power will be strengthened but in other ways it will be weakened.[43] For instance, Senate party caucuses may have little access or influence on executive government since they will likely be detached from the political party that has formed the government. Not all of these changes in the way that Parliament will function are undesirable. However, they are significant and have every chance of being deeply transformative of the parliamentary legislative process.

What is clearly a danger is the skewing effect of these reforms; the reforms are likely to have two very damaging results. The first is the effect that will flow from legitimating

[42] The most obvious effect of the federal reforms is to weaken the anti-democratic or anti-republican values that lay behind the appointed Senate. (see, W.H. McConnell, *supra* note 9, at 67). It is difficult to see this effect as unfortunate. Nevertheless, it is a further instance of a basic constitutional condition relating to the Parliament of Canada that is being altered through the policies of the federal government acting alone.

[43] However, the weakening of caucus or party influence may serve to disempower Senators notwithstanding the higher political legitimacy and prestige of persons elected for nomination to the Senate. This could arise from added difficulty in forming stable coalitions of common interest.

the power of Senators and bringing to the Senate a much more pronounced provincial perspective to the Canadian parliament without any reform of the current levels of provincial representation in the Senate. While the Senate will grow more powerful and become a more effective voice for provincial interests, nothing is being done to correct the massive over-representation in the Senate from the Atlantic provinces and the equally significant under-representation from British Columbia and Alberta. The reason for the failure to address this issue is that section 42(1)(c) of the *Constitution Act, 1982* requires any changes to "the number of members by which a province is entitled to be represented in the Senate" be approved under the general amending formula requiring the consent of seven provinces with 50% of the population. Provincial under-representation is tolerable only so long as the Senate plays no significant role, or only a weak role, in representing provincial interests – and not a forceful role in implementation of the national legislative policy.

The second danger of the federal reforms is that they may have the effect of creating a strongly independent chamber of Parliament – one with little interest in facilitating the agenda of the government provinces. This could lead to a greater pattern of impasse in the process of enacting federal legislation. While forced negotiation between the government and the Senate could serve the nation's legislative process well, it could also represent a serious erosion of responsible government, the constitutional theory that holds that executive government is answerable to legislators for both government administration and for presenting an effective legislative program. In short, a pattern of impasse between parliamentary chambers in the legislative program is inimical to responsible government.

It is noteworthy that when the federal government and the provincial premiers agreed in the Charlottetown Accord on having an elected Senate, they realized the risk of legislative impasse and instituted mechanism to deal with this risk. These included a using a joint parliamentary session in which the outcome on votes to approve bills would be determined by majority vote, thereby giving a clear upper hand to the House of Commons.[44] In addition, the reformed Senate was not granted any role in budgetary measures. Again, the failure of the current federal proposals to include these sensible safeguards is due to the terms of the general amending formula which in section 42(1)(b) require that changes to "the powers of the Senate" be approved by seven provinces with two-thirds of the population. Constitutional integrity requires interpreting amending power in a co-ordinated way so that the scope of unilateral

[44] See, Draft legal Text of October 9, 1992, based on the terms of the Charlottetown Accord of August 28, 1992. The Charlottetown Accord's formation and terms are described in Peter Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (2d ed.) (Toronto: University of Toronto Press, 1993) at 190-227.

power does not lead to amendments with effects that go far beyond the interests of the federal order of government to the effectiveness of national political processes. These specific limitations on making changes to the Senate's structure and power speak to a broader constitutional sense that the Senate is part of the national governing arrangement the terms and efficacy of which touch the interests of both orders of Canadian political communities.

The Senate is not a creature of, nor a facet, of governance that falls within, the authority of the Parliament of Canada. It is a creature of the constitution. If its function and its composition are to be recast, it will need to be done through the general processes of national self-determination and constitutional amendment. Finding gaps in language that the federal government claims will permit major changes to the political function of the Senate to be made by the federal order alone defeats the constitutional plan and abridges the principles of amendment. Making sweeping changes to the Senate without the involvement of both orders of government is not a process for making constitutional change that respects broad national interests. The construction through these reforms of a new parliamentary dynamic represents a constitutional alteration on a scale that will affect the politics of national governance more profoundly than any constitutional reform that has been made since 1867.

6. Applying the Amending Rules of the *Constitution Act, 1982*

a. Issues

The interpretive issues with respect to the application of the 1982 constitutional amendment rules to the changes to Senate terms and Senate appointments are these. First, do the changes that would be effected by Bill C-7, alter the office of the Governor General, thereby triggering the requirement unanimous consent to amendments under section 41 of the *Constitution Act, 1982*? There will be two impacts on the Governor General's constitutional role. First, the Governor General's appointment function will be substantially affected by the holding of provincial elections to identify persons to be nominated for appointment to the Senate. Second, legislation coming to the Governor General for Royal Assent will have been voted on by a body that is significantly different than that created by the *Constitution Act, 1867* in that one of the essential elements of federal legislative approval will have been altered to reflect a different order of approval and, therefore, the Governor-General's authority will be exercised in relation to bills formed by a process measuring political assent that was not contemplated in the 1867 *Act*.

Second, do Bill C-7's proposals relating to provincial elections to identify persons to be considered in the nomination of persons to be appointed to the Senate alter "the

method of selecting Senators", thereby falling within the requirement that such changes require provincial consent according to the formula set out in section 38(1) of the *Constitution Act, 1982* – the general formula requiring consent of seven provinces with 50% of the population?

Third, do Bill C-7's proposals relating to provincial elections to identify persons to be considered in nominating persons to be appointed to the Senate alter "the powers of the Senate" thereby falling within the requirement that such changes require provincial consent according to the same general formula?

Fourth, can the proposal relating to establishing nine year term limits for persons appointed to the Senate be said to be in relation to "the method of selecting Senators", thereby falling within the requirement that such changes require provincial consent according to the same general formula?

Fifth, do Bill C-7's proposals relating to establishing nine year term limits for persons appointed to the Senate alter "the powers of the Senate" thereby falling within the requirement that such changes require provincial consent according to the same general formula?

And, of course, there is general issue of whether the changes to the nature of appointments to the Senate, and the process through which Senate appointments are made alter the fundamental features of the Canadian constitution in relation to its core elements of the role of the Governor General as head of state, the character of the national Parliament, the federal arrangement of government in Canada to such a degree that the basic principles of the constitution will be abridged through a process that engages only one the orders of the Canadian nation as created by the 1867 constitution and draws on the consent of only the section 91 side of Canadian constitutional expression.

b. Unanimous consent for changing the office of the Governor General

Possibly, the Senate reforms proposed in Bill C-7 affect the office of the Governor General through altering the office to which the Governor General makes appointments. The constitution contemplates a certain kind of appointment – one that is significant by virtue of its legislative function, one that enjoys both prestige and political independence by virtue of the term of appointment, and one that assumes a high degree of political responsibility by virtue of its lack of formal accountability. It is an appointment designed to conduce to careful deliberation of longer term national interests, an appointment that is meant to create a chamber of that will give "sober second thought" to legislative measures. The form and features that a constitution

provides for any body created (or recognized) in it will reflect specific ideas about the political virtues that are meant to be reflected in that body.

While it is possible that notions of political virtue that shape a constitutional arrangement may fall out of favour, or become less valued, over time (and that certainly seems to be the case with respect to the purposes behind the creation of the Canadian Senate) they are part of the constitutional program and should be altered only through processes that follow the rules and principles of constitutional reform. One of these principles is that alteration of the appointing power of the Governor General through a highly significant alteration of the office to which appointments are made sensibly requires unanimous consent under section 41 of the *Constitution Act, 1982*. Maintaining the same title – of Senator – cannot disguise the fact that the office and powers of Senators will be is changed. When an appointing power is altered from responsibility for appointing a certain office holder with certain capabilities and characteristics to appointing a significantly different office holder it can be said that the office with responsibility for making appointments has also changed. If, for instance, a university were to change the composition of the university senate from a mixture of administrators, faculty and students to a mixture of administrators, overseers drawn from outside the university and alumni donors, then the rules for appointing members of the original senate would no longer be relevant or suited to the process of making appointments to the reformed senate. The proposition that a constitutional power to appoint persons to an office is altered through changing the office can be demonstrated through a further analogy. The members of the House of Commons name the Speaker of the Commons, and, as well, parliamentary officers, but if there were a change so that these office holders could be removed without cause on a vote supported by, say, one-third of the members of the Commons (a rule that some might argue reflects the view that these offices require the broadly held confidence of House of Commons members) we would say that this was a change not only in relation to these offices but also in relation to the power of members of the House of Commons and, hence, a change in the relation of parliamentary officers to the House of Commons. The House of Commons would be appointing different sorts of officers and, in this way, the powers, and nature of the role, of the House of Commons would have become altered.

It is constitutionally undesirable to allow Parliament alone to change fundamentally the office to which the Governor General is constitutionally empowered to make appointments. Such changes alter the weight and political dynamic of the office, will alter (either to enhance or lower) the force and prestige of that office and, therefore, will change the power that the constitution has assigned to the Governor General – in short, it will change the vice-regal office.

As earlier described, electoral support for a person seeking a place on the list for Senate nomination will provide a basis of legitimacy that will lead to more independence from federal parties than the degree of independence and legitimacy that comes from the current appointment process. Term appointments will remove incentives to maintain lines of political loyalty to the federal political parties. The Senate will become a far different parliamentary body and the appointment of a Senator will have a different significance for the functioning of Parliament. While it is true that the Governor General will continue to appoint "Senators", in fact, the Governor General's functional relationship with Parliament and the nature of the Governor General's appointing function will be markedly different. The Governor General office is to be recruited for a different role that it was assigned in 1867. The office of the Governor General is to be changed in a constitutionally significant way.

c. Powers of the Senate

The general amending formula, requiring the consent by resolution of the House of Commons, the Senate and the legislatures of seven provinces with 50% of the population, must be followed with respect to amendments in relation to "the powers of the Senate" and "the method of selecting Senators." Turning first to the question of "powers of the Senate" it may be instructive to note that Part VI of the *Constitution Act, 1867* is headed "distribution of Legislative Powers" and the sub-heads in this Part are labelled "powers of Parliament" and "Exclusive Powers of Provincial Legislatures". The word "powers", in this context, has specific constitutional meaning. It has the same meaning as "jurisdictions" – the formally stipulated functions and capacities of an institution. The jurisdiction of the Senate is primarily the power to legislate. Senators must consider, and debate and vote on, legislative measures. The Senate that will emerge from the implementation of Bill C-7's proposals will continue to have exactly this power or jurisdiction.

An argument that challenges this formal analysis is that, in a broader sense of "powers" or "jurisdictions" the Senate's powers will be markedly changed by Bill C-7's reforms. Its powers with respect to the exercise of its legislative function are likely to be increased. It will not be possible for members of executive government or members of the House of Commons to point to Senators' weaker political legitimacy and it will not likely be the case that Senators, under the new arrangements, can be cowed into not interrupting the legislative agenda of the government, or of the Commons. So, too, will be altered, and likely enhanced, the Senate's power to hold government members (of which, in order to satisfy the principle of responsible government, there will always be some in the Senate – and with elected Senators, there may be more) to account. In addition, its functional powers in reviewing the policy and administrative work of the

public service and the military will be altered and strengthened? There is likely to be less deference and the accountability of government through Senate committee review, it seems safe to assume, will be conducted more aggressively. Senators with their independence from government and opposition parties will be more effective and independent in reviewing legislation and public administration. One might argue that where there was little independent legislative and accountability power in the Senate, now there will be high levels of both powers.

While this may not seem to lead to the conclusion that the formal "powers" of the Senate have been altered, the phrase "powers of the Senate" may not be restricted to only direct and formal legislative power, but may include the broader functional powers of decision-making, review and accountability. "Powers" in this sense includes powers that become defined by processes of appointment, responsibility and legitimacy. This is certainly the way that powers and jurisdiction are understood in Canadian administrative law. In that field, courts constantly review administrative agencies to determine if the softer influences of politics, policy and direction (in addition to the harder influence of the statutory text) have had an effect on administrative decision-making through influences on process that can fetter discretion, or can bring into play factors and considerations that exist apart from decision-makers' statutorily described jurisdiction. In this way, the power of agencies and decision-makers is often said to have been altered or changed from the original power granted by legislation. Courts in performing judicial review of administrative agency decisions will frequently decide that a decision-maker's decisional powers have been changed, or impaired, through a change in decisional processes, or through certain forms of consultation, or through changed agency priorities, or by political influences. From the analogy of administrative law, the changes to the Senate's functioning that would be brought about by the reforms of Bill C-7 will clearly affect the powers of the Senate to an extent that it could be said that the powers of the Senate have been subject to amendment through constitutional alteration.

These two lines of argument are distinct. The first is that influences on the exercise of the powers of the Senate can amount to a change in the powers of the Senate when "powers" is understood as a social or functional term, such as, for example, a changed capacity or changed conception of prudence or a change of resources, and not only as a concept relating to the assignment of jurisdiction. This argument does not depend on drawing an analogy with Canadian administrative law, but only inviting the Court to see constitutional powers are an integral nature of democratic governance and that functional changes to power are constitutionally significant. The second argument is that the concept of "powers" in section 42(1)(b) should be interpreted broadly, not just in the narrow way expressed in Part VI of the *Constitution Act, 1867* under the heading of "Distribution of Legislative Powers", but in the broader way that jurisdiction is

normally treated in Canadian public law as a change in priorities and values that bear on decision-making.

With respect to the former argument there is, as always in this sort of matter, the subtle question of whether concern for the preservation of fundamental constitutional features should lead the Court to interpret the constitution's provisions in a way that precludes facile or easy (or unilateral) evisceration of constitutional structures that were designed to meet specific constitutional purposes. As has been canvassed earlier, the constitutional creation of the Senate had distinct purposes for which powers were assigned. The new structures of power produced by the proposed federal reforms will push away those original purposes and, in this way, the basic constitutional structure is being transformed. The proscription against altering "powers" of the Senate in section 42(1)(b) of the *Constitution Act, 1982* is identified to preserve the Senate's role as purposively understood. For this reason, both of the arguments that establish an alteration of "the powers of the Senate" – one structural and one political or cultural – have salience in considering Bill C-7's constitutional validity.

d. The method of selecting Senators

It seems clear that the reforms of Bill C-7 relate to the method of selecting Senators. What is proposed is, put simply, a new method of selection. Instead of the Prime Minister deciding on persons to be appointed and an order prepared for the Governor General's assent (see section 13 of the *Constitution Act, 1867,* which requires the Governor General to act on the advice of the Queen's Privy Council for Canada – actually, the federal cabinet), section 3 of Bill C-7 changes this method of appointing. It does this, first, by constitutionalizing the Prime Minister's role as a nominator of persons to be appointed to the Senate. This may seem to be only a technical (or declarative) constitutional reform, but, nevertheless, this element of section 3 of the *Senate Reform Act* clearly amends the Constitution of Canada in relation to the method of selecting Senators through specific constitutional introduction of the Prime Minister's nominating power. The *Senate Reform Act* contains a textual addition to the constitutionally prescribed steps in Senate appointments.

Second, the far more important alteration in the method of senatorial appointments is the new constitutional requirement – the unequivocally mandatory requirement – in section 3 to consider (*tient compte*, in the French text*)* names of a specific class of persons for appointment. This, too, is a textual addition of a constitutionally prescribed step in the selection of Senators. The fact that the new constitutional requirement to consider, in making nominations to the Governor-General, those persons elected in provincial elections for precisely this nomination does not, of course, force the Prime Minister to nominate specific persons for appointment. This, however, is not

constitutionally significant. It does not lessen the constitutional change to "the method of selecting Senators" that will be put into effect. There is a clear new constitutional duty on the Prime Minister – the duty to consider (*tient compte*) – and a constitutionally backed condition on the making of nominations and, thus, the senatorial selection process has been formally altered. Again, this is a two-pronged argument. First, there is a textual alteration relating to constitutional language dealing with summoning people to the Senate. Second, there is a functional limitation imposed on the selection of Senators that is not included under the current regime of appointment provided for in the *Constitution Act, 1867*.

With respect to both of these claims of new constitutional provisions for appointing Senators, the federal government cannot make an argument that the *actual* constitutional text relating to the appointment of Senators will not be altered, or that the new *Senate Reform Act* will not amend the Constitution of Canada. Canada may argue that there needs to be an alteration of the existing constitutional text that is found in section 32 of the 1867 *Constitution Act* before the limitations on federal amending power in 42(1)(b) apply. But since the new *Senate Reform Act becomes* a document within the category "Constitution of Canada" then it will be an amendment of the Constitution of Canada relating to Senate appointments. This view of the *Senate Reform Act* is supported by the eighth paragraph of the Preamble of the proposed Act which states "Whereas Parliament by virtue of section 44 of the *Constitution Act, 1982*, may make laws to amend the Constitution of Canada in relation to the Senate […]", thereby confirming that this law *is* an amendment to the Constitution of Canada.[45] And, it is a law that alters the constitutional prescriptions relating to Senate appointments.

But there is a far more fundamental argument to be made. Appointments to the Senate are to be determined not as exercises of executive discretion but as exercises of executive discretion that is circumscribed by the constitutional obligation to take account of the results of provincial elections that have identified persons for Senate appointment. The retention of executive discretion in the proposed reform and imprinting it with an obligation to consider, although not an obligation to follow, the results of senatorial elections might be presented as not altering the existing basic constitutional structure. But, indeed, the basic structure of nomination – and, hence, "the method of selection" – will be changed by the addition of the new constitutional

[45] The minister for Democratic Reform, Tim Uppal, stated in the House of Commons: "Parliament is able to enact this [reform] through its authority under s. 44 of our Constitution. Under s. 44 of the *Constitution Act, 1982*, Parliament has the legislative authority to amend the Constitution in relation to the Senate." Quoted in Mark D. Walters. "The Constitutional Form and Reform of the Senate: Thoughts on the Constitutionality of Bill C-7" (2013) 7 Journal of Parliamentary and Political Law 37 at 51.

imperative to consider for nomination persons who have prevailed in provincial "Senate" elections. This new constitutionally required step is neither meaningless nor a mere formality. As a matter of the actual political imperatives that follow constitutional prescriptions that are as forceful – as non-negotiable – as this one, as well as a matter, of its inevitable practical effect, appointments will, as a matter of absolutely certainty, be changed from appointments within political prerogative to appointments determined by a democratic process. This is a change in the method of selecting Senators that will transform the Senate and, hence, the Canadian Parliament.[46]

One must assume that the purpose behind placing "the method of selecting Senators" in section 42(1)(b) was that the mode of selection affects directly the legislative role of the Senate and, hence, the operation of Parliament and, of course, the operation of intra-state federalism. Both of these functional features in the method of selecting Senators logically caused the 1982 constitutional drafters to protect the method of making Senators from change through unilateral federal Parliamentary action. Furthermore, the constitutional drafters' choice of the general language of the exception (as opposed to the narrower phrase "the method of appointment") must be the result of legislative recognition that what matters in the functioning of the Senate is not the nature of the formal appointing power but the actual political process by which persons are selected for senatorial appointment. A *de facto* elected Senate is precisely the kind of reform in the selection of Senators that the makers of the *Constitution Act, 1982* clearly wished to preserve for amendment through application of the general amending formula.

e. Does the interpretive maxim *expressio unius est exclusio alterius* apply?

If it were thought that the federal proposals relating to term limits and the provincial election of persons to be nominated for Senate appointment cannot be said are found to be in relation to either "the powers of the Senate" of "the method of selecting

[46] Walters, *ibid.* at 54-59, explores the argument that the requirement that in making nominations to the Senate the Prime Minister must take account of the results of provincial elections to determine persons for nomination to the Senate is not a "legal" rule but only the channelling of a constitutional convention relating to prime ministerial nominations to the Senate. Walters makes the point that legislation that relates to a conventional practice – that, in fact, seeks to regulate and constrain it – is, nevertheless, legislation. In Canada, legislation, regardless of the nature of the conduct that it regulates must comply with Canadian constitutional law. Because it stipulates conditions for political action that had not formerly been subject to constitutional regulation in this way does not immunize that enactment from the requirement that it meet constitutional constraints – in this case the constraint expressed in section 42(1)(b) that altering the method of selecting Senators. It cannot be enacted by Parliament acting alone.

Senators" does this mean that Parliament has constitutional authority to make the significant changes to Senate appointments that the proposals would produce? It would if the interpretive maxim that a rule's express identification of specific instances of application implicitly excludes the rule's application of all other instances – the *expressio unius est exclusio alterius* rule. An interpretive concept that leads to the opposite conclusion is that, in some legislative contexts specific instances of application are included in legislation *ex abundanti cautela*. This means that the legislative inclusion of specific instances of application is not strictly necessary because what the rule states clearly applies to a broad category of instances but that some specific instances of application are listed in the legislation, not to serve as implicit exclusion of all other instances, but only to make certain that the specific named instances will be brought within the general category. In other words some specific applications are identified out of an abundance of caution – to overcome any possibility of wrong interpretation that would exclude application, or simply to underscore the key concerns behind the legislative rule. Applying the latter maxim to the terms of section 42(1)(b), one would argue that such major changes to the structure, power and operation of the Senate would clearly fall within the general amending formula (section 38(1) but, in order to guarantee this result these two categories of amendment have been expressly identified. This puts beyond debate the notion that the unilateral amending power of the Parliament of Canada under section 44, whatever it might actually be, does not include changes that so fundamentally alter the structure and functioning of Parliament.

For this argument to prevail two further claims need to be made. First, these two categories of reform would have to be presented as especially worthy of specific mention, even though there are other instances to which the section applies that are not listed. It can be argued that these two instances represent particularly disruptive changes to the operation of the Canadian Parliament and so deserve this form of certain protection. The subsidiary question is whether there are other changes to the Senate that would sensibly and compellingly require application of the general amending formula but are of lesser significance to the Senate's position under the constitution than the powers of the Senate and the method of selecting Senators so that constitution drafters were not as concerned to make the constitutional intention clear. Application of the *ex abudanti cautela* maxim is a persuasive argument when there are clear examples of other reforms that ought to require the general amending formula but have not been specifically identified in section 42(1)(b). There are, in fact, several categories of amendments to the constitution's Senate provisions that without controversy seem to lie beyond the power of the federal Parliament acting alone to alter. This strongly suggests that the two instances of application that are identified in section 42(1)(b) cannot be exhaustive of the limitations on federal unilateral amending power. Rather, they are just extremely important elements – indispensable elements,

one might say – of the Canadian political structure. These other items of considerable significance, that would lie beyond federal unilateral power are: the property qualification of Senators, the power to add supernumerary Senators, the number of supernumerary Senators, amendments with respect to the specific regional representation by Quebec Senators (this provision could only be amended through the bilateral amending process described in section 43 of the *Constitution Act, 1982* indicating that the limitations to unilateral federal amending power expressed in section 42(1)(b) cannot be exhaustive) and, perhaps most obviously, the provisions for the removal of Senators. It seems certain as a matter of the constitutional integrity of Parliament that each of these elements of the Senate is protected against alteration, abridgment or removal through the legislative action of Parliament acting alone.

f. Structural Integrity in the amending process

There may be a further potential argument for reading section 42(1)(b) and 42(1)(c) – the section that prevents federal unilateral amending power from changing senatorial residency requirements or the level of each province's Senate representation – does not as not implicitly license unilateral Parliamentary power to make all other changes to the Senate. This argument is that section 42 is not primarily about preserving the scope of the general amending rule against federal claims for unilateral amending power, but rather it is about identifying the amendments that dissenting provinces may not avoid having applied to them under section 38(3). After all, the amending formula that section 42 insists must apply is not all of the whole of the general amending formula but just the part of the amending formula described in section 38(1) – the subsection that simply identifies the legislative consents needed. Section 38(1) is, in fact, a restrictive version of the general amending formula found in section 38. It is restrictive in that it does not allow the possibility of provincial dissent or the non-application to a province of a constitutional amendment when the amendment bears on a province's power, property, rights or privileges (which could well include a province's interest in the level of provincial representation in the Senate). In fact, the feature of all the amendments listed in section 42(1) as being unavailable for provincial non-application are amendments that would not work on any other basis than uniform national application. In fact, confirming the purpose of limiting the non-application of amendments in section 42(1), section 42(2) expressly stipulates that all of the categories in section 42(1) are amendments for which it is necessary to exclude the special treatment for provinces given under section 38(2) to (4). This, section 42(1) is not about limiting the scope of federal unilateral amending authority but about limiting the scope of provincial exemptions from constitutional amendments. Therefore, the actual scope of the amending power with relation to the Senate, for example, is the power identified in section 44, but, of necessity, interpreted in light of the general notion that

changes that bear on significant elements of the constitutional order – Parliamentary democracy, constitutionalism and federalism – require approvals under general amending rules, rules that are congruent with basic principles of Canadian constitutionalism.

A subsidiary argument, based on the idea of what our constitutional regime sensibly ought to allow or ought not allow, is that reform of the Senate (which has, in fact, become a national political imperative) should not be held hostage to the Senate's consent. This would be exactly the situation if the level of fundamental Senate reform that is contained in Bill C-7 were found to be permissible under section 44 of the *Constitution Act, 1982*. From the perspective of an appropriate constitutional order, fundamental Senate reform should be achievable even without the consent of Senate to changes to it. This ability to act on Senate reform without being blocked by the Senate's veto is exactly what is permitted under the Senate suspensive veto provision in section 47 of the *Constitution Act, 1982*. That section removes a Senate veto for amendments made under the general amending rule (section 38(1)) as well as under section 41, the section that requires unanimous provincial consent for some amendments. It would seem to be a serious error of constitutional design to subject significant Senate constitutional reform to Senate veto. Unilateral federal amendments made under section 44 face exactly this problem of reform being held hostage to the senate's will. This concern may primarily be a prudential observation and not one that can direct the interpretation of section 44. On the other hand, it is this sort of structural integrity in constitutional design that a constitution-applying court normally considers in trying to get a clear idea of which reading of a provision best meets constitutional purposes and basic constitutional structures.

7. Conclusion

Through the proposed federal reforms, Canada would have a new Senate and a new Parliament, brought about through a simple Parliamentary enactment brought about without consultation with other Canadian governments and without reference to the wishes of Canadians – or, at least, with reference to only the section 91 side of Canadians through their federal representatives. This is, in a general moral sense of constitutionalism, unacceptable. It seems also to violate section 42(1)(b) of the *Constitution Act, 1982* in that this section seeks to preserve against purely parliamentary enacted reforms the existing powers of the Senate, the existing composition of the Senate and the existing process of Senate appointment for the specific constitutional purpose of preserving the constituted features and nature of the federal Parliament.