

Constitutional Conventions and Senate Reform

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Introduction

The Senate, like every other institution in the Canadian constitutional scheme, is governed not only by the rules set out in the “written” constitution, but also by constitutional conventions. One cannot understand the Senate’s nature without knowing these conventions. One cannot reform the Senate without affecting these conventions. And one cannot assess the constitutionality of a Senate reform project without taking into account its interaction with, and impact on, these conventions. Yet conventions have, for the most part, not featured prominently in academic commentary on Stephen Harper’s successive plans for reforming the Senate (with the notable exception of an excellent article by Mark Walters²), or indeed in the factum that the government of Canada has submitted to the Supreme Court³ in the reference regarding the constitutionality of the latest such plan, Bill C-7.⁴

Our purpose is to fill this gap and to address what Walters describes as “the tricky question about the tripartite relationship between conventions, ordinary law and

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² 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. See also Charles-Emmanuel C  t  , “L’inconstitutionnalit   du projet d’  lections f  d  rales s  natoriales” (2010) 3 *Revue qu  b  coise de droit constitutionnel* 81.

³ *In the Matter of Section 53 of the Supreme Court Act, R.S.C. 1985, c. S-26; In the Matter of a Reference by the Governor in Council concerning reform of the Senate, as set out in Order P.C. 2013-70, dated 1 February 2013* (29 July 2013), 35203 (Factum of the Attorney General of Canada), online: Supreme Court of Canada <http://www.scc-csc.gc.ca/factums-memoires/35203/FM010_Appellant_Attorney-General-of-Canada.pdf> [AGC Factum SCC].

⁴ Bill C-7, *An Act respecting the selection of Senators and Amending the Constitution Act, 1867, in respect of Senate term limits*, 1st Sess, 41st Parl, 2011 [Bill C-7]. Bill C-7 died on the Order Paper when Prime Minister Stephen Harper prorogued Parliament on September 13, 2013: see Proclamation Proroguing Parliament to October 16, 2013, *Canada Gazette Part II*, SI/2013-97, September 16, 2013. We will, nonetheless, refer to it in this essay, on the assumption that any replacement would be substantially similar.

supreme constitutional law,”⁵ as it concerns the Senate. After a brief description of the reforms of the Senate proposed by Bill C-7 in Part 1, we will consider the nature of constitutional conventions and their role in the Canadian constitutional scheme in Part 2, and then examine the impact of Bill C-7 on the two key conventions governing the Senate—pursuant to which Senators are appointed on the Prime Minister’s advice and the Senate yields to the House of Commons—in Part 3.

1. **Bill C-7**

Bill C-7 was the latest attempt of the Harper Government to reform the term for which, and process by which, Senators are appointed. A number of previous such attempts have died on the Order Paper as a result of prorogations or dissolutions of Parliament over the last five years⁶—a fate that Bill C-7 itself did not escape. If enacted, it would have made two changes to the way the Senate is now set up.

Arguably the less significant of these changes was the limitation of the term of Senators appointed after October 14, 2008, to nine years,⁷ subject to the current mandatory retirement age of 75,⁸ which would remain in force. On its own, this change may not have resulted in any considerable difference to the Senate. Indeed, at present, the average tenure of senatorial office is roughly nine years,⁹ so that the enactment of Bill C-7 need not even have increased the turnover of Senators.

The more important innovation of Bill C-7 was that it would have required “the Prime Minister, in recommending Senate nominees to the Governor General, [to]

⁵ Walters, *supra* note 2 at 56.

⁶ Bill S-4, *An Act to amend the Constitution Act, 1867 (Senate tenure)*, 1st Sess, 39th Parl, 2006 (died with the prorogation of the first session of the thirty-ninth Parliament); Bill C-19, *An Act to amend the Constitution Act, 1867 (Senate tenure)*, 2nd Sess, 39th Parl, 2008 (died with the dissolution of Parliament on September 7, 2008, for the general election); Bill S-7, *An Act to amend the Constitution Act, 1867 (Senate term limits)*, 2nd Sess, 40th Parl, 2009 (died when session ended in December 2009). Two additional bills died on March 26, 2011, with the dissolution of the fortieth Parliament: Bill C-10, *An Act to amend the Constitution Act, 1867 (Senate term limits)*, 2nd Sess, 40th Parl, 2010; Bill S-8, *An Act respecting the selection of senators*, 2010. For a discussion on previous proposals for Senate reform, see Jack Stilborn, *Senate Reform Proposals in Comparative Perspective*, BP-316E (Ottawa: Parliamentary Information and Research Service, Library of Parliament, November 1992).

⁷ See Bill C-7, *supra* note 5, cls 4-5.

⁸ Clause 5 of Bill C-7 would have replaced section 29 of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 [*Constitution Act, 1867*]. This part of the law would have been called *Constitution Act, 2011 (Senate term limits)* and considered part of the constitution.

⁹ See Jack Stilborn, *Senate Reform: Issues and Recent Developments*, PRB 07-42E (Ottawa: Parliamentary Information and Research Service, Library of Parliament, January 2008) at 10.

consider names from the most current list of Senate nominees selected for [any] province or territory” that has set up elections of “Senate nominees” “substantially in accordance with the framework” supplied by the bill.¹⁰ The bill thus did not purport to bind the Prime Minister to recommend the appointment of elected “Senate nominees” to the Governor General, still less to bind the Governor General to accept any such recommendation. The discretion that the letter of the *Constitution Act, 1867* confers on the Governor General in his or her choice of “qualified Persons”¹¹ to summon to the Senate¹² was apparently left undisturbed.

Yet of course Parliament would not consider enacting legislation that would change nothing to the *status quo*. A legal requirement that the Prime Minister consider recommending elected “Senate nominees” puts pressure on the Prime Minister to actually recommend their appointment—for what explanation could he or she have for not appointing the person put forward by the people of a province as their representative? It also puts pressure on provinces to set up the “consultative” elections, the winners of which the Prime Minister would be required to “consider”—for, what reason could a province have for not giving its people a say in the matter, when the federal government has declared itself willing to listen? Thus, says Walters, Bill C-7, “if enacted, [would have made] a profound difference to the practical working of the Constitution, shifting the real power of senator selection from prime ministers to provincial electors.”¹³ This power shift would not have been the direct and inevitable effect of the enactment of Bill C-7, but rather the indirect yet deliberate consequence of the emergence of constitutional conventions obliging provinces to hold elections for “Senate nominees” and the Prime Minister to appoint the winners of these elections. Bill C-7 was thus a grain of sand that Parliament wanted to drop into the pearl oyster of the political process, in the hope that an artificial pearl of constitutional practices or indeed conventions would, in time, grow around it.

This consequence is uncertain but not far-fetched. Another similar grain of sand, section 56.1 of the *Elections Canada Act*,¹⁴ which attempted to set up a system of fixed dates for federal elections—without limiting the discretion of the Governor General to call an election at a time of his or her choosing, or the Prime Minister’s power to advise the Governor General to call an election—did not produce the desired pearl. The shell

¹⁰ Bill C-7, *supra* note 5, cls 2-3.

¹¹ *Constitution Act, 1867*, *supra* note 9, s 24.

¹² This discretion is such that in the famous *Persons Case* (*Edwards v Canada (Attorney General)*, [1930] AC 124 PC [*Persons Case*]), the Privy Council denied that it was “deciding any question as to the rights of women,” asserting that “[t]he real point at issue is whether the Governor General has a right to summon women to the Senate.”

¹³ Walters, *supra* note 2 at 48.

¹⁴ SC 2000, c 9.

was cut open too quickly when the 2008 general election was called. Similarly, there would have been at least a possibility that provinces would not have set up the “consultative” mechanism contemplated by Bill C-7, or that future prime ministers, or indeed the current one, would have disregarded the results of “consultative” elections even if they were to take place. However, as Walters makes clear, the pressure both on provinces and on the Prime Minister would have been very strong indeed.¹⁵ And there is historical precedent for the kind of change the Harper government seeks to accomplish, in the transformations of the constitution of the United States. There, the decisions of some states to introduce popular elections, first for the Office of the President and then for US Senators, presaged, in the first case, the development of constitutional conventions,¹⁶ and in the second, the introduction of a formal constitutional amendment radically transforming the original schemes of indirect election.¹⁷

Thus, that Bill C-7 would have made very few changes to the legal rules of the Canadian constitution does not say much about the impact it was likely to have. If the oyster reacted in the expected way and the grain of sand became a pearl, the changes to the actual functioning of the constitution would have been very significant. Supererogatory on paper, the two-step process of provincial elections and appointment of “Senate nominees”—which, as Walters argues persuasively, is quite contrary to the intent, values, and structure of the *Constitution Act, 1867*—would have become constitutionally mandatory in the conventional sense. The constitutional conventions whose development Bill C-7 attempted to spur would be, in Walters’ words, “a powerful political dynamic in which future prime ministers would be, in effect, trapped within Harper’s policy of appointing elected Senators, even if they disliked that policy.”¹⁸ Charles-Emmanuel Côté, for his part, describes the emergence of such conventions as an “effet juridique potentiel” of Senate Reform.¹⁹ Political dynamic or legal effect? What exactly are constitutional conventions?

¹⁵ Walters, *supra* note 2 at 47-48.

¹⁶ See Herbert W Horwill, *The Usages of the American Constitution* (Glasgow: Oxford University Press, 1925) at 32-33. It is convention that dictates that states hold popular elections for president (and vice-president); it was also, originally, convention that dictated that the electors who are formally tasked with electing the president pursuant to the US Constitution (art II, § 1, cl 3) respect the outcome of the popular election in their state. Although the latter convention has been codified into law in many states, it is revealing that, to this day, an elector who refuses to cast his or her vote in accordance with the popular will is described as “faithless”. See also Vasan Kesavan, “The Very Faithless Elector” (2001) 104:1 W Va L Rev 123.

¹⁷ US Const amend XVII.

¹⁸ Walters, *supra* note 2 at 48.

¹⁹ Côté, *supra* note 2 at 8.

2. Constitutional Conventions

Following A.V. Dicey, orthodox constitutional theory holds that constitutional conventions are those constitutional rules “which ... regulate the conduct of the several members of the sovereign power, of the Ministry, or other officials”²⁰ but, because of their political origin, are not judicially enforceable. The Supreme Court of Canada has accepted this understanding of conventions, drawing a sharp line between constitutionality in the legal sense, which excludes conventions, on the one hand, and constitutionality in the conventional sense, which encompasses them, on the other.²¹ Dicey’s insistence on nonenforceability and the extralegal character of conventions (which, for him, were the same thing) has been questioned and criticized,²² and some judges in Canada might be prepared to consider questions about constitutional conventions as ordinary legal questions.²³ Indeed it is arguable that the Supreme Court did, in reality, enforce constitutional conventions in the *Patriation Reference* by declaring their existence.²⁴ However, in this essay, we will follow doctrinal orthodoxy and treat constitutional conventions as distinct from constitutional law.

²⁰ Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed (London, UK: MacMillan, 1915) at 23.

²¹ *Reference Re Resolution to Amend the Constitution*, [1981] 1 SCR 753 at 884 [*Patriation Reference*].

²² See TRS Allan, “Law, Convention, Prerogative: Reflections Prompted by the Canadian Constitutional Case” (1986) 45:2 Cambridge LJ 305; Jeremy Waldron, “Are Constitutional Norms Legal Norms?” (2006) 75:3 Fordham L Rev 1697; Léonid Sirota, “Towards a Jurisprudence of Constitutional Conventions” (2011) 11:1 OUCLJ 29.

²³ See *Conacher v Canada (Prime Minister)*, 2009 FC 920 at paras 33-47, [2010] 3 FCR 411.

²⁴ See Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Toronto: Oxford University Press Canada, 1991) (“the Supreme Court’s declaration in the 1981 *Patriation Reference* that unilateral amendment would breach existing conventions may have resulted in the enforcement of those conventions, since it has been widely credited with spurring political leaders on to reach an accord” at 154). See also Fabien Gélinas, “La Cour suprême du Canada et le droit politique” (2008) 24 C du Cons Const 72 ¶ 77:

On peut bien sûr affirmer que l’« obligation » constitutionnelle reconnue par la Cour suprême dans le *Renvoi relatif au rapatriement* était « conventionnelle » et partant, à l’abri d’une réelle « sanction » juridique. Mais à ce chapitre, Jennings eut bien raison de mettre en doute l’utilité de la sanction des tribunaux proposée par Dicey comme critère distinctif entre droit et convention. La faille dans le raisonnement de Dicey consistait à présumer que le droit constitutionnel est « sanctionné » au-delà de sa constatation par les cours de justice. Or la décision judiciaire prise à l’encontre du gouvernement ou du législateur est utile non pas parce qu’elle pourrait faire l’objet d’une exécution forcée — ce n’est pas le cas — mais bien parce qu’elle est respectée.

To the same effect, see Sirota, *supra* note 22 (arguing that a declaration of the conventional rules would be as effective (or as little effective) as a mandatory order purporting to enforce

Even assuming their non-legal status, conventions are of central importance to the operation of Canada's constitution; without them, it would be unrecognizable. They are "the motive power of the constitution," ensuring "that the constitution works in practice in accordance with the prevailing constitutional theory of the time."²⁵ In the *Patriation Reference*, the Supreme Court recognized that conventions are "fundamental"²⁶ elements of the constitution, and the breach of a convention, in some circumstances, "could be regarded as tantamount to a *coup d'état*,"²⁷ even if not susceptible of legal sanction.

Conventions are rules of political practice, which emerge when the rules of constitutional law are not or are no longer in accordance with, or sufficient to give full effect to, "the prevailing constitutional theory" or values. Faced with a discrepancy or a gap between law and constitutional values, political actors work out solutions that enable them to give effect to the latter without openly contravening the former. As the solution adopted by one political actor is imitated by that actor's successors, expectations that it will be similarly imitated in the future develop, with each precedent reinforcing these expectations. The combined forces of the values to which the practice gives effect and of the expectations that it will be followed make it binding. Constitutional conventions are indeed the pearls of the constitution, formed as the mollusk of the political process responds to the irritant of inadequate law or to the stimulus of a deliberate political decision, by enveloping it in layer after layer of the protective coating of precedent, until its very existence might be forgotten except by those who know that it must once have been there.²⁸

The conception of constitutional conventions as elaborated through (repeated) practice but grounded in constitutional values is reflected in Sir Ivor Jennings' test, which the Supreme Court has applied to ascertain the existence of constitutional conventions:

them, because "[w]hatever the role of coercion in securing the effectiveness of the legal system as a whole when applied to private citizens, it can have none when securing the application of law to the apparatus of government. An order of damages is no more coercive when made against the state than a declaration, because there is nothing that can coerce the state to pay up" at 42-43).

²⁵ WS Holdsworth, "The Conventions of the Eighteenth Century Constitution" (1932) 17:2 Iowa L Rev 161 at 163.

²⁶ *Patriation Reference*, *supra* note 21 at 877.

²⁷ *Ibid* at 882.

²⁸ *Ibid* ("many Canadians would perhaps be surprised to learn that important parts of the constitution of Canada, with which they are the most familiar because they are directly involved when they exercise their right to vote at federal and provincial elections, are nowhere to be found in the law of the constitution" at 877-78).

We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule? A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it.²⁹

The “reason for the rule,” found in the “constitutional theory of the time,” is thus the key to the existence of a convention.

Importantly, the reasons justifying the conventions of the constitution correspond to another element of the Canadian constitutional scheme: its “underlying principles”³⁰ — mostly, but not exclusively, those identified by the Supreme Court in *Reference Re Secession of Quebec*.³¹ Thus the various conventions of responsible government are justified by the democratic principle; those nullifying the federal power of disallowance of provincial legislation and mandating regional or provincial representation in the Supreme Court are justified by the principle of federalism; and the conventions regulating the relationships between the members of the Commonwealth are justified by (what may be described as) the principle of independence.

Now these principles, the Supreme Court has held, are not merely political or theoretical. They are legal norms, and “may in certain circumstances give rise to substantive legal obligations... which constitute substantive limitations upon government action.”³² Conventions, which are justified by and give effect to these principles, cannot do so, according to the orthodox view. This brings us to the fraught issue of the relationship between conventional and legal constitutional norms, and of the way in which this relationship influences the process of constitutional change.

Because the different sources of the constitution, such as principles, conventions, and formal legal rules (legislation and common law rules), constantly interact with one another, changes to one of these sources put pressure on the others to adapt. Thus, the development of the democratic principle between the 17th and the 19th centuries put pressure on the law of the constitution, which remained that of a monarchy where the King had considerable powers. The conventions of responsible government developed in response to this pressure. In other cases, (constitutional) legislation proved to be an

²⁹ Sir William Ivor Jennings, *The Law and the Constitution*, 5th ed (London, UK: University of London Press, 1959) at 136. See the endorsement of this test in *Patriation Reference*, *supra* note 21 at 888.

³⁰ See Fabien Gélinas, “Les conventions, le droit et la Constitution du Canada dans le renvoi sur la ‘sécession’ du Québec : le fantôme du rapatriement” (1997) 57:2 R du B 291.

³¹ [1998] 2 SCR 217 [*Secession Reference*].

³² *Ibid* at para 54.

answer to perceived inadequacies of constitutional conventions. For instance, legislation was used to refine, and to some extent modify, the conventions of civil service independence, in response, among other things, to changed ideas about the importance of civil servants' individual rights.³³

At the same time, constitutional change in Canada takes place against the background of a pre-existing entrenched, “supreme” constitution, which cannot be modified except in accordance with the procedures that it sets out.³⁴ The difficulty is in knowing exactly what this supreme constitution consists of. Pursuant to subsection 52(2) of the *Constitution Act, 1982*, it “includes” the various *Constitution Acts* (most importantly those of 1867 and 1982) and their amendments. But does it exclude underlying principles and conventions? In other words, can Parliament interfere with conventions and principles by ordinary legislation (such as that enacted pursuant to section 44 of the *Constitution Act, 1982*)?

Despite the orthodox view that conventions are not part of the law of the constitution (and thus not part of the “supreme law” entrenched and protected, by section 52 of the *Constitution Act, 1982*, from amendment by ordinary legislation), there have been suggestions that at least some forms of legislative interference with conventions would be impermissible. Most significantly, discussing the amendment of a provincial constitution in *OPSEU*, Justice Beetz suggested (albeit in *obiter*) that

it is uncertain, to say the least, that a province could touch upon the power of the Lieutenant-Governor to dissolve the legislature, or his power to appoint and dismiss ministers, without unconstitutionally touching his office itself. It may very well be that the principle of responsible government could, to the extent that it depends on those important royal powers, be entrenched to a substantial extent.³⁵

It is not clear, however, to what extent the “principle” of responsible government encompasses the specific conventions that give it effect.

The idea that the entrenchment of the vice-regal office protects at least some conventional rules from change, except by way of constitutional amendment under section 41 of the *Constitution Act, 1982*, is echoed in some academic commentary. Thus Walters contends that, although legislation enacted pursuant to section 44 of the *Constitution Act, 1982* can normally change conventions, because—unlike underlying

³³ See *Ontario (Attorney General) v OPSEU*, [1987] 2 SCR 2 [OPSEU]; *Osborne v Canada (Treasury Board)*, [1991] 2 SCR 69.

³⁴ See *Constitution Act, 1982*, s 52(3), being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11 [Constitution Act, 1982]. See also *Secession Reference*, *supra* note 31 at para 76.

³⁵ *OPSEU*, *supra* note 33 at 108.

principles—they are not part of the supreme constitutional law,³⁶ some conventions, namely those governing prime ministerial advice to the Governor General, are indirectly incorporated into supreme constitutional law through the provisions of the *Constitution Act, 1867* relating to the Privy Council.³⁷ Warren Newman has also argued that the discretion that the Prime Minister enjoys in advising the Governor General cannot be fettered by statute.³⁸ In his view, that is because the entrenchment of the “office of the Governor General” in paragraph 41(a) of the *Constitution Act, 1982* encompasses the Governor’s right to unfettered advice; the fettering of prime ministerial advice is tantamount to the fettering of vice-regal discretion, which is an interference with the “office of the Governor General.”³⁹

In our respectful view, this position is mistaken. The conflation of the *conventional* powers of the Prime Minister (and the cabinet) with the legal powers of the Governor General is contrary to both the letter and the spirit of the *Constitution Act, 1982*. So long as one is committed to the orthodox watertight separation between law and convention, one cannot read *any* conventions into the law of the constitution, and one must be content to believe that the Governor General is free to do as he or she pleases with the Prime Minister’s advice, so that restricting the latter does not affect his or her powers. Alternatively, one could accept that the constitutionally entrenched “office of Governor General,” is (almost) entirely limited, as convention dictates it is, to doing the Prime Minister’s bidding. (This, we will presently argue, is the better view.) If so, again, the fettering of the Prime Minister’s discretion does not take away from the Governor General any power that he or she actually has. It does not make sense to say that the power belongs to the Prime Minister, yet its limitation infringes on the office of the Governor General.

The conflation of the Prime Minister and the Governor General is contrary to the wording of the *Constitution Act, 1982*, section 44 of which specifically authorizes amendments to the constitution of Canada relative to “the executive government.” Constitutional legislation cannot, any more than the ordinary sort, speak in vain; constitutional provisions cannot be interpreted so as to render them meaningless. In

³⁶ Walters, *supra* note 2 at 56.

³⁷ *Ibid* at 58. Walters gives the example of section 9 of the *Constitution Act, 1867* (*supra* note 8), which provides that “[t]he Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen.” However, section 11, pursuant to which “[t]here shall be a Council to aid and advise in the Government of Canada, to be styled the Queen’s Privy Council for Canada” seems more directly relevant to his argument.

³⁸ Warren J Newman, “Of Dissolution, Prorogation, and Constitutional Law, Principle and Convention: Maintaining Fundamental Distinctions during a Parliamentary Crisis” (2009) 27 NJCL 217.

³⁹ *Ibid* at 224-25.

order to avoid doing so, one must not confuse the Governor General—the explicit and only exception to the section 44 power to amend the constitution in relation to the executive—and the other components of the federal executive. To give section 44 its full effect, it must be read as authorizing amendments relative to the Privy Council, the cabinet, and the civil service, none of which is mentioned along with the Queen and the Governor General in paragraph 41(a) of the *Constitution Act, 1982*.

Failing to distinguish between the Governor General, on the one hand, and the Prime Minister and the cabinet, on the other, is also contrary to the spirit and the underlying principles of the constitution. The relevant principles are those of democracy and, more specifically, responsible government; but it is crucial to apply these principles in the historical and structural context of the Westminster constitutional model. This context is one of a shift from royal to parliamentary (and thus popular) sovereignty, over the course of which the powers of the King and the Privy Council came to be exercised by the cabinet, *which then came under the control of Parliament*, through the emergence of what we now know as the conventions of responsible government.⁴⁰ To say that the powers that the Prime Minister and the cabinet came by convention to exercise as a result of the first stage of this evolution are protected from legislative control is to deny that the second stage of the evolution, the subjection of cabinet to Parliament, took place. This denial is arbitrary. It lets the Prime Minister stand in the shoes, if not wear the crown, of the monarch, as if his position were analogous to that of the President of the United States, misconceiving the nature of democracy in the Westminster system, which is a parliamentary, rather than a presidential, one.

As the foregoing discussion illustrates, it is dangerous to assimilate some constitutional conventions to supreme constitutional law while ignoring the significance of others. At the same time, however, Walters and Newman, not to mention Justice Beetz in *OPSEU*, are right that one cannot ignore conventions altogether when interpreting constitutional law and the limits that it imposes on Parliament's power of constitutional amendment. These limits are set out in terms—such as “the office of ... the Governor General”—that require interpretation. If this interpretation is not to go astray, it must pay careful attention to the conventions of the constitution.

So, for instance, the interpretation of the expression “the office of ... the Governor General” must take into account the convention that requires the Governor General to follow the advice of the Prime Minister and the cabinet. But, rather than selectively incorporating these conventions into constitutional law and protecting the Prime Minister's advice-giving function from any legislative control, this entails the

⁴⁰ For a history of these developments, which took place from the early 18th century up to 1841, see Holdsworth, *supra* note 25; Sir William Ivor Jennings, *Cabinet Government*, 3d ed (Cambridge, UK: Cambridge University Press, 1959) at 8-15.

recognition that the powers of the Governor General are narrowly limited and that only these limited powers are entrenched by paragraph 41(a) of the *Constitution Act, 1982*.

Such an interpretation is consistent with treating the constitution as a “living tree capable of growth and expansion within its natural limits.”⁴¹ If the constitution is to be a living organism, its interpretation must take into account its “motive power”;⁴² if “underlying principles ... breathe life into” the constitution,⁴³ the conventions that depend on, and give effect to, these principles are among the most important concrete manifestations of this life. In less lofty terms, conventions are an essential part of the context in which the terms of constitution legislation, as well as underlying constitutional principles, must be understood.

Interpretations of constitutional texts that take conventions into account are also preferable in light of the Preamble to the *Constitution Act, 1867*, which provides that the constitution of Canada is to be “similar in Principle to that of the United Kingdom.” This has always been understood as a reference to constitutional conventions, in particular those of responsible government. Indeed, it is because of this understanding that it was not necessary for the drafters of the *Constitution Act, 1867* to elaborate the principle of responsible government, and to describe the institutions through which it is implemented, more than they did.

We hasten to add that our claim that constitutional interpretation must take conventions into account is not “an invitation to dispense with the written text of the Constitution,”⁴⁴ something the Supreme Court cautioned against in the *Secession Reference*. To be sure, explicit provisions of the constitutional text cannot be interpreted away by invoking conventions. So, for instance, Parliament could not—as the British Parliament did⁴⁵—leave the Senate with only a suspensory veto, even though convention arguably does just that, allowing the Senate to resist the House of Commons until the will of the electorate is known as the result of election.⁴⁶ That is because a constitutional provision, namely the introductory clause of section 91 of the *Constitution Act, 1867*, makes the “the Advice and Consent of the Senate” one of the requirements for the enactment of any legislation by Parliament. The giving of “[a]dvice and [c]onsent” is clearly one of the “powers of the Senate” entrenched by paragraph 42(1)(b) of the *Constitution Act, 1982* and thus can only be removed by amendment in accordance with

⁴¹ *Persons Case*, *supra* note 12 at 136.

⁴² Holdsworth, *supra* note 25 at 163.

⁴³ *Secession Reference*, *supra* note 31 at para 50.

⁴⁴ *Ibid* at para 53.

⁴⁵ See *Parliament Act, 1911* (UK), 1 & 2 Ge 5, c 13; *Parliament Act, 1949* (UK), 12, 13 & 14 Geo 6, c 103.

⁴⁶ See Heard, *supra* note 24 at 87 ff (for a discussion of the powers of the Senate).

that provision. Similarly, Parliament could not formalize, by legislation, the abolition of the royal veto or the power of disallowance, because, although fallen into disuse and in-existent as a matter of convention, these powers are specifically provided for by explicit constitutional provisions.⁴⁷

What we are saying, rather, is that insofar as constitutional provisions, including the amending formula entrenched by the *Constitution Act, 1982*, require interpretation—insofar as they do not refer to clear constitutional text—an interpretation that takes into account and is consistent with conventions is to be preferred to one that does not. So, for instance, explicit constitutional provisions make it clear that “the office of ... the Governor General” includes a power “according to his Discretion ... [to] withhold ... the Queen’s Assent” to a bill enacted by the House of Commons and the Senate.⁴⁸ But explicit constitutional provisions do not define that “office” exhaustively, and to the extent that they do not, courts must interpret that term. In doing so, they ought to take conventions into account. Similarly, in the *Persons Case*, the Privy Council could not have overridden explicit constitutional language providing that only men could be summoned to the Senate. But, as the language of the constitution was actually amenable to an interpretation in line with the understandings of the times (a point which much of Lord Chancellor Sankey’s opinion is devoted to making), such an interpretation was the better one.

3. Conventions, the Senate, and Reform

We turn now to the role constitutional conventions play in framing the application of the *Constitution Act, 1982* to Bill C-7 or any similar future legislative scheme for Senate reform. Two conventions are relevant here. According to one, the Governor General’s power to “summon qualified Persons to the Senate” is—like most of the Governor General’s powers—exercised upon the Prime Minister’s advice. According to the other, the Senate, although formally almost the equal of the House of Commons,⁴⁹ gives way to the latter’s legislative judgment and priorities. Both of these conventions influence the interpretation of important limits on Parliament’s power to amend the constitution pursuant to section 44 of the *Constitution Act, 1982*.

⁴⁷ See *Constitution Act, 1867*, *supra* note 9, ss 55, 57, 90.

⁴⁸ *Ibid*, s 55.

⁴⁹ The Senate’s legal powers are more limited than those of the House in two ways: first, pursuant to section 53 of the *Constitution Act, 1867* (*supra* note 8), “Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons”; second, subsection 47(1) of the *Constitution Act, 1982* (*supra* note 35) allows the Senate to be bypassed in the process of adopting a constitutional amendment “under section 38, 41, 42 or 43.”

The first potential constitutional difficulty with the government's Senate reform project which conventions help us clear up is the argument that it is invalid because it interferes with the Prime Minister's advice to the Governor General on the choice of Senators. Walters hints at this argument, though he says that it is not what is ultimately problematic with Bill C-7.⁵⁰ By contrast, the government of Canada argues that even if "that sort of change amounts to a constraint on the Prime Minister's conventional authority to submit the names of Senate nominees to the Governor General[,] it does not demand resort to the amending procedures in ss. 41 or 42 [of the *Constitution Act, 1982*]."⁵¹ The government elaborates this position in the factum it has submitted to the Québec Court of Appeal,⁵² arguing both that the Prime Minister remains free, under Bill C-7, not to advise the Governor General to appoint an elected "Senate nominee", and that, in any case, the Governor General's legal power remains unaffected by the Prime Minister's advice, whatever the conventional situation may be.

In our view, Bill C-7 does not run against the entrenchment of "the office of ... the Governor General" in paragraph 41(a) of the *Constitution Act, 1982*. However, this is so not because the Governor General remains free to summon anyone he or she wishes to the Senate, but rather precisely because he or she lacked that freedom in the first place. As we suggested above, the fettering of prime ministerial advice to the Governor General does not change the vice-regal "office", since that office (except in rare circumstances that have nothing to do with the appointment of Senators) consists merely in giving effect to advice, whatever it is. Nor does any constitutional provision protect the Governor General's discretion in this matter, as section 55 of the *Constitution Act, 1867* does with his or her ability to refuse royal assent to legislation. Interpreted in light of the long-standing constitutional conventions, paragraph 41(a) of the *Constitution Act, 1982* is no obstacle to constraining the Prime Minister's traditional discretion in advising the Governor General, because such a constraint does not deprive the Governor General of any power which he or she now possesses. The constraint on the advice-giving power of the Prime Minister is best understood as an

⁵⁰ Compare Walters, *supra* note 2 at 58 ("legislation that purports to regulate the ways in which prime ministerial 'advice' to the Governor General is made, such as advice about Senate appointments, is not really the regulation of a field of convention outside or unknown to law" because prime ministerial advice to the Governor General is required by constitutional provisions on the Privy Council); *ibid* at 57 ("[t]he proposed Senate Reform Act is constitutionally problematic, not because it conflicts with constitutional convention or because it interferes with the Governor General's legal power to appoint Senators").

⁵¹ AGC Factum SCC, *supra* note 3 at para 130.

⁵² *Renvoi à la Cour d'appel du Québec relativement au projet de réforme du Sénat*, dated 31 July 2013 (31 July 2013), Montreal 500-09-022626-121 (Factum of the Attorney General of Canada), online: <<http://www.scribd.com/doc/157427431/MEMOIRE-RENVOI-A-LA-COUR-D%E2%80%99APPEL-DU-QUEBEC-RELATIVEMENT-AU-PROJET-DE-REFORME-DU-SENAT>>.

amendment to “the Constitution of Canada in relation to the executive government of Canada,” of which the Prime Minister is part. Pursuant to section 44 of the *Constitution Act, 1982*, Parliament is authorized to “make laws” to carry out such amendments.

The real source of constitutional difficulties with Bill C-7 is paragraph 42(1)(b) of the *Constitution Act, 1982*. It provides that “the powers of the Senate and the method of selecting Senators” may only be amended by following the “7/50” procedure set out in subsection 38(1). The “powers of the Senate and the method of selecting Senators” are thus two exceptions to the power given Parliament by section 44 of the *Constitution Act, 1982* to “make laws amending the Constitution of Canada in relation to ... the Senate.” The scope of these exceptions, no less than the concept of the “office” of Governor General, can only be understood by reference to the constitutional conventions that regulate both the Senate’s powers and the way in which its members are chosen, and to the legal principles that underlie the constitution and have given rise to these conventions.

The Senate’s powers, as explained above, are limited by a long-standing convention which curtails its ability to oppose the will of the House of Commons. The Senate’s situation is, in this respect, similar to that of the Governor General, in that the broad legal powers of these institutions are much reduced by convention. In both cases, the reason for the conventional rule is obviously the democratic principle: neither the Senate nor the Governor General is democratically elected.

As we explain in Part 1, Bill C-7 aims at changing the situation of the Senate by serving as the basis for a set of future constitutional conventions that will, in due course, require provincial legislatures to set up electoral mechanisms for selecting “Senate nominees” and make it obligatory for future prime ministers to advise the Governor General to summon these nominees to the Senate. To be sure, the grain of sand might never grow into a pearl. The similarly designed project for setting up a system of fixed election dates failed to create the convention whose development it was intended to provoke. Nonetheless, the intention behind Bill C-7 to create, over time, an elected Senate is clear.⁵³

Once the Senate has become an elected body—and, indeed, much earlier than that, as soon as any significant proportion of its members are elected—the reason for the convention limiting the Senate’s powers will no longer hold, and the convention will naturally disappear, the “reason for the rule” being an essential, and indeed the crucial, precondition for a convention’s existence. The predictable effect of the success, even a partial success, of Bill C-7 would thus be to increase the real “powers of the Senate.”

⁵³ See Walters, *supra* note 2 at 46-49.

This increase would be contrary to paragraph 42(1)(b) of the *Constitution Act, 1982*, if that provision is interpreted, as it must be, in the context of the conventions that regulate the Senate's powers.

The transformation of the Senate into a democratic body would also be likely to interfere with at least some of the conventions that implement the principle of responsible government in Canada. For example, there is no reason why cabinet ministers would not be drawn from an indirectly elected Senate as a matter of course, rather than very exceptionally, as convention now dictates. Less certainly but more importantly, the clarity of the principle of responsibility of the cabinet to the House of Commons, as the elected representation of the people of Canada, may be compromised. A cabinet that enjoys the confidence of the House of Commons and thus, presumptively, of the people, may be thwarted by the Senate; or a cabinet (perhaps drawn largely from the Senate) might resist, on the strength of senatorial support, the lack of confidence of the House. Although these consequences are uncertain, they would arguably rise to a level of interference with the principle of responsible government that, as Justice Beetz cautioned in *OPSEU*, would not be permissible without amending entrenched constitutional provisions.

Similarly, it would be difficult to pretend that the setting up of a “consultative” election mechanism to select a “nominee” for the position of Governor General for the Prime Minister to propose to the Queen would not alter “the office of ... the Governor General,” even though that office's legal powers and the formal procedure for the appointment of the Queen's representative would remain unchanged. Notwithstanding this formal continuity, the true character of the vice-regal “office” would change dramatically. A democratically, if indirectly, elected Governor General would have little reason to take the Prime Minister's advice in (almost) all matters, as the appointed one does; the entire set of conventions of responsible government would stand in danger of collapse. Such a change to the position of Governor General would, in substance, run against Justice Beetz's warning in *OPSEU*, even though, in form, the legal institutions on which it depends would remain unaltered.

This example also shows that Bill C-7 would in fact interfere with the constitutionally entrenched “method of selecting Senators.” As with the “powers of the Senate” and “the office of ... the Governor General,” the interpretation of that expression must take into account its conventional meaning. Convention dictates that Senators are, in reality, prime ministerial appointees—and it makes it clear that they are not, even indirectly, elected officials. Though there is some precedent for the appointment of Senators whose names were put forward in an electoral process, this practice has not been consistently followed, and it is clear that prime ministers do not feel bound to follow it. The conventions of the constitution, as they have existed since Confederation, have

given the actual power of “selecting Senators” to the Prime Minister, much as (more recent) conventions have given the Prime Minister the actual power of selecting the Governor General. And in the same way that introducing an element of election into the choice of Governor General would be considered a fundamental alteration in the mode of his or her appointment, the creation of an electoral process is an alteration of the “method of selecting Senators” that has been followed since Confederation.

Of course, as the government contends before both the Supreme Court and the Quebec Court of Appeal, the Prime Minister is free to consult before advising the Governor General to summon a person to the Senate.⁵⁴ However, as Walters points out, when that consultative process is made the subject of legislation, that legislation—unlike a mere practice—must pass constitutional muster. The distinction between practice and legislation is precisely what allows constitutional conventions to grow even when the conventional rule is at odds with a clear rule of constitutional law. The legal limits on the constitutional changes that Parliament can achieve by legislating are more stringent than the political limits that constrain the actual action of the Prime Minister. This is only logical, because a law, once enacted by the Parliament of today, needs no further confirmation by those of the future to remain in force, whereas the practice of a single Prime Minister will not acquire the binding character of a convention unless his or her successors come to view it as “the constitutional position” and feel bound by it themselves.

Conclusion

Constitutional conventions and constitutional law do not exist separately and apart from each other. When a constitution is as thoroughly dependent on conventions as that of Canada, one cannot be blind to the conventional rules that give form to its most significant underlying principles. This is true not only of academics who comment on, but also of judges who are entrusted with authoritatively interpreting the constitution. An interpretation that failed to take into account the daily life of the constitution, which conventions shape, would be at best divorced from reality and at worst perverse and dangerous.

That is why, in the *Patriation Reference*, the Supreme Court refused the invitation to remain silent about the significance of conventions to the proposed patriation process. Although it concluded that constitutional conventions were not a direct source of legal

⁵⁴ This argument has led one of us to adopt a slightly more generous position toward the powers of Parliament in the past. See the presentation of Fabien Gélinas in House of Commons, Legislative Committee on Bill C-20, *Evidence*, 39th Parl, 2nd Sess, No 005 (16 April 2008), online: Parliament of Canada <<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=3434086&Language=E&Mode=1>>.

obligations, it was keenly aware of their role in giving life to constitutional principles and maintaining the balance between the federal government and the provinces. That balance could not legitimately be changed, it concluded, in contravention of the conventions of the constitution and the principles that give rise to them.

The Court subsequently held that the new amending formula set out in the *Constitution Act, 1982* replaced the rules on constitutional amendment that applied before its enactment.⁵⁵ But that formula requires interpretation—and in order to be meaningful, its interpretation must also take the conventions of the constitution into account. These conventions, through which the constitution develops, are part of what makes it “a living tree”. No less than the society’s views on, say, equality, they are part of the evolving context that courts must appreciate when interpreting the constitution.

The amending formula’s provisions relative to the Senate must, therefore, be understood in the context of the conventions that apply to that institution and give life to the relevant constitutional principles. These conventions limit the Senate’s powers and define the way in which its members are chosen, which are protected from unilateral amendment by Parliament. The federal government’s plan for unilateral Senate reform would alter both of these characteristics and is, for this reason, unconstitutional.

⁵⁵ *Reference Re Objection by Quebec to a Resolution to Amend the Constitution*, [1982] 2 SCR 793 at 806.