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Senate Reform on the Horizon: Does the Parliament of Canada have the power to unilaterally change the terms and selection method of Senators?

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Cases Considered:

Bill C-7, *An Act respecting the selection of senators and amending the Constitution Act, 1867 in respect of Senate term limits* ("*Senate Reform Act*"), 41st Parliament, 1st Session

After a very long journey, Canadians may be reaching the end of the long road to Senate reform. In the recently introduced *Senate Reform Act* the federal government is proposing a framework for electing senate nominees, and proposing to significantly reduce Senator term limits. Questions have been raised about Parliament's unilateral ability to effect these reforms without provincial consent. This comment will explore the constitutional validity of the *Senate Reform Act* in terms of Parliament's jurisdiction to unilaterally amend the Canadian Constitution. It will be suggested that while the proposed term limit is likely constitutionally valid, the proposed framework and legal obligation of the Prime Minister to consider elected Senate nominees is beyond Parliament's sole power.

Senate reform has been a legislative priority for the government since taking office in 2006. Indeed there has been a string of reform proposals or calls for the abolition of the Senate almost since confederation itself, and especially in the last forty years (see F. Leslie Seidle, "Senate Reform and the Constitutional Agenda" in Janet Ajzenstat ed, *Canadian Constitutionalism: 1791-1991* (Ottawa: Canadian Study of Parliament Group, 1992) 91; Jack Stillborn, "Forty Years of Not Reforming the Senate – Taking Stock" in Serge Joyal ed, *Protecting Canadian Democracy: The Senate You Never Knew,* (Montreal: McGill-Queen's University Press, 2003) 31). The present Conservative government criticizes the Senate as being an antiquated and undemocratic institution (see the 2011 Conservative Party of Canada platform). Prime Minister Stephen Harper has gone so far as to require all of his Senate nominees to pledge support for his Senate reform agenda (see for example Gloria Galloway's recent Globe and Mail article about the seven most recent appointees to the Senate). When the *Senate Reform Act* was introduced in June 2011 Tim Uppal, the Minister of State for Democratic Reform, said that the purpose of the Act is to make the Senate "more democratic, accountable, and representative of Canadians" (News Release, "Harper Government Introduces the Senate Reform Act" (Ottawa: June 21, 2011)). Ultimately, reforming the Senate is about resolving its democratic deficit.

However, not everyone dismisses the Senate as an anachronism. Proponents of the Senate argue, generally, that the upper chamber continues to serve a valuable function in the federal legislative process. In particular, they note the Senate committee system—lauded for its thoughtful, collegial, and in-depth studies of bills and important social issues—as being one of the key strengths of the institution (Paul Thomas, "Comparing the Lawmaking Roles of the Senate and the House of Commons" in *Protecting Canadian Democracy: The Senate You Never Knew*, *supra,* 189 at 218). Additionally, it is argued that the independence of Senators allows them to

take stands on more controversial issues, such as the 1995 report of *The Special Senate Committee on Euthanasia and Assisted Suicide* or the ongoing Senate investigations into matrimonial property rights on aboriginal reserves (see for example the 2003 interim report of the Senate Standing Committee on Human Rights).

If the government does proceed with Bill C-7 (it has only received first reading) the stage appears set for a protracted battle over the constitutionality of the reforms. The federal government currently intends to unilaterally enact their proposal. However, even if they wanted to proceed according to the "7/50" formula (s 38(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*CA, 1982*], provides a mechanism for amending the Constitution with the consent of seven provinces representing at least 50% of the Canadian population), reform would prove elusory since both Ontario and Quebec have indicated opposition to the *Senate Reform Act*, citing the need for provincial consent for the Bill to be constitutional. With their recently achieved majority in both the House of Commons and the Senate the federal government has the technical capacity to pass Bill C-7 into law. If this occurs it will likely be for the courts to decide if the federal government has the jurisdiction to effect the proposed changes. It is timely, then to consider the power of Parliament to unilaterally amend the Constitution in the context of the *Senate Reform Act.*

The Proposed Reforms

Senatorial Selection

Bill C-7 ostensibly does *not* change the way senators are presently *appointed*. The relevant constitutional provisions that presently guide the senator selection process are contained in sections 23 and 24 of the *Constitution Act, 1867* (UK), 20 &31 Vict, c 3, reprinted in RSC 1985, App II, No 5 [*CA, 1867*]. Section 23 provides a list of six eligibility criteria for qualification to be summoned to the Senate:

(1) Be at least 30 years old,
(2) Be a natural born or legally naturalized subject of the Queen,
(3) Have free and clear, unencumbered title to at least $4000 worth of real property,
(4) Have combined real and personal property worth more than $4000 above all debts and liabilities,
(5) Reside in the province for which he or she is appointed,
(6) In the case of a Senator from Quebec, he or she shall reside, and have their property qualification in the senatorial district for which he or she is appointed.

Section 24 provides the mechanism by which the Governor General appoints an eligible person to the Upper Chamber:

> Summons of Senator
>
> **24.** The Governor General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon qualified Persons to the Senate; and, subject to the Provisions of this Act, every Person so summoned shall become and be a Member of the Senate and a Senator.

All Bill C-7 requires is that the Prime Minister "consider" the names of individuals elected as Senate Nominees when making recommendations to the Governor General on whom to summon to the Senate:

> 3. If a province or territory has enacted legislation that is substantially in accordance with the framework set out in the schedule, the Prime Minister, in recommending Senate nominees to the Governor General, must consider names from the most current list of Senate nominees selected for that province or territory [emphasis added].

There is nothing conferring any priority upon elected Senate nominees nor anything on its face that would seem to constrain the ultimate discretion of the Prime Minister and Governor General.

Senate nominees need only be "considered" by the Prime Minister if they are elected "substantially in accordance" with a model legislative framework ("Framework for the Selection of Senators") set out in the Schedule to the *Senate Reform Act.* It is interesting to note that this model legislative framework is virtually identical in content to the Alberta *Senatorial Selection Act*, RSA 2000, c S-5 (and British Columbia currently has Senate Nominee Election legislation pending before its legislature that would also be compliant). The Framework for the Selection of Senators specifically requires Senate nominee candidates to, *inter alia*, meet the criteria set out in section 23 of the CA, 1867 *(*see s 8(a) (i) of the Framework). Thus, in the end, there would technically be no change to the actual criteria or mechanism for *appointing* senators.

Senate Term Limits

The proposed amendments in Bill C-7 regarding term limits, on the other hand, represent substantive amendments to section 29 of the *CA, 1867.* Since 1965 senators have been entitled to serve until the age of 75 (before 1965 senators were appointed for life, see *Constitution Act, 1965*, SC, 1965, c 4). Given that an eligible person could be summoned to the upper chamber at the age of 30, this potentially allowed for a forty-five year senatorial term. Under the *Senate Reform Act* senators appointed after 18 October 2008 would serve for a maximum 9-year non-renewable term (s 4(1)).

Bill C-7 also contains a provision for dealing with interruptions to senatorial terms. Under the proposal, senators whose terms are interrupted (for example, resigning to run for a seat in the House of Commons and losing the election) could be reappointed. This reappointment, however, would only be for the remaining balance of his or her original 9-year term (s 4(2)). In other words, it would not be possible to bypass the term limit by resigning before the expiration of one's term and securing reappointment.

Thirdly, Bill C-7 amends section 29 of the *CA, 1867* to provide that, notwithstanding the 9-year non-renewable terms, a senator's term expires when that person turns 75, regardless of time remaining in the 9-year term (s 5). Essentially, this provides that the proposed term limits are still subject to the absolute age cap.

Background on the Senate

Before discussing Parliament's power to reform the Senate it is valuable to consider how the Senate is established, its historical significance, and the connection between Alberta and the Senate reform movement. The Senate is established by section 17 *CA, 1867* where it states: "there shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons." The Senate, then, is one of three constituent institutions of

the Parliament of Canada. This bespeaks of its institutional importance and centrality in the Canadian political system.

Historically, the Senate was the lynch-pin of the Confederation deal. At that time, Quebec and the Maritime provinces demanded a mechanism to counter-balance the perceived perils of representation by population, which was to govern representation in the House of Commons. They feared that Ontario would run rough-shod over their regional interests by way of their numerical superiority in the lower house. Equal regional representation in the Senate was to be their protection. This prompted George Brown, a father of Confederation, to famously observe "Our Lower Canadian friends have agreed to give us representation by population in the Lower House, on the express condition that they could have equality in the Upper House. On no other condition could we have advanced a step" (Janet Ajzenstat, "Bicameralism and Canada's Founders: The Origins of the Canadian Senate," in *Protecting Canadian Democracy: The Senate You Never Knew*, *supra* at 3-31).

Western Canada, and Alberta in particular, has been the cradle for Senate reform proposals throughout Canadian history. In the 1920s, dissatisfaction with the Senate manifested calls to limit senators' terms, make the Senate an elected body, and even calls for the outright abolition of the institution. Concurrently, a more focused effort, led by the pioneering Albertan jurist Emily Murphy and the other members of the "Famous Five" campaigned to have women appointed to the Senate. While no one could defensibly question the propriety of appointing women to the Senate today, at the time the proposal represented a dramatic departure from the status quo, which was met with great resistance. After political avenues failed, the Famous Five launched a court action that was ultimately appealed all the way to the Judicial Committee of the Privy Council (*Edwards v Canada (Attorney General),* [1930] 1 DLR 98, [1930] AC 124), after the Supreme Court of Canada ruled that women were not "qualified persons" for the purposes of section 24 *CA,1867* (*Edwards v Canada (Attorney General),*[1928] SCR 276). The establishment of the legal personhood of women in Canada, then, traces its origins to a campaign that began in Alberta, amidst a broader discourse about the future of the upper chamber (see Robert J Sharpe and Patricia I. McMahon, *The Persons Case: The Origins and Legacy of the Fight for Legal Personhood* (Toronto: Osgoode Society for Canadian Legal History, 2007).

Alberta was also the birthplace for the more recent "Triple-E" (elected, effective and equal) Senate reform proposal. It came to prominence after a special committee of the Alberta Legislature endorsed it (see Select Special Committee on Upper House Reform, *Strengthening Canada*: *Reform of Canada's Senate* (Edmonton: Plains Publishing, 1985)). Interestingly, this proposal also called for a formal reduction in the powers of the Senate, and suggested a means for the House of Commons to override a vote of the Senate; no similar provision is included in the *Senate Reform Act.* While the "Triple-E" Senate model is problematic for a variety of political, theoretical and practical reasons, which need not be rehearsed here, it suffices to say that this proposal—and its popularity—is indicative of western Canada's, and Alberta's in particular, desire for Senate reform (Michael Lusztig, "Federalism and Institutional Design: The Perils and Politics of a Triple-E Senate in Canada" (Winter 1995) 25:1 Publius 35). It seems fitting, then, that a Prime Minister representing an Albertan constituency should be the one to advocate Senate reforms.

The Power to Reform Parliament: Past and Present

Past:

The powers of Parliament to reform itself have changed over the years. Prior to 1949 any amendments to the Canadian Constitution required an act of the British Parliament because the *British North America Act* was a British statute. In 1949 the *British North America (No. 2) Act, 1949,* 13 Geo. VI, c 81 (U.K), added section 91(1) to the Constitution which conferred some authority on the Parliament of Canada to amend the "Constitution of Canada":

> 91(1) The amendment from time to time of the Constitution of Canada, except as regards matter 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 the requirements that there shall be a session of the Parliament of Canada at least once each year, and that no 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 continuation is not opposed by the votes of more than one-third of the members of such House.

This authority initially seemed to be quite broad in scope. A plain and common reading of this provision suggests that it would have been within Parliament's exclusive jurisdiction to amend the Constitution with respect to Parliament as an institution. As noted above, in 1965, under the authority of section 91(1) Parliament set an age limit on senatorial terms.

However, Parliament's power under section 91(1) was more limited than it initially appeared. The Supreme Court of Canada (SCC) has had occasion to consider the scope of Parliament's authority under this provision in the *Reference re Legislative Authority of Parliament of Canada In the matter of a Reference by the Governor in Council concerning the legislative authority of the Parliament of Canada in relation to the Upper House, as set out in Order in Council P.C. 1978-3581, dated the 23rd day of November, 1978,* [1980] 1 SCR 54, 102 DLR (3d) 1 [*Upper House Reference* cite to SCR]. The SCC was asked to consider whether it would be within the power of the Government of Canada to abolish the Senate or effect a series of other reforms, including providing for the election of senators and significantly reducing senatorial term lengths.

Regarding abolition, the SCC concluded that, notwithstanding the apparently broad scope of the powers conferred by the language of section 91(1), it was not within Parliament's jurisdiction to abolish the Senate. It held that the continued existence of the Senate was implied by the exceptions to the general power in section 91(1). Specifically, the inability of Parliament to change the requirement that a session of Parliament not extend beyond five years presupposed that the Senate, as one of three institutions of Parliament, would continue to exist (*Upper House Reference* at 73-73).

The SCC also rejected the idea of an elected Senate. The SCC said "[t]he substitution of a system of election for a system of appointment would involve a radical change in the nature of one of

the component parts of Parliament" (at 77, emphasis added). It was clear, they held, that the present design of the Senate was to instill independence in the Upper House so that it could dispassionately canvas measures of the House of Commons, in a fashion "similar in principle" to the House of Lords in the United Kingdom (*Upper House Reference* at 75-55).

Additionally, it is interesting to note that regarding the tenure of senators the SCC observed, in *obiter*, that "[a]t some point, a reduction of the term of office might impair the functioning of the Senate in providing… 'sober second thought in legislation'" (*Upper House Reference* at 75-77). So while the SCC has not directly ruled on proposals similar to reforms contained in Bill C-7, it has certainly given strong suggestions as to their views on electing senators and senators' tenure of office.

The overall position of the SCC in the *Upper House Reference* was famously stated as follows: "it is not open to Parliament to make alterations which would affect fundamental features, or essential characteristics, given to the Senate as a means of ensuring regional and provincial representation in the federal legislative process" (at 78). As would be made clear a year later in *Re: Resolution to Amend the Constitution*, [1981] 1 SCR 753 [*Patriation Reference*], a constitutional convention existed that would have required the federal government to seek provincial consent before seeking an amendment to the Constitution to "fundamentally" or "essentially" reform the Senate.

Present

The *CA, 1982* "patriated" the Constitution by establishing domestic constitutional amendment formulas. Section 91(1) *CA, 1867* was repealed and replaced by Part V of the *CA, 1982*. The two most relevant sections of Part V, for present purposes, are sections 42 and 44:

> Amendment by general procedure
>
> **42.** (1) An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with subsection 38(1):
>
> > *(a)* the principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada;
> >
> > *(b)* the powers of the Senate and the method of selecting Senators;
> >
> > *(c)* the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators;
> >
> > *(d)* subject to paragraph 41(*d*), the Supreme Court of Canada;
> >
> > *(e)* the extension of existing provinces into the territories; and
> >
> > *(f)* notwithstanding any other law or practice, the establishment of new provinces.
>
> …
>
> Amendments by Parliament
>
> **44.** Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons. [emphasis added]

Section 44 *CA, 1982* can be seen as the successor to section 91(1) *CA, 1867*. The more limiting language of section 44 *CA, 1982* is consistent with the way the SCC interpreted the phrase "Constitution of Canada" in the *Upper House Reference* as referring only to federal level government rather than to the entirety of Canada as a "geographical" unit (at 69-70). In other words, it is not open to Parliament under section 44 *CA, 1982*, for instance, to amend the provincial heads of power under section 92 *CA, 1867*. Furthermore, an important difference to observe is that section 44 is subject to the specific qualifications regarding amendments affecting the Senate found in section 42. Most importantly, section 42(b) requires that any amendment to the Constitution of Canada that would affect (i) the powers of the Senate or (ii) the method of selecting Senators be enacted through the "7/50" amendment formula in section 38(1), mentioned above. The constitutionality of the *Senate Reform Act*, then, turns on whether Parliament's authority is grounded in section 44 or section 42.

Whether or not the *Upper House Reference* is still good law, and applicable to the interpretation of sections 42 and 44 *CA, 1982*, is contested. Peter Hogg argues that any principles that might have been derived from the *Upper House Reference* have been overtaken by the complete 'code' for constitutional amendments affecting the Senate laid down in Part V of the CA*, 1982* (see Michel Bédard and Sebastian Spano, *Bill S-8: The Senatorial Selection Act*, (Ottawa: Library of Parliament, 2010) at 11). Andrew Heard, on the other hand, argues that section 44 cannot be read as a complete code because it would result in absurdities such as the Government of Canada being able to repeal citizens' right to vote, or amend section 32 to make the *Charter* not apply to acts of the federal government. In Heard's view, the principles articulated in the *Upper House Reference* must inform an interpretation of Parliament's power under sections 42 and 44 (Andrew Heard, *Constitutional Doubts About Bill C-20 and Senatorial Elections* (Kingston: Queen's University School of Public Policy Institute of Intergovernmental Relations, School of Policy Studies, 2008) at 8-9).

The *Upper House Reference* continues to be relevant for several reasons. From a pragmatic point of view, if the courts are called upon to review the constitutional merits of Bill C-7 (or any subsequent Senate reform bill) the *Upper House Reference* will undoubtedly be cited as authority by one side or the other since it is the only Canadian judicial decision directly on point. More important, however, is the fact that the lenses of interpretation employed by the SCC to interpret and define Parliament's power under section 91(1) remain constant: the historical role of the Senate to Confederation; the reference in the preamble to Canada having a constitution "similar in principle to that the of the United Kingdom"; and the wordings of sections 17 and 91 *CA, 1867*, set out below:

> Constitution of Parliament of Canada
>
> **17.** There shall be <u>One Parliament</u> for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons. [emphasis added]
>
> Legislative Authority of Parliament of Canada
>
> **91.** It shall be lawful for the Queen, by and with the Advice and Consent of the <u>Senate and House of Commons</u>, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) <u>the exclusive Legislative Authority of the Parliament of Canada</u> extends to

> all Matters coming within the Classes of Subjects next hereinafter enumerated; [emphasis added]

Are these reforms constitutional?

So what then of Bill C-7? It is clear from the preamble that the Government is relying on section 44 *CA, 1982* as its constitutional authorization to enact the reforms:

> 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; …

Interestingly, the preamble also asserts that Parliament "wishes to maintain the essential characteristics of the Senate with Canada's parliamentary democracy as a chamber of independent, sober second thought" (last perambulatory clause). This statement seems to anticipate the argument of opponents of the Bill who might rely on *Upper House Reference* to assert that the Bill would be *ultra vires* the Parliament of Canada.

Ultimately, it is a question of jurisdiction. If Bill C-7 falls under section 44 it should withstand judicial scrutiny. If, however, Bill C-7 falls under section 42(b) *CA, 1982* then it is beyond Parliament's competence to enact the reforms unilaterally; if they wish to proceed they would require the consent of two-thirds of the provinces, representing fifty percent of the population, as outlined in section 38(1) *CA, 1982*. It is sensible, then, to consider whether the term limit proposal affects the powers of the Senate, or whether the senatorial selection framework affects the method of selecting Senators for the purposes of section 42(b) *CA, 1982*.

Term Limits and "Powers of the Senate"

The first task of the court, should the issue be litigated, will be to interpret what is meant by the "powers of the Senate" for the purposes of section 42(b) *CA, 1982*. The important difference between section 42 and section 44 *CA, 1982* is that Parliament requires provincial consent under section 42. Therefore, defining the "powers of the Senate" (under s. 42) should relate to the purpose of requiring provincial consent to amend it. In the *Upper House Reference* the SCC held in effect that "fundamental" or "essential" changes that would affect the Senate's ability to "[ensure] regional and provincial representation in the federal legislative process" were beyond Parliament's sole jurisdiction (at 77-78). The "powers of the Senate" therefore relate to the Senate's legislative review role.

The Senate essentially has the same legislative role and powers as the House of Commons. Section 18 of the *CA, 1867* provides that the same privileges, immunities and powers are to be enjoyed by both houses of Parliament. The only exception is in section 53 of the *CA, 1867*, which requires that money or tax bills originate in the House of Commons. The federal-provincial division of powers under sections 91 and 92 *CA, 1867* assigns all federal legislative authority to the Parliament of Canada, of which the Senate is a constituent element. Therefore amendments that would change the privileges, immunities or powers of the Senate relative to the House of Commons, authorize money or tax bills to originate in the Senate, or affect the Senate's authority to legislate in respect of the enumerated heads of power in section 91 would fall under the section 42(b) amendment formula and require provincial consent.

There are some provisions under the "Senate" heading of Part IV "Legislative Power" of the *CA, 1867* that could affect the powers of the Senate to discharge its legislative role. For instance, the

section that provides for the number of senators per province (s 22 *CA, 1867*) and the residency requirement of senators (ss 22 and 25 *CA, 1867*) have a material impact on the ability of the Senate to bring regional and provincial representation to bear on the federal legislative process. Amendments that would alter the distributive balance of Senate seats, or alter the requirement that senators reside in the province they represent could impair the Senate's legislative purpose. Such amendments, however, are already made subject to provincial consent by section 42(c) *CA, 1982*. The "powers of the Senate" must not be read in an overly broad way that would make section 42(c) *CA, 1982* redundant.

Other provisions under the "Senate" heading in Part IV of the *CA, 1867* are of an administrative or procedural nature. Examples of administrative provisions include the process for resignation (s 30 *CA, 1867*), or the appointment of the speaker (s 34 *CA, 1867*). These matters surely fall under Parliament's exclusive amendment authority under section 44 *CA, 1982,* since they only affect the federal level of government. Arguably, some of the procedural provisions like the quorum threshold (s 35 *CA, 1867*), or the voting system (s 36 *CA, 1867*) could have an impact on how the Senate exercises its legislative power. Whether these procedural provisions amount to "fundamental" or "essential" characteristics of the Senate that would affect the Senate's ability to bring regional and provincial representation into the legislative process is not immediately clear. If they are, then amendments that would affect sections 35 and 36 of the *CA, 1867* should also be governed by section 42(b) *CA, 1982*.

Based on the preceding assessment, it does not appear that the proposed term limit in the *Senate Reform Act* amendment would affect the "powers of the Senate." The *dicta* in the *Upper House Reference*—"[a]t some point, a reduction of the term of office might impair the functioning of the Senate in providing… 'sober second thought in legislation'"—does not give any indication as to where this threshold might lay. The suggestion seems to relate to the political independence of the Senate from partisan influence from the House of Commons. If the terms of senators were so short that a government in the House of Commons could simply wait out an opposing majority in the Senate and replace it with a slate of loyal partisans, the capacity of the Senate to block, amend or review legislation would effectively be removed. However, the nine-year term limit proposed in the *Senate Reform Act* would ensure that senators' tenure of office exceed the lifespan of any one government. While opponents to the term limit may be tempted to conflate experience and wisdom with the legal power to effectively review legislation, the two must remain conceptually distinct. That senators may have less time to develop legislative and topical expertise due to shorter terms of office does not mean that the independence of the institution to engage in "sober second thought" has been affected. For these reasons a reviewing court should find the term limit amendments of the *Senate Reform Act* to be within the constitutional jurisdiction of the Parliament of Canada under section 44 of the *CA, 1867.*

Senatorial Selection and the "Method of Selecting Senators"

The first task here will also be to determine what is encompassed within the "method" of selecting senators in section 42(b) *CA, 1982* using a similar interpretive approach. The debate will likely be one of substance versus form. Does the method include the process that leads up to the Prime Minister making a recommendation to the Governor General? Or is the method simply the appointment mechanism embodied in section 24 of the *CA, 1867*? In the end, substance should be more important than form in considering the constitutionality of the section 3 of the *Senate Reform Act.*

The constitutional validity of section 3 of the *Senate Reform Act* depends on a narrow interpretation of the "methods of selecting Senators" in section 42(b) of the *CA, 1867* that does not appear to be sustainable. The argument in favour of constitutional validity rests on the fact that the appointment mechanism (s. 24 of the *CA, 1867*) is not formally being amended. However, section 42(b) *CA, 1982* requires that the general amending formula of section 38(1) *CA, 1982* be used for amendments that affect the method of "selecting" senators, not just for the method of "appointing" or "summoning" senators. The process for selecting nominees is broader than the final act of appointment under section 24 *CA, 1867*.

This is bolstered by the present method for *selecting* senators. Currently, it is the special prerogative of the Prime Minister to recommend qualified individuals to the Governor General for appointment to the Senate (see Privy Council Minute 3374, "Memorandum regarding certain of the functions of the Prime Minister"). Note, however that nowhere in the *CA 1867* or *1982* is the Governor General required to solicit, much less abide by the Prime Minister's suggestions. It is by constitutional convention that the Governor General abides by the advice of the Prime Minister and Cabinet (Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics,* (Toronto: Oxford University Press, 1991) at 18).

The effect of the *Senate Reform Act* then is to legislatively constrain the Prime Minister's special prerogative on who can be recommended to the Governor General. The fact that section 3 only superficially requires the Prime Minister to "consider" recommending elected nominees belies the purpose of providing a framework for electing Senate nominees in the first place: to increase the democratic legitimacy of the Senate. Moreover, the SCC has ruled that democracy is a "fundamental value in our constitutional law and political culture" (*Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 61). It would be tantamount to betraying of one of the fundamental underlying principles of the Constitution to suggest that the Prime Minister would be legally required to "consider" but then not obligated to recommend the appointment of democratically elected Senate nominees.

There is already some support for a developing convention of appointing elected Senate nominees. Prime Minister Harper—an obvious Senate reform supporter—has filled both of the most recent senate vacancies in Alberta with nominees elected in the 2004 Alberta Senate Election: Burt Brown (elected 1998 & 2004, appointed 2007); Betty Unger (elected 2004, appointed 2012). Moreover, he appointed them in descending order of most votes received (see *2004 Provincial Senate Nominee Election Report*). This builds on the 1990 appointment of Stan Waters (elected in 1989). This point should not be exaggerated, though, as three happenings of an event, with a seventeen year gap in between the first two occurrences, can scarcely be called a pattern, much less a convention. However, it is noteworthy that Prime Minister Harper has made these appointments absent any *legal* obligation to consider the elected nominees. Imposing a legal obligation in the *Senate Reform Act* would increase the democratic imperative to continue recommending elected nominees.

Also, it cannot be ignored that the SCC rejected the notion that Parliament was entitled to unilaterally convert the Senate from an appointed to an elected body in the *Upper House Reference*. It characterized such an act as a "radical change." Converting the Senate to a directly elected body would unquestionably be a change in the "method of selecting Senators." While it is true that the *Senate Reform Act* would not convert the Senate into a directly elected body, like the House of Commons, the democratic imperative that would be created to appoint elected Senate nominees would (or at least should) effectively result in an indirectly elected Senate. This consequence should raise concerns; Parliament should not be able, through indirect means, to

unilaterally achieve a constitutional amendment that it would not be directly permitted to make. This also suggests that the senatorial selection provision of the *Senate Reform Act* should be enacted in accordance with section 42(b).

Creating a legal obligation for Prime Ministers to consider elected Senate nominees affects the method of selecting senators. If no substantive obligation flowed out of a Prime Minister's legal duty to "consider" elected Senate nominees then the senatorial selection provision of the *Senate Reform Act* amounts to nothing more than a hollow shell. If, however, the scheme were meaningfully implemented it would effectively result in constitutional amendment, which if directly undertaken, would have required provincial consent under section 38(1) *CA, 1982*. Based on these reasons the senatorial selection provision of the *Senate Reform Act* should be held *ultra vires* the Parliament of Canada under section 44 of the *CA, 1982*.

Broader Considerations

It seems prudent to consider some of the possible ramifications of the *Senate Reform Act* and its possible contingencies.

a) What if only the term limits are constitutionally valid?

A single Prime Minister could reappoint the entirety of the Senate. According to section 50 *CA, 1867* a House of Commons shall not continue for more than five years after the return of the writs for electing that House. Assuming that a majority government did not dissolve Parliament sooner than the five-year term limit, a two-term majority-government Prime Minister could hold office for ten consecutive years. With nine year term limits for senators, this would mean that every single Senate seat would come up for re-appointment within a two-term Prime Minister's term of office. This would represent a significant concentration of power in the hands of a Prime Minister. This would also likely exacerbate the perceived democratic illegitimacy of the institution. This is a legitimate concern give that five out of twenty-two Canadian Prime Ministers served more than ten consecutive years (MacDonald (1878-1891); Laurier (1896-1911); McKenzie-King (1935-1948); Trudeau (1968-1979); and Chrétien (1993-2004)). Prime Minister Harper (2006-present), if he does not seek the dissolution of the current Forty-First Parliament of Canada before its constitutional term expires (2016) will also have served for more than ten straight years.

b) What if only the senatorial selection process is constitutionally valid?

Consultative elections would become a perfunctory ritual if elected Senate nominees ended up holding office for decades after being appointed. This would add little additional democratic legitimacy to the institution. However, that does not mean that it would not be a worthwhile endeavor. There have now been three senators from Alberta who have been appointed after winning nomination elections (Waters, Brown, and Unger). While these "elected" senators are entitled to serve until age 75, both Brown and Unger have committed to support Prime Minister Harper's Senate reform efforts. If ultimately the *Senate Reform Act* or some other reformatory legislation is not passed within nine years of their appointments, it will be interesting to see whether Senators Brown and Unger resign anyways.

Furthermore, it would also be interesting to observe whether a Prime Minister would recommend elected Senate nominees affiliated with political parties other than his or her own. Would a Prime Minister recommend a sovereigntist from Quebec? Would a Prime Minister recommend the

appointment of a Senate nominee that would lose his or her party a majority in the Senate? These are the types of scenarios that will test the true democratic veracity of an elected nominee system. For the moment, it is easy for Prime Minister Harper to trumpet the democratic merits of the system, since it only exists in Alberta, which is a province that has strongly supported his political party and elected conservative Senate nominees. The true test will come when he is faced with recommending provincially elected Liberal or NDP nominees to the Governor General.

c) What if an "elected" Senate, with or without term limits, became emboldened and thwarted the will of Parliament?

If all future senators were nominated from lists of elected nominees the democratic legitimacy of the Senate would substantially increase. This creates a risk of legislative deadlock in the event that a much more democratically legitimate Senate decides to more actively review, amend or reject legislation from the House of Commons. This risk is especially acute if there are opposing political majorities in each house. Since there is no deadlock resolution mechanism in Bill C-7 it is not immediately clear how such a conflict would be resolved. If a majority of the Senate did consistently oppose the government in the House of Commons, the Senate would effectively become, for all intents and purposes, a second chamber of confidence for the government. Indeed it is difficult to foresee how any government could sustain itself if it could not advance a legislative agenda through Parliament. If this were the case it would represent a dramatic departure from Canadian practice where only the House of Commons is a chamber of confidence.

d) Assuming the *Senate Reform Act* is valid, what if the whole Senate comes up for "election" at once?

While perhaps improbable, it is not impossible that the entire upper chamber (or the vast majority of it) would come up for "election" (and appointment) within a narrow timeframe. There is no provision in Bill C-7 to grandfather the nine-year term limits so as to stagger the number of Senators to be "elected"/re-appointed at any one time. In comparison, in the United States, one third of the US Senate is elected every two years; US Senators serve six-year terms. Under Bill C-7 discretion is left to the provinces as to when Senate nomination elections are to be held (see s 2 *Framework for the Selection of Senators* in the Schedule to Bill C-7). Without regulating the rate of turnover under a regime of significantly reduced term limits there is a significant risk that institutional capacity will essentially be reset every nine years with the new slate of rookie senators.

e) Assuming at least the senatorial selection provision is valid, who is going to pay for Senate nomination elections?

According to Bill C-7 the answer must be that the provinces would pay, since they would be responsible to conduct the nomination elections. Alberta spent $1.6 million on its 2004 senate nominee election. This may very well serve as an accurate benchmark for costs that would be incurred by provinces with six senators or less. However, with considerably more Senate seats to fill Ontario and Quebec would likely incur much higher costs to conduct ongoing Senate nomination elections. Even if the costs of holding these elections is relatively minor in comparison with the annual multi-billion dollar budgets of provincial governments, foisting the costs of nomination elections on to the provinces creates a cost-disincentive for establishing

provincial nomination election frameworks—or at least putting them into operation—in accordance with the model framework in Bill C-7.

Conclusion and Suggestions

Reforming the Canadian Senate is not going to be an easy task. If the Senate is to be reformed then it should be done cautiously and thoroughly. Symbolic half-measures could cause more harm than good. The partial validity of the *Senate Reform Act* could make the present situation even worse—at least from the perspective of reform proponents—in terms of democratic legitimacy. In the event that either the term limit or the senatorial selection provision is rejected the entire Act should be struck down and the government should be given a fresh opportunity, if they so desire, to effect constitutionally valid reforms.

A deadlock resolution mechanism should also be developed. If the Senate is to be imbued with greater democratic legitimacy the risk that it may become more oppositional to the will of the House of Commons should be mitigated by predetermining how an irreconcilable stalemate will be resolved. The middle of a full blown constitutional crisis is not the time to be negotiating a further constitutional reform.

Lastly, the nine-year terms should be staggered to provide for institutional stability. This could be achieved by initially appointing individuals for a three, six or full nine year term, or by initially providing for extended nine, twelve and fifteen year terms. My sense is that the former would be more popular than the latter. Grandfathering the term limits into operation would achieve the desirable result of avoiding periodic mass turnover in the future.

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