

AN EXPERT OPINION OF BILL C-7  
AN ACT RESPECTING THE SELECTION OF SENATORS  
AND AMENDING THE CONSTITUTION ACT, 1867  
IN RESPECT OF SENATE TERM LIMITS

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## BIOGRAPHY

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## MANDATE

I have been asked, by the Government of Québec, to prepare an expert opinion in connection with the reference filed on April 30th 2012 by the Attorney General of Québec before the Québec Court of Appeal on the initiative of the federal government to unilaterally reform the Senate through *Bill C-7, An Act respecting the selection of senators and amending the Constitution Act, 1867 in respect of Senate term limits*.

In this opinion, I explain the effects of Bill C-7 on the Prime Minister's discretionary power to appoint Senators and the effects of the introduction of a consultative electoral mechanism on the method of selecting Senators.

## EXECUTIVE SUMMARY

This appraisal of the historical, political, and legislative contexts of Bill C-7 provides several conclusions about its genesis, intent, and effects. The historical context provides an understanding of the significance of the Senate and the constitutional protection afforded the Senate, which are both essential to assessing the impact of Bill C-7 on the constitutional order. It is argued that the legislative history of s.44 of the Constitution Act, 1982 reflects an incorporation of restrictions on Parliament's powers previously found in s.91.1 of the Constitution Act, 1867, and in the Supreme Court of Canada's positions in *Re Authority of Parliament in Relation to the Upper House*, [1980] 1 S.C.R. 54. Section 44 was drafted to ensure that any substantive change to the fundamental characteristics of the Senate, including the method of selecting Senators, would require national consensus through the general amending formula.

In my opinion, Bill C-7 is an attempt to present legislation that is intended to circumvent the restrictions on Parliament's powers to unilaterally amend the Constitution of Canada. The Conservative Party of Canada has campaigned since 2004 on promises to reform the Senate through elections to fill future vacancies. These promises have since been acted upon through a succession of bills intended to impose term limits on Senators and to authorize elections to fill vacancies. Statements by government spokespersons have consistently stated that the Senate lacks legitimacy because it is appointed, and that the government's legislation would correct this problem by allowing Canadian citizens to choose their Senate representatives. These elections are true, direct elections and not some kind of consultative referendum of voters' opinions. Bill C-7 would radically transform the Senate with the election of future Senators, turning it into a hybrid body in the short term. The quality of provincial representation in the Senate would be jeopardized as some provinces come to

be represented by elected Senators, and others continue with appointed Senators – who would be increasingly viewed as lacking the political legitimacy and authority of the elected Senators from other provinces.

Bill C-7 not only authorizes elections for Senate vacancies, but imposes clear obligations on the Prime Minister and Governor General to appoint the winners of these elections as vacancies arise. The wording of the bill states that the winners of these elections 'must be considered' and 'should be' appointed. C-7 also engages broader constitutional principles to reinforce these obligations. Of particular importance is the democratic principle, which would be seriously undermined if the Prime Minister and Governor General were not bound to respect the outcomes of elections authorized by Parliament. In my opinion, the Prime Minister and Governor General would be obliged by Bill C-7 to appoint the winners of these elections, except on the rare occasions when some serious deficiency, such as infirmity or criminal conviction, arises between an individual's election and the time to fill a vacancy.

## **EXPERT OPINION**

Bill C-7 needs to be seen in historical, political, and legislative context in order to understand fully its legal and practical effects. This opinion will focus first on the historical evolution of the constitutional protection given to certain aspects of the Senate. This historical context is important to an appreciation of the extent of, and necessity for, joint federal provincial authorization for changes to the method of selecting Senators. This opinion will then examine the political context of the government's commitment to an elected Senate through a review of Conservative Party campaign platforms since 2004, statements by leading Party members, and legislative initiatives. The nature and significance of the electoral process authorized by C-7 will also be assessed. The practical effects of these changes on the composition and function of the Senate will be another dimension of the political context to be explored. This political context is useful to reveal the intended purpose of C-7. Finally it will review the legislative context, to assess the effects of the specific terms of C-7 as well as unwritten constitutional principles recognized by the SCC. With these discussions in place, conclusions will be drawn about the effects of Bill C-7 on the method of selecting Senators and on the discretion of the Prime Minister and Governor General on the method of selecting Senators

### **Historical Context**

A fuller understanding of the significance of the Senate and the constitutional protection afforded the Senate is essential to assessing the impact of Bill C-7 on the constitutional order. Important context for the current attempts to alter the method of selecting Senators is found in the historical evolution of constitutional provisions dealing with the Senate, and of the Supreme Court of Canada's reasons in *Re Authority of Parliament in Relation to the Upper House*, [1980] 1 S.C.R. 54 (hereafter *Senate Reference*).

Canada's upper house was modelled in 1867 on the UK House of Lords, as an unelected body. As in the UK, the Senate was intended to provide 'sober second thought' in the legislative process, to counterbalance ill-conceived measures emanating from the elected lower house. The decision to adopt an appointed upper house was all the more deliberate, given the existence of elected upper houses in the Province of Canada and Prince Edward Island at the time of the confederation debates (Janet Ajzenstat, Paul Romney, Ian Gentles, and William D. Gairdner (eds.), *Canada's Founding Debates*, Toronto: University of Toronto Press, 1999, p.77). Unlike the House of Lords, Senate membership was allocated on a territorial basis, to provide equal representation of 24 Senators to the then three regions of Canada, Quebec, Ontario, and the Maritime Provinces. This regional representation was then expanded in 1915 to include a fourth, equal sized division for the Western Provinces. This sectional representation is thought of as a foundational element of Canada's federal system (Janet Ajzenstat, 'Bicameralism and Canada's Founders: The Origins of the Canadian Senate,' in Serge Joyal (ed.), *Protecting Canadian Democracy: The Senate You Never Knew*, Montreal: McGill-Queen's Press, 2003, pp.3-30). The importance of the Senate to the confederation bargain is underlined by the fact that over half of the confederation debates were devoted to discussing the Senate (André Bernard, *La vie politique au Québec et au Canada*, Sainte-Foy: Les Presses de l'Université du Québec, 1996, p.27).

Section 24 of the Constitution Act, 1867 granted the Governor General the power to appoint Senators, who had to meet certain age and financial qualifications as well as residency requirements found in s.23. Until 1965, Senators were appointed for life according to s.29. The three most pertinent sections of the Constitution Act, 1867 related to appointing Senators are worth citing in full:

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.

26. If at any Time on the Recommendation of the Governor General the Queen thinks fit to direct that Four or Eight Members be added to the Senate, the Governor General may by Summons to Four or Eight qualified Persons (as the Case may be), representing equally the Four Divisions of Canada, add to the Senate accordingly.

32. When a vacancy happens in the Senate by Resignation, Death or otherwise, the Governor General shall by Summons to a fit and qualified Person fill the Vacancy.

Since the s.26 process for appointing extra Senators was only used once in Canadian history, in 1990, the usual appointment powers are those found in sections 24 and 32. In law and practice, the Governor General is aided by the Privy Council, of which the cabinet is the active component that makes virtually all decisions for the Governor General. Under the principles of responsible government founded in the preamble of the Constitution Act, 1867, the Governor General is bound to formally endorse the decisions of the Prime Minister and cabinet. The established practice has been for the Prime Minister to personally choose which individuals will be appointed to the Senate, rather than the cabinet collectively (F.A. Kunz, *The Modern Senate of Canada, 1925-1963: A Re-appraisal*, Toronto: University of Toronto Press, 1965, pp.29-34; André Bernard, *Vie politique au Canada*, Québec: Presses de l'Université du Québec, 2007, p.257; Peter W. Hogg, *Constitutional Law of Canada*, 2012 Student Edition, Toronto: Carswell, 2012, p.9-39, n.102; Donald J. Savoie, *Governing from the Centre: The Concentration of Power in Canadian Politics*, Toronto: University of Toronto Press, 1999, p.264). This prime ministerial power has been embodied in two cabinet minutes that were approved by the then Governors General in 1896 and 1935 respectively, and endorsed with the Great Seal of Canada for added authority. (PC 1896-1853 and PC 1935-3374). Both formulations read in part: "The following recommendations are the special prerogative of the Prime Minister: ...Appointment of - ...Senators."



Initially none of the provisions relating to the Senate were directly amendable by Canadian legislators, as authority to change most provisions of the 1867 Act remained with the British Parliament. Provincial legislatures were granted the power under former s.92(1) of the Constitution Act, 1867 to amend the Constitution of the province "notwithstanding anything in this Act," and those with upper houses all later abolished them by simple legislation. The national Parliament was not, however, initially given an equivalent power. Some minor adjustments were made to Parliament's powers in the early decades after confederation. For example, the Constitution Act, 1886 empowered the Canadian Parliament to provide for seats in both the House of Commons and Senate for any new territories. This situation only changed with the enactment of the Constitution Act (No.2), 1949, which added a broad new section to the original 1867 Act:

s.91(1). The amendment from time to time of the Constitution of Canada, except as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces, or as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a province, or to any class of persons with respect to schools or as regards the use of the English or the French language or as regards the requirements that there shall be a session of the Parliament of Canada at 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 new power to amend the Constitution allowed Parliament to pass laws with respect to its two Houses. The only significant constitutional change made to the Senate under this power came with the enactment of the Constitution Act, 1965,

which provided that future Senators would be appointed until age 75 instead of for life.

Armed with the seemingly broad powers granted in 1949, however, the Trudeau government proposed radical changes in 1978 in Bill C-60, to replace the Senate with a House of the Federation. Half of the members of the new House would be chosen by provincial legislatures and the other half by the House of Commons. Bill C-60 would have also replaced the Senate's existing absolute veto over all legislation with a suspensive veto of only 60 days over most legislation and a requirement for a double majority of French and English speaking Senators to approve legislation dealing with language issues (Roy Romanow, John White, and Howard Leeson, *Canada... Notwithstanding: The Making of the Constitution, 1976-1982*, 25<sup>th</sup> Anniversary Edition, Toronto: Carswell, 2007, p.9). The distribution of seats among the Atlantic and Western provinces would have been changed as well.

An enormous outcry against this bill resulted in the federal government's decision to refer some issues to the Supreme Court of Canada. After Justice Minister Otto Lang consulted with the provinces on the wording of potential reference questions in September and October 1978, the following questions about the powers of Parliament to enact changes to, or abolish, the Senate were put to the Court:

1. Is it within the legislative authority of the Parliament of Canada to repeal sections 21 to 36 of the *British North America Act, 1867*, as amended, and to amend other sections thereof so as to delete any reference to an Upper House or the Senate? If not, in what particular or particulars and to what extent?
2. Is it within the legislative authority of the Parliament of Canada to enact legislation altering, or providing a replacement for, the Upper House of Parliament, so as to effect any or all of the following:
  - (a) to change the name of the Upper House;
  - (b) to change the numbers and proportions of members by whom provinces and territories are represented in that House;

- (c) to change the qualifications of members of that House;
  - (d) to change the tenure of members of that House;
  - (e) to change the method by which members of that House are chosen by
    - (i) conferring authority on provincial legislative assemblies to select, on the nomination of the respective Lieutenant Governors in Council, some members of the Upper House, and, if a legislative assembly has not selected such members within the time permitted, authority on the House of Commons to select those members on the nomination of the Governor General in Council, and
    - (ii) conferring authority on the House of Commons to select, on the nomination of the Governor General in Council, some members of the Upper House from each province, and, if the House of Commons has not selected such members from a province within the time permitted, authority on the legislative assembly of the province to select those members on the nomination of the Lieutenant Governor in Council,
    - (iii) conferring authority on the Lieutenant Governors in Council of the provinces or on some other body or bodies to select some or all of the members of the Upper House, or
    - (iv) providing for the direct election of all or some of the members of the Upper House by the public; or
  - (f) to provide that Bills approved by the House of Commons could be given assent and the force of law after the passage of a certain period of time notwithstanding that the Upper House has not approved them?
- If not, in what particular or particulars and to what extent?

In the event, the Court felt it could only answer four of these questions, 1, 2(b), (e)(iv), and (f), because more details would be needed in order to answer the other questions (*Re: Authority of Parliament in Relation to the Upper House*, [1980] 1 S.C.R. 54). All four of the questions were answered in the negative.

The reasons for the negative answers, as well as some ideas expressed on the unanswered questions are particularly germane to the questions posed in this current reference process. The Court held that the power granted Parliament in 1949 was only to amend laws relating to the federal level of government, and within that body of law only to those matters with no provincial interest. "The power of amendment conferred by s.91(1) is limited to matters of interest only to

the federal government.”(p.70) And in short, the Senate is an institution in which the provinces have an inherent interest. The Court believed that that the Senate plays “a vital role as an institution forming part of the federal system” which the Constitution Act, 1867 fashioned (p.66). “A primary purpose of the creation of the Senate, as a part of the federal legislative process, was, therefore, to afford protection to the various sectional interests in Canada in relation to the enactment of federal legislation”(p.67). As a result, Parliament was not able to either abolish the Senate or alter its fundamental characteristics (pp.77-8).

The *Senate Reference* clearly identifies key features to be protected. In the opinion of the Court, “the system of regional representation in the Senate was one of the essential features of that body when it was created” (p.76). And it went on to say that Senators are appointed for an extended term “to make the Senate a thoroughly independent body which could canvass dispassionately the measures of the House of Commons” (p.77). Thus the Court found that Parliament could not enact legislation to directly elect Senators: “To make the Senate a wholly or partially elected body would affect a fundamental feature of that body” (p.77).

The net result of the *Senate Reference* was that the federal government would have to seek provincial approval for amendments if it were to abolish the Senate, disturb its regional representation, or elect Senators. These were constitutional changes which required a broad national consensus before adopting.

It is worth noting the constitutional interest provincial governments may have in the Senate does not extend to picking its members. Although the Court felt it needed a factual basis to definitively answer questions 2(e)(i), (ii), and (iii) on providing for provincial legislatures, cabinets or other bodies to select Senators, it did make an important observation: “The selection of Senators by a provincial

legislature or by the Lieutenant Governor of a province would involve an indirect participation by the provinces in the enactment of federal legislation and is contrary to the reasoning of this Court in the *Lord Nelson Hotel* case..." (p.77)

An essential point to be made about the *Senate Reference* is that the protections it extended to the Senate from unilateral federal legislation were essentially read into the Constitution Act, 1867. The Court noted that the exclusions in s.91(1) included references to the requirement that Parliament meet at least once a year and the no House of Commons may last longer than five years. In the Court's view, these references presupposed the continued existence of the Senate: "These two exceptions clearly indicate that the power to amend 'the Constitution of Canada' given by s.91(1) was not intended to include the power to eliminate the Senate or the House of Commons" (p.77). The Court cited the preamble of the Constitution Act, 1867 as the foundation for the Senate's role in Canada's federal system and for its appointed nature (p.66). It also cited records of the confederation debates to underline the importance given to the representation of regions in the Senate (pp.66-7).

In my view these considerations remain as alive today as they did at the time of the *Senate Reference*, and they remain as relevant to the amending processes under the Constitution Act, 1982 as they were to those of the Constitution Act, 1867. Indeed a brief historical review of the development of the current amending processes demonstrates that these same protections continue under the Constitution Act, 1982.

Following the publication of Bill C-60, the federal and provincial governments engaged in a lengthy series of meetings about constitutional reform in 1979 and 1980. These meetings culminated in a first ministers' conference in September 1980 where full agreement on a package of constitutional reforms was not reached. Following the collapse of these talks, the federal government

announced its intention to unilaterally ask the British Parliament to act and tabled its proposed resolution in the House of Commons on October 6, 1980. The resolution requested that the British Parliament enact a Canada Act, which would have ended Britain's legislative authority over Canada and put into force a Constitution Act, 1980 contained in a schedule to the Canada Act. In form this was the same legislative structure eventually used to enact the Constitution Act, 1982. The proposed Constitution Act, 1980, like the eventual Constitution Act, 1982, contained a Charter of Rights and an amending formula for all future amendments to the Canadian Constitution. However, there are some important details that differed between the 1980 and 1982 proposals on the unilateral amending power of Parliament and which matters were reserved for joint federal-provincial. The evolution of these amendment formula proposals provides very instructive insight into the details eventually entrenched in 1982.

The original October 1980 proposals relating to the unilateral power of Parliament to amend the Constitution in relation to the Senate are as follows:

s.48 Subject to section 50, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate or House of Commons.

s.50 An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with a procedure prescribed by section 41 or 42. ...

(d) the powers of the Senate;

(e) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators;

(f) the right of a province to a number of members in the House of Commons not less than the number of Senators representing the province; (Anne F. Bayefsky, *Canada's Constitution Act 1982 & Amendments: A Documentary History*, Toronto: McGraw-Hill Ryerson, 1989, Vol. 2, pp.756-7.)

Thus, the only substantive aspects of the Senate seemingly beyond the legislative power of Parliament are its powers and the representation of the

provinces. The abolition of the Senate was also implicitly protected. The method of selecting Senators is notably absent from this list.

The proposed resolution to amend the Constitution was sent to a Special Joint Committee of the Senate and the House of Commons on October 23, 1980. The Minister of Justice, Jean Chrétien tabled a consolidation of proposed changes the government was prepared to make to the resolution on January 12, 1981, but no amendments were foreseen to the sections relating to Parliament's unilateral powers of amendment. (Bayefsky, *supra*, p.779.)

In February, Conservative MP Jake Epp proposed an amendment in that committee to exclude entirely the Senate from Parliament's unilateral powers of amendment, but he withdrew this amendment after Jean Chrétien assured him at the meeting on February 4, 1981 that this was not necessary. Chrétien stated that these powers only related to the Senate's 'internal' matters, such as quorum (*Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, Issue 53, February 4, 1981, p.50; see also: Don Desserud, 'Whither 91.1? The Constitutionality of Bill C-19,' in Jennifer Smith, (ed.), *The Democratic Dilemma, Reforming the Canadian Senate*, Kingston: Institute of Intergovernmental Relations, 2009, p. 76). This is a clear indication that Parliament's unilateral powers to amend the Constitution were never intended to encompass substantial changes to the Senate. Consistent with this position, Mr. Chrétien went on to back important changes that added the method of selecting Senators to the exclusions from Parliament's amending powers. The explanation for this change was given by his Deputy Minister, Roger Tassé, who accompanied him:

When we asked ourselves, on reviewing the text, how the mode of selection of Senators could be affected or changed under this proposal, we came to the conclusion that, in effect, it could be done under clause 48, that is by Parliament, the House of Commons and the Senate alone. We thought this was not the right thing, that in

effect, it should be protected in the sense that it should be part of clause 50 that requires that a change by made to the method of appointment of Senators to be done in conjunction with Parliament and the provinces under Clause 41. ...So it is a clarification to ensure that the method of selection of Senators be done under Clause 41 rather than under Clause 48, which would not have required the approval of the provinces. (*Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, Issue 53, February 4, 1981, p.68.)

Quite clearly, the government believed that, on reflection, any formal changes to the selection of Senators should be made only with provincial approval. This suggestion was subsequently approved and appeared in the text of the resolution reported back to Parliament by the joint committee on February 13, 1981:

s.53 Subject to section 54, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate or House of Commons.

s.54 An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with a procedure prescribed by section 45 or 46.

(d) the powers of the Senate;

(e) the number of members by which a province is entitled to be represented in the Senate;

(f) the method of selecting Senators and the residence qualifications of Senators;

(g) the right of a province to a number of members in the House of Commons not less than the number of Senators representing the province; (Bayefsky, *supra*, pp.797-8)

The suggestion to protect the method of selecting Senators was echoed and approved at an April 16, 1981 meeting of the eight provincial premiers, including Québec, which objected to the federal government's proposed unilateral request for Britain to amend the Constitution. The premiers agreed that the following matters relating to the Senate should only be achieved through the general amending formula requiring joint federal-provincial action:



- s.10 (b) the powers of the Senate and the method of selection of members thereto;
- (c) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators; (Bayefsky, *supra*, p.811)

While this suggestion was not immediately acted upon, the wording of this agreement would later form the basis the next year for the Constitution Act, 1982. In the meantime, the federal government's resolution to amend the Constitution was approved by the House of Commons on April 23, 1981 and by the Senate the next day. The final text of the passage providing exceptions to the unilateral amending power of Parliament was the same as that recommend by the joint committee, with a minor renumbering of sections. (Bayefsky, *supra*, pp.831)

The proposed unilateral request to amend the Constitution resulted in a series of court challenges by the dissident provinces, which were eventually consolidated in a decision of the Supreme Court of Canada on September 28, 1981, *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 754. As a consequence of the Court's conclusion that it would breach constitutional conventions for the federal government to unilaterally request constitutional amendments to alter the powers of the provinces, a first ministers' meeting was held November 2 to 5, 1981. This meeting saw all the provinces except Quebec agreeing to a new set of proposals to be put to the British. The principal exclusions to the unilateral power of Parliament to amend the Constitution with respect to the Senate were worded almost identically to the premiers' agreement earlier that year.

While the resolution approved by the first ministers was later amended after further parliamentary hearings, the sections dealing with the unilateral powers of Parliament with respect to the Senate remained untouched. The relevant

portions of the final text eventually contained in the Constitution Act, 1982 are as follows:

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):

(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;

44. Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to executive government of Canada or the Senate and House of Commons.

The wording of sections 41(b) and (c) that were originally approved by the eight dissenting premiers is instructive in the twinning of particular subjects in combinations that had not occurred in the first sets of proposals made by the federal government. The final text proposed by the provinces saw the powers of the Senate included in the same section as the method of selecting Senators. As well, the residence qualifications were combined in the section protecting the number of Senators a province is entitled to. These are both very logical and important changes made to the federal texts. Residence qualifications are inherently tied to a Senator's ability to represent a province. To effectively represent a province one must have been residing in it at the time of appointment.

The powers of the Senate are inextricably tied into the method of appointment as well. It has long been recognized that the broad powers assigned to the Senate in the Constitution Act, 1867 would be revisited as part of any move to change the way in which Senators are selected. Every proposal since 1982 for major reform of the Senate has tied a change in powers to a change in selection. It should be noted that the Meech Lake Accord proposed a change in the selection process without a change in the powers of the Senate. This was not intended as a major departure from the basic appointed structure currently in

place; the Prime Minister would have continued to make a meaningful choice from a list of candidates to be submitted by the provincial government where a vacancy occurred. Prime Minister Brian Mulroney initially refused to appoint the winner of the nomination elections set up by Alberta, on the grounds that they were unilaterally authorized by a provincial legislature and contravened the notion of an appointed Senate which he believed underlay the Meech Lake Accord. In contrast, significant changes in the selection process were matched with substantial changes in the powers of the Senate in the four national proposals for major Senate reform since 1982: the Molgat-Cosgrove Committee in 1984, the Macdonald Commission in 1985, the Beaudoin-Dobbie Committee in 1992, and the Charlottetown Accord in 1992. All of these initiatives proposed an elected Senate, along with significant changes to the powers of the Senate. Some means to overcome deadlocks between the two Houses was considered crucial. Common changes in the powers included a suspensive veto over most legislation instead of the current absolute veto over all legislation; the suspensive veto ensured that legislation approved by the House of Commons could ultimately be passed after a certain period of time. As well, there were proposals for fundamental language matters to be subject to a double majority of both English and French speaking Senators. Finally, it was thought essential to stipulate that the Senate could not be a confidence chamber. For example, section 10 of the consensus report on the Charlottetown Accord states:

The Senate should not be a confidence chamber. In other words, the defeat of government-sponsored legislation by the Senate would not require the government's resignation. (Consensus Report on the Constitution: Final Text, Charlottetown, August 28, 1992, Charlottetown Accord, [http://www.saic.gouv.qc.ca/publications/Positions/Part3/ Document 27\\_en.pdf](http://www.saic.gouv.qc.ca/publications/Positions/Part3/Document%2027_en.pdf)).

There is a tension between responsible government and the powers of the Senate to amend or veto legislation passed by the House of Commons. But, the powers of second chambers in Westminster systems are not meant to extend to

a challenge to the convention that confidence matters are dealt with only in the Commons (David E. Smith, *The Canadian Senate in Bi-Cameral Perspective*, Toronto: University of Toronto Press, 2003, pp. 131-145). Looking more generally across the globe, federal systems with parliamentary forms of government restrict confidence matters to the lower house. (Ronald Watts, 'Bicameralism in Federal Parliamentary Systems,' in Serge Joyal (ed.), *Protecting Canadian Democracy: The Senate You Never Knew*, Montreal: McGill-Queen's University Press, 2003, p.83). While a few non-federal parliamentary systems such as Italy allow confidence votes in both houses, these are rare exceptions which risk potential government instability by multiplying the opportunities for government defeat. The very real temptation to extend confidence to an elected Senate in Canada was demonstrated by the Government House Leader Peter Van Loan on February 7, 2008 when he proposed an unprecedented motion in the House of Commons which essentially made the Senate's passage of Bill C-2 to amend the Criminal Code a test of confidence if it were not passed by March 1. (CTV News, "Tories Threaten to Force Election over Anti-Crime Bill," <http://www.ctvnews.ca/tories-threaten-to-force-election-over-anti-crime-bill-1.275207>) The very real possibility of many more confrontations and threats to make Senate votes matters of confidence would arise under Bill C-7 if elected Senators believed they had a democratic mandate to stand up to the government of the day. It is therefore imperative that any move to elect Senators be accompanied by some legal constraint on the powers of the Senate and a prohibition on extending the confidence convention to the Senate. The principle of responsible government has been recognized on a number of occasions by the Supreme Court of Canada as being a fundamental principle of the Constitution, arising from the preamble to the Constitution Act, 1867 (*Re: Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, at p.805; *Ontario (Attorney General) v. OPSEU*, [1987] 2 S.C.R. 2, at para 85). That principle begins and ends in the House of Commons and does not extend to the Senate. The Molgat-Cosgrove Committee foresaw this danger

when it recommended that the powers of the Senate be restricted to a suspensive veto when they endorsed Senate elections:

We believe that Canada should establish an elected Senate designed in such a way that it would not be vying continually for supremacy with the House of Commons: it should have significant powers, but it should not be able to undermine Canada's well tried system of responsible government. We therefore propose that the new Senate be given only a suspensive veto, which would allow time for national debate and reflection, but which the Commons could, after a suitable lapse of time, override by re-passing the legislation in question. (*Report of the Special Joint Committee of the Senate and of the House of Commons on Senate Reform*, Ottawa: Parliament of Canada, 1984, pp.2-3)

The necessity to consider the powers of the Senate along with changes to the method of selection and other fundamental features was also explicitly addressed by the Beaudoin-Dobbie Report:

The powers of the Senate are one of the key issues that will determine the success with which a reformed Senate can perform its role and legitimacy that is given by the people of Canada's provinces, territories and regions to represent their interests. The Senate's powers cannot, however, be considered in isolation from other features of the reformed Senate, especially the distribution of seats. These will always interact. For example, if provinces or territories were to be equally represented in a reformed Senate, the larger provinces would be much less willing to give the Senate wide powers. By the same token, a Senate with very weak powers would be unlikely to achieve credibility in Canadian public opinion, nor would it attract credible candidates to seek election. Furthermore, an elected Senate that had very wide powers would also risk confrontation with the House of Commons and potential deadlock of the parliamentary system. For these reasons all the features of a reformed Senate need to be considered together and the combined impact carefully evaluated. (*Report of the Special Joint Committee of the Senate and the House of Commons on a Renewed Canada*, Ottawa: Parliament of Canada, 1992, pp.52-3)

This review of the historical development of constitutional protection for the Senate establishes the continued need to prevent unilateral legislative

measures from undermining the agreements made at the time of confederation for the Senate to be an appointed body. The *Senate Reference* clearly detailed a prohibition against Parliament legislating to either abolish the Senate, change provincial representation in the Senate, or elect members of the Senate. The Constitution Act, 1982, in my opinion, both continued the exclusions previously found in s.91(1) and also added protection for the fundamental characteristics of the Senate identified by the Supreme Court in the *Senate Reference*. The Constitution Act, 1982 entrenched all the express measures excluded from Parliament's powers under the old s.91(1) of the Constitution Act, 1867: the powers of the provinces, s.38(2); denominational school rights, implied in s.43; French and English language rights, s.41(c) and s.43; the annual meeting of Parliament, s.5; and, the five-year limit on the life of a House of Commons, s.4(1). The constitutional negotiations which lead to the enactment the Constitution Act, 1982 involved a very deliberate decision to exclude "the method of selecting Senators" from Parliament's powers of unilateral amendment under s.44. Indeed, the negotiations in 1980 and 1981 culminated in excluding from Parliament's s.44 powers the most fundamental characteristics of the Senate as a federal institution identified in the *Senate Reference*: the appointed nature of the Senate, s.42(b); provincial representation, s.42(c); and, the powers of the Senate, s.42(b). Thus, the powers of Parliament to act alone under s.44 do not extend to instituting elections; see also Dessserud, *supra*, and John D. Whyte, 'Senate Reform: What Does the Constitution Say?' in Jennifer Smith, *supra*, pp.97-109.

In the next sections of this opinion, I will assess whether Bill C-7 has a serious impact on those constitutional provisions and processes involved in selecting Senators, which are supposed to be entrenched beyond the reach of Parliament acting alone. Key issues to be examined next are the intentions of the government in proposing Bill C-7 and the effects of the proposed legislation.

Central to this analysis is whether C-7 authorizes elections which would be beyond the scope of Parliament's powers under s.44.

## **Political & Practical Context**

The intended and practical effects of Bill C-7 may be gauged by the context in which this legislation was proposed as well as the concrete consequences that would flow from its enactment. Although given first reading on June 11, 2011, Bill C-7 is the product of a long-standing endeavour on the part of the Conservative Party of Canada to effect fundamental reform of the Senate. This section will review the legislative history of C-7 and its predecessor bills. The government's description of the problem to be solved with this legislation, as well as its treatment of the three Senators who have been appointed after winning nomination elections provide a clear indication of the government's intent in proposing Bill C-7. The nature of the elections authorized by C-7 needs to be assessed in order to ascertain whether they are merely consultative of the public's opinion, akin to a non-binding referendum, or whether they are in fact true elections. If they are true elections, then there may well be obligations upon the Prime Minister and governor General to appoint the winners. The potential effects of appointing the winners of these elections to the Senate must be considered as well, especially their effects on the composition and functions of the Senate.

Since first becoming Prime Minister in 2006, Prime Minister Harper's government has introduced a succession of bills to reform the Senate. Senatorial elections were proposed in Bill C-43, which was given first reading in the House of Commons on December 13, 2006; this proposal was re-introduced with some modifications as Bill C-20 on November 13, 2007 after C-43 had died on the order paper at prorogation. This measure provided for the holding of federally-administered "consultative elections" held at the time of general elections for either the House of Commons or a provincial legislature. The votes

would be counted province-wide according to the single transferrable vote method, to encourage a mix of winners from different political parties. C-20 was referred to a special committee before second reading; the committee held public hearings on the bill in 2008 but did not report before Parliament was dissolved later that year.

These proposals for nomination elections were complemented with companion legislation to institute eight-year term limits on any future Senators, to replace the current tenure until age 75. Bill S-4 was introduced in the Senate on May 30, 2006. This bill received second reading and extensive committee hearings. A special committee on Senate reform held meetings on a range of issues in 2006, including the subject matter of Bill S-4 prior to it receiving second reading; the Prime Minister appeared before this committee and explained his desire for Senate reform. Once Bill S-4 was given second reading more committee meetings were held in early 2007, and the committee's report recommending amendments to the legislation to provide for 15-year non-renewable terms was adopted by the Senate on June 16, 2007. This measure died on the order paper with prorogation later that year. Eight-year terms were proposed again in the next session of Parliament as Bill C-19, on the same day as Bill C-20 (Assessments of these two bills are given by various authors in: Jennifer Smith, *supra*; see also: Bruce M. Hicks, and André Blais, 'Restructuring the Canadian Senate through Elections,' (2008) 14 *IRPP Choices* No.15.).

Following the 2008 general election, the government introduced fresh bills to limit Senate terms and to provide for elections. Eight-year terms for Senators were introduced again in Bill S-7, introduced in the Senate on May 28, 2009, but this measure expired with prorogation at the end of the year. Term limits of eight years were re-introduced in the House of Commons on March 29, 2010 as Bill C-10; this proposal also died on the order paper with dissolution the following year. Elections for Senate nominees were once again proposed in Bill S-8



Senate on April 27, 2010. The scheme in Bill S-8 differed from that found previously in C-43 and C-20, as S-8 authorized the provinces to administer their own elections according to provincial laws compatible with measures set in S-8. This bill, however, died without progressing to second reading before the election in 2011.

Within a few weeks of Parliament's return after the 2011 election, the government introduced Bill C-7 on June 21. C-7 marks a departure from the previous legislative proposals, in that it combines both terms limits and elections for Senate nominees in one bill. In terms of content, however, the measures contained in C-7 are essentially the same as those in S-8 and C-10, with the exception that term limits for Senators are set at nine years in C-7.

This succession of bills proposing both term limits and nomination elections, introduced in three Parliaments spanning five years, serve as a testimony to the government's desire to reform the Senate. This commitment to Senate reform, however, is worth exploring further, as the statements by government leaders and officials on the subject may reveal an intention to achieve matters with Bill C-7 that are beyond the reach of Parliament acting alone.

The Conservative Party has consistently pursued the goal of an elected Senate since its creation after the merger of the Reform Party and Progressive Conservative Party in late 2003. Stephen Harper has served as the party's only elected leader since early 2004, and his personal desire to reform the Senate has undoubtedly shaped the party's overall position. Pledges for Senate reform have been made in all the party platforms published for the 2004, 2006, 2008, and 2011 general elections. These campaign comments have been mirrored and reinforced by statements by Conservative spokespersons at various points over the intervening years as well. A review of these statements can provide an important picture of the intentions embodied in Bill C-7.

The 2004 Conservative Party election platform stated: "A Conservative government led by Stephen Harper will: ... Hold elections to fill vacancies in the Senate." (Conservative Party of Canada, "Demand Better Accountability", 2004, [http://web.archive.org/web/20040611154950/http://www.conservative.ca/platform/english/db\\_account/db\\_account\\_1.htm](http://web.archive.org/web/20040611154950/http://www.conservative.ca/platform/english/db_account/db_account_1.htm))

During the 2004 election campaign, a report in the Ottawa Citizen made clear Mr Harper's commitment to appoint any individuals who win Senate nomination elections:

"I'll concede with you there are a lot of other issues to be addressed in getting comprehensive Senate reform," he told reporters after addressing one of the most boisterous rallies he has had since the campaign started.

"My answer is we'll never start Senate reform until somebody kickstarts the process. I'm determined to kickstart it with electing senators."

Mr. Harper said he will immediately appoint Ted Morton and Bert Brown, two men who were elected in an Alberta vote several years ago as 'senators-in-waiting' if he wins government June 28.

"I have made a commitment to appoint the Alberta senators-in-waiting -- the elected senators.

"After that I would like to see future senators chosen by an electoral process but to be frank, I'd like to see that electoral process initiated and pursued by the federal government," said Mr. Harper. (Anne Dawson, "Harper Vows to Scrap Senate Appointments," *Ottawa Citizen*, June 6, 2004, p.A3.

The 2006 platform said:

A Conservative government will:

- Begin reform of the Senate by creating a national process for choosing elected Senators from each province and territory.
- Propose further reforms to make the Senate an effective, independent, and democratically elected body that equitably represents all regions. (Conservative Part of Canada, *Stand Up for Canada*, 2006, [http://www.cbc.ca/canadavotes2006/leadersparties/pdf/conservative\\_platform20060113.pdf](http://www.cbc.ca/canadavotes2006/leadersparties/pdf/conservative_platform20060113.pdf), p.44 )

When Stephen Harper appeared before the Senate Special Committee on Senate reform in 2006 he offered some insights into his intentions as Prime Minister. As with later statements, he mixed his references to later constitutional reforms to the Senate with the establishment of 'consultative elections,' a commitment to appoint anyone who wins a nomination election, and the intent to introduce legislation in the near term to create an elected Senate (*Proceedings of the Special Senate Committee on Senate Reform*, Sept 7, 2006, Issue No.2):

As yet another step in fulfilling our commitment to make the Senate more effective and more democratic, the government, hopefully this fall, will introduce a bill in the House to create a process to choose elected senators. (p.8)

We desire a national process for electing senators rather than a province-by-province process. I view the Senate properly structured as an important national institution, not a federal institution, not a provincial institution. There is no doubt that to change the process in a formal constitutional sense — to making senators elected — would require provincial consent. The government would be seeking to have the ability to consult the population before making Senate appointments. Obviously, this is an interim step of democratization but we think it would be an important one. (p.13)

There are still nine vacant seats for senators. I do not intend to appoint senators, unless necessary. But I can tell you that the government intends to table a legislation to create an elected Senate. (p.14)

As I mentioned earlier, the proposed legislation the government will bring forward is obviously by necessity permissive in nature. It allows the government of the day not just to create elected senators, but to evaluate how that is affecting the system and what is happening; and it will occur over a period of time. (p.18)

When Bill C-43 was first introduced in the House of Commons in December 2006, the Prime Minister's Office issued a press release that said:

The bill will see voters choose their preferred Senate candidates to represent their provinces or territories. "This bill will make the Senate more democratic and more accountable," said Prime Minister Harper in a speech to his caucus. "For the first time, it will let the Prime Minister give Canadians a say in who represents them in the Upper House." ("Prime Minister Moves Forward on Senate

Reform," December 13, 2006, <http://www.pm.gc.ca/eng/media.asp?category=1&featureId=6&pageId=26&id=1458>)

The Minister of State (Democratic Renewal), Peter Van Loan, told the House of Commons in a debate on Bill C-43:

Bill C-43 will do more than enable Canadians to have their say about the representatives who will be making decisions on their behalf here in Ottawa. It also guarantees that those representatives will be accountable for the decisions they make.

Consulting the Canadian public on Senate appointments will help to boost the Senate's legitimacy in the eyes of Canadians by transforming it into a more modern, more democratic, and more accountable institution that reflects the core values of Canadians.

...Ultimately, of course, we know that fundamental reform of the Senate will require complex, lengthy and multilateral constitutional change. There does not exist, sadly, at present, the national consensus or will required to engage in the inevitably long and potentially contentious rounds of negotiations that would be involved.

Some people say that it would be best to do nothing. They just want to shrug their shoulders and say they cannot do what must be done. That is exactly what the Leader of the Opposition did this week. Others prefer to close their eyes and wait until some other time when all of the issues concerning the Senate can be resolved at once.

That is not what the government thinks, nor is it what Canadians think. We believe that Canadians expect more from their national institutions and their government. In fact, that is what they have told us. They know that some Senate reforms are within our grasp, and they want us to act.

There are, of course, other elements of a reformed Senate that will have to wait for another day, most notably redressing the inequalities of provincial representation. However, our step-wise approach will lay the groundwork for a strong foundation for any future change.

...In conclusion, Bill C-43, the Senate appointment consultations act, will strengthen and revitalize the very values that define us as Canadians, values such as democracy and accountability in government.

Indeed, it extends to Canadians the most fundamental right of all, the right to vote, by advancing the principle that Canadians should have a say in who speaks for them in the Senate.

The government believes Canadians should have that right. Bill C-43 not only allows Canadians to indicate who they would like to represent them, it ensures that the people they select are required to account for their actions. (House of Commons, *Debates*, April 20, 2007, pp.8478-9)

Appearing before the House of Commons committee hearings into Bill C-20, Minister Peter Van Loan provided a succinct summary of the problems which the bill was intended to address (House of Commons, Legislative Committee on Bill C-20, *Evidence*, March 5, 2008):

As Members of Parliament, I am sure we can all agree that it is utterly absurd for the members of the unelected, unaccountable Senate to have power nearly equal to the equal, accountable House of Parliament that we are all members of, the House of Commons. This is not healthy for the Senate, it's not healthy for democracy in Canada, and it's not appropriate for the 21st century. That's why we introduced two bills to create a modern and accountable Senate that is consistent with modern and contemporary democratic values, principles, and traditions. (p.1)

Our hope, obviously, is that we can salvage the Senate by introducing a democratic element that has been absent until now by asking Canadians who they want to represent them. ...this is a worthy incremental reform that will help to solve many of the problems with the lack of legitimacy of the Senate today. (pp.5-6)

The 2008 Conservative Party platform also mentioned:

The Conservatives and Stephen Harper believe that the current Senate must either be reformed or abolished. An unelected Senate should not be able to block the will of the elected House in the 21<sup>st</sup> century. As a minimum, a re-elected Conservative Government will reintroduce legislation to allow for nominees to the Senate to be selected by voters to provide for Senators to serve fixed terms of not longer than eight years and for the Senate to be covered by the same ethics rules as the House of Commons. (Conservative Party of Canada, *The True North Strong and Free: Stephen Harper's Plan for Canadians*, 2008, <http://www.scribd.com/doc/6433355/Conservative-Party-of-Canada-2008-Election-Platform-English>, p.24)

During the 2008 election campaign, the Conservative Party web site reviewed the government's accomplishments in the previous Parliament and said: "Conservatives also took action to make our democratic institutions more effective and more democratic by: Introducing legislation to facilitate the election of Senators." (Conservative Party of Canada, *The Conservative Record*, 2008, <http://web.archive.org/web/20080930223709/http://www.conservative.ca/EN/4739/78168>)

When Bill S-8 was introduced in the Senate in 2010, the government issued a press release which said:

The Honourable Steven Fletcher, Minister of State (Democratic Reform), along with Senator Pierre-Hugues Boisvenu today encouraged provinces to establish a democratic process for selecting senators so Canadian voters can have a say on who represents them in the Senate.

"Canadians have been clear they want a modern, accountable and elected Senate" said Minister of State Fletcher. "Prime Minister Harper and this government are committed to a democratic Senate, elected by the voters."

The Senatorial Selection Act, introduced in the Senate today, provides a voluntary framework for provinces to implement a democratic process where voters elect nominees for the Senate. While it does not require the provinces to enact such processes, it underscores the Government's support for provinces that choose to do so. The Prime Minister commits to consider recommended names from a list of elected Senate nominees put forward by provinces that conduct a consultation process.

"Our Government believes Canadians should have a say in who represents them in the Senate," said Senator Boisvenu. "The Prime Minister appointed the only elected senator currently sitting in the Senate and will continue to appoint senators chosen through democratic selection processes." ('Harper Government Drives Senate Reform Agenda,' April 27, 2010, <http://www.democraticreform.gc.ca/index.asp?lang=eng&page=news-comm&sub=news-comm&doc=20100427-eng.htm>)

And most recently, the 2011 Conservative election platform made the following commitments:

A Stephen Harper government will:

- re-introduce and pass legislation setting term limits for senators;
- continue to encourage the provinces to work with us to establish a democratic process for selecting senators;
- appoint those who are selected through democratic processes; and
- in provinces that do not take us up on our offer, we will fill Senate vacancies with individuals who support our Senate reform goals, including our goal of an elected Senate. (Conservative Party of Canada, *Here For Canada*, 2011, [http://www.conservative.ca/media/2012/06/ConservativePlatform2011\\_ENs.pdf](http://www.conservative.ca/media/2012/06/ConservativePlatform2011_ENs.pdf), pp.62-3.)

The government marked the introduction of Bill C-7 into the House of Commons by issuing a press release:

Today, the Harper government introduced the Senate Reform Act to make the Senate more democratic, accountable, and representative of Canadians.

"After receiving a strong mandate from Canadians, our Government is taking action on our commitment to make the Senate more democratic, accountable, and representative of Canadians," said Tim Uppal, Minister of State (Democratic Reform). "With the Senate Reform Act, tabled today in the House of Commons, our Government is proposing measures that will give Canadians a say in the selection of their Senate nominees and will limit new senators to one nine-year term."

The Senate Reform Act, introduced in the House of Commons today, provides a voluntary framework for provinces to implement a democratic process that enables voters to select nominees for the Senate. The Prime Minister will be required to consider the names of Senate nominees when making recommendations on appointments to the Senate. The province of Alberta has already established a democratic process for the selection of senators, which resulted in the appointment of Senator Bert Brown in 2007.

"The Prime Minister has already demonstrated his commitment to this process with my appointment to the Senate," said Senator Brown. "This bill is an important step in making the Senate more representative of Canada and Canadians in the 21st century."

Senators who were or will be appointed after the October 2008 election will be subject to nine-year terms from the date of the coming into force of the bill.

"We have listened to Canadians and acted quickly on our commitment to move forward with these important and reasonable Senate reforms," added Minister Marjory LeBreton. "The measures introduced today will go a long way in making the Senate a more accountable and democratic institution."

"As a senator, I am well aware of the importance of the Senate in our parliamentary system," said Senator Claude Carignan. "The Senate Reform Act, announced today in the House of Commons, builds on our Government's long-standing commitment to transform the Senate into a renewed institution based on democratic principles." ("Harper Government Introduces the Senate Reform Act," June 21, 2011,

<http://www.democraticreform.gcs.ca/index.asp?lang=eng&page=news-comm&sub=news-comm&doc=20110621-eng.htm>)

Speaking in the House during second reading debates on Bill C-7, Democratic Reform Minister Uppal again stressed the problem which C-7 was meant to redress:

Taken together, the Senate lacks any essential democratic characteristics. Its effectiveness and legitimacy suffers from the democratic deficit. ...Our government believes that Senate reform is needed now, and we are committed to pursuing a practical, reasonable approach to reform that we believe will help restore effectiveness and legitimacy in the Senate. That is why we are moving forward with the Senate reform act. (House of Commons, *Debates*, September 30, 2011, p.1706)

In her contribution to the second reading debate, Parliamentary Secretary Kellie Leitch stressed the commitment of the Prime Minister to appoint winners from these nomination elections: "The Prime Minister has always been clear that his preference is to appoint senators chosen by the voters, and he is committed to respecting results of any democratic consultation with voters." (House of Commons, *Debates*, September 30, 2011, p.1725)



These statements reflect a consistent and explicit determination to transform the Senate into an elected body. That desire was based on a perception that the appointed nature of the Senate undermines its legitimacy. The elections proposed in successive Bills by this government are clearly viewed as a remedy to that problem.

Along with these statements about the need for reform and how the government's legislation would address the perceived problems, government actors also mentioned that the bills would not, in their view, legally bind the Prime Minister or Governor General and therefore would not need to be achieved through the general amending formula. As Mr Uppal also said during second reading of C-7:

The act would require the Prime Minister to consider the names of individuals selected from the holding of democratic processes with Canadians when making recommendations on appointments to the Governor General. The act would not bind the Prime Minister or the Governor General when making Senate appointments. Nor would it change the method of selecting senators. (House of Commons, *Debates*, September 30, 2011, p.1706)

Several clear points emerge from these comments by government spokespersons. The Senate is perceived as lacking democratic legitimacy and accountability because of its appointed character. The solution is to elect Senators. The government recognizes that it does not have sufficient support among provincial governments to amend the Constitution through the joint federal-provincial process outlined in s.38 of the Constitution Act, 1982. But, it feels it can achieve the same purpose through legislation such as Bill C-7 where voters would elect 'nominees.' Allegedly the legislation binds neither the Prime Minister nor Governor General to appoint the winners of these elections. While the Prime Minister has said he would appoint these winners, the commitment is portrayed as political rather than legal.

In my opinion, however, these comments by government actors reveal that the true purpose of Bill C-7 is to change the method of selecting Senators in order to transform the Senate into an elected body. That goal has been quite clearly and consistently expressed by several actors over a number of years. The government sees a serious deficiency arising from the Senate's appointed nature, and this legislation is intended to address that deficiency. A variety of statements have also attempted to distract attention from this purpose by describing the elections from time to time as 'consultations' that produce a list of 'nominees' and by drawing attention to the fact that the legislation does not alter the existing constitutional provisions relating to the appointment of Senators. The elected nominees will only be 'considered' by the Prime Minister when recommending new Senate appointments to the Governor General. In my view, however, such statements are a misrepresentation that does not accurately reflect the true purposes and intended effects of the legislation.

The government's intention to transform the Senate into an elected body is further evidenced by its description of those Senators who have been appointed after having won senatorial elections in Alberta. When Burt Brown was appointed to the Senate in October 2007, the Prime Minister's Office issued a press release that began, "Prime Minister Stephen Harper today congratulated long-time Senate reform advocate Bert Brown after he was sworn in as Canada's second elected Senator." ('Prime Minister Hails Arrival of Elected Senator Bert Brown as a Victory for Democracy in the Red Chamber,' October 16, 2007, <http://www.pm.gc.ca/eng/media.asp?id=1857>) The Leader of the Government in the Senate, Marjorie LeBreton had this to say in the Senate chamber when welcoming Burt Brown:

Two decades since his journey began, Senator Brown follows in the footsteps of our late colleague the Honourable Stan Waters as the second person to be appointed to this chamber following election by the people in the province of Alberta. I am proud to note that both

elected senators were appointed by Conservative governments.  
(Senate, *Debates*, October 17, 2007, p.8)

Both the PMO and Senator LeBreton referred to Burt Brown as an “elected Senator.” The same phrase was used to welcome Betty Unger’s appointment in 2012 as well. The PMO press release stated:

Prime Minister Stephen Harper today announced the appointments of JoAnne Buth, Norman Doyle, Ghislain Maltais, Dr. Asha Seth, Betty Unger and Vernon White to the Senate. This marks the first time a female elected Senator – Betty Unger – has been appointed to the Senate, as well as the first time two elected Senators will be sitting at once – Mrs. Unger and Bert Brown. (‘PM Announces Seven New Senators,’ January 6, 2012, [http://www.pm.gc.ca/includes/send\\_friend\\_eMail\\_print.asp?category=1&id=4566](http://www.pm.gc.ca/includes/send_friend_eMail_print.asp?category=1&id=4566))

Senator LeBreton’s statement of greeting to Senator Unger in the Senate chamber included this: “We are pleased to welcome Betty, Canada’s third elected senator and first female elected senator to the Senate of Canada.” (Senate, *Debates*, January 31, 2012, p.1037)

These statements are examples of a consistent reference to Senator Brown and Senator Unger as elected Senators. Thus I conclude that an individual who wins a nomination election and is subsequently appointed to the Senate will indeed be regarded as an elected Senator. This perception is the correct one as well, in my view, as the elections they contest and win are in every sense an election.

Government spokespeople have at times tried to portray these elections as consultations, like referendums. As Dan MacDougall, (Director of Operations, Democratic Reform, Privy Council Office) testified to House of Commons committee which examined Bill C-20:

To start with, the bill does not provide for a process for electing senators. Rather, much like the Referendum Act, it sets out a scheme for consultations with Canadians, without binding the Prime

Minister or the Governor General to the results of a consultation (House of Commons, Legislative Committee on Bill C-20, *Evidence*, April 2, 2008, p.1).

He went on to say:

It's not an election process, that's correct, in the way we would normally conceive of it. It is really a consultation process. The idea is that the people who are selected from this will have a democratic mandate, but it is not an election process; in fact, the bill is constructed to make sure that the actual selection process and the criteria for selection remain as they are now, because to change to a fully elected process would require a complex constitutional amendment, which this bill doesn't do (Ibid., p.2).

These descriptions of consultations rather than elections are completely inaccurate from my perspective as a political scientist. I have maintained a web site during Canadian federal elections since 2004, with a wide range of information on electoral matters (<http://www.sfu.ca/~aheard/elections/>). This is a widely used site, which received over a million page hits during the 2011 election. As a result, I am well acquainted professionally with the nature of elections. The process envisioned in Bill C-7, and already practiced in Alberta, is clearly not a referendum consultation. In a referendum or plebiscite, voters choose between public policy alternatives. In an election, voters select representatives (Frank Bealey, *Democracy in the Contemporary State*, Oxford: Oxford University Press, 1988, pp.30-7; David Beetham, *Democracy: A Beginner's Guide*, Oxford: Oneworld, 2005, p.174; Sarah Birch, 'Elections,' in Paul Barry Clarke and Joe Foweraker (eds.) *Encyclopedia of Democratic Thought*, London: Routledge, 2001, pp.244-5; Patrick Boyer, *The People's Mandate: Referendums and a More Democratic Canada*, Toronto: Dundurn, 1992, p.25; David H. McKay, 'Referendums,' in Clarke and Foweraker, *supra*, p.594; Cees van der Eijk and Mark N. Franklin, *Elections and Voters*, Basingstoke: Palgrave Macmillan, 2009, p.1.). The ultimate purpose of the

electoral process conducted under C-7 is to allow voters to choose their Senators. By definition, then, this is an election.

The elections authorized in Bill C-7 are in virtually every sense the same as elections for the House of Commons or a provincial legislature. There is the same nomination process, for candidates to be put on the ballot. Candidates must be either nominated by a registered political party or run as independents. The same campaigning for votes would be undertaken by parties and candidates, based on promises of what policies would or would not be supported if elected. An equivalent provision for declaring winners by acclamation is made in C-7 as in a regular election (Appendix, Part 1, s.15). The same laws that regulate funding in a province's general election are to apply to senatorial elections (Appendix, Part 1, s.28). The ballots used by voters would be the same format as in any other election run under the same rules for counting ballots, i.e. plurality, single transferrable vote, etc. The conduct of Senate elections and other elections would be essentially indistinguishable to both voters and candidates. The same procedures would apply to contesting controverted elections. The only substantive difference is that there would be a delay between someone winning a Senate election and being able to take their seat to fill a vacancy. The winners of these elections go on a list which will then be drawn from as vacancies occur in the Senate. This is a meaningful difference in outcome, since the winners of other elections get to assume their seats once they take the oath or affirmation of allegiance. But in all aspects relating to the organization, voting, and ultimate political significance of elections, there would be no difference. It should be noted that waiting on a list to take a seat is not unprecedented in modern democracies, as Germany fills vacant seats that arise in the Bundestag between elections with individuals on the party lists used in the previous election (Inter-Parliamentary Union, 'Germany: Deutscher Bundestag (German Bundestag),' available online at: [http://www.ipu.org/parline/reports/2121\\_B.htm](http://www.ipu.org/parline/reports/2121_B.htm)).

It is also important to realize that these elections are direct elections. The fact that the winning candidates have to wait to be appointed to their seats does not mean that these are indirect elections. This distinction was properly made by the committee of the Manitoba legislature that examined, and recommended, senatorial elections for that province in 2009. Their description of the alternative models of elections proposed by those appearing before the committee is instructive:

Indirect election proposals included the selection of senators by an arms length legislated committee as well as a legislative process requiring a majority endorsement of MLAs from each party in the legislature.

Direct election proposals included the current plurality voting both from constituencies and province wide. Proportional representation models were proposed which included the use of party lists.

Most presenters argued that there should be direct election of senators meaning that Manitobans would be able to cast a ballot to determine who sits in the upper house on their behalf. (Legislative Assembly of Manitoba, *Report of the Special Committee on Senate Reform*, November 9, 2009, pp3-4.)

The categorization of the elections under Bill C-7 as direct elections is relevant to the Supreme Court of Canada's position in the *Senate Reference*. The Supreme Court answered 'No' when asked whether Parliament had the authority to pass legislation "providing for the direct election of all or some of the members of the Upper House by the public."

The elections to be held under Bill C-7 would be a major change to the method of selecting Senators, because they are intended to affect the choice of candidates made by the Prime Minister as well as fundamental features of the Senate itself. From a practical point of view, it is almost inconceivable that Prime Ministers and Governor General would in the future ignore the results of Senate elections held under the authority of a statute of Parliament; as will be discussed later, perhaps the only exception might be when the suitability of an individual becomes fatally compromised in the period between their election and the

opportunity to take a seat in the Senate. With the institution of direct elections to choose Senate representatives and an election campaign that costs millions of dollars from both public and private funds, the intended, expected, and usual result will be that winners of these elections are appointed to the Senate as vacancies arise.

The provincially organized elections under Bill C-7 would also result in a radical change in both the representational function and the operation of the Senate. Section 9(4) of C-7 provides that candidates are to be nominated by provincial political parties, and not by the federal parties which currently structure elections for the House of Commons and the current processes of the Senate. Senator Brown was chosen by the government to lead debate on second reading of Bill S-8, which provided for identical election measures to those found in C-7. In answer to a question as to whether the federal government would be prepared to fund the provincially organized Senate elections, he said:

I doubt that the Prime Minister wants to pay for those elections for the simple reason that because we expect people who run in these elections to represent a provincial political party, not a federal one, the intent is to allow the provinces to have immediate, direct input into every bill considered by the House of Commons. (Senate, *Debates*, April 29, 2010, p.429)

This statement highlights an intended, radical departure in representation in the Senate, by displacing the attachment and discipline of national party caucuses with Senators beholden instead to their provincial parties. To the extent that party discipline will be exercised by these parties over their members in Ottawa, Senators will be subject to orders from provincial government and party leaders. This would indeed provide, as Senator Brown foretold, the provinces a direct role in the national legislative process. And as noted in the discussion above on the *Senate Reference*, the Supreme Court of Canada has a negative view of a provincial role in the national legislative process. All internal aspects of the Senate are based on party caucuses, from the choice of members and chairs for

committees to the speaking order in debates. While the Senate has historically made a better effort than the House of Commons in accommodating independent members or those of very small party caucuses, there still is an inherent advantage for those who belong to one of the major national caucuses. The introduction of provincial political parties into the selection and control of Senators will result in significant adverse effects for those provinces with major parties with no ready affiliation with one of the national caucuses. Quebec and Alberta have unique provincial parties, while the Saskatchewan Party and the BC Liberal Party are both essentially amalgams of federal Conservative and Liberal supporters. It is not at all clear how these provincial party Senators would associate in caucus and how the caucus discipline would be enforced – or by whom. Saskatchewan Premier Brad Wall underlined these concerns as a major stumbling block to participating in the C-7 regime:

We need to ask a few more questions on the reform front from a provincial perspective. If all the senators, elected or otherwise, are still whipped, if they are all part of their respective whipped parliamentary caucus ... are they free to speak on behalf of the province they come from or are they toeing a party line? (Jane Taber, "Brad Wall's Senate Wish: 'Reform It, Abolish It, Paint It Pink'," *Globe & Mail*, June 24, 2011, <http://www.theglobeandmail.com/news/politics/ottawa-notebook/brad-walls-senate-wish-reform-it-abolish-it-paint-it-pink/article/>)

The major practical impact of the Bill C-7 would be quite simply to transform the Senate into an elected body. In the short term it would create a body with hybrid membership, divided between those with the democratic legitimacy conveyed through winning their elections and the current appointed Senators who would lack this legitimacy. The current participation of two elected Senators is something of a curiosity, but they would soon be joined by an increasingly large number of other elected Senators. Unfortunately it is impossible to quantify the rate of this hybridization, because we cannot know which provinces will opt for senatorial elections. The potential for a significant renewal of the Senate's



membership is seen in the fact that, within six years, one half of its current members will either reach retirement age or the end of their nine-year terms under Bill C-7. Alberta has already held several senatorial elections. Saskatchewan has enacted legislation, which has not yet been proclaimed. New Brunswick's legislature is currently debating a bill to institute elections. The British Columbia government has promised legislative action in the spring of 2013. A sizeable portion of the Senate's membership would be elected within a few years, pitting a substantial number of elected Senators from some provinces against the 'old guard' of appointed Senators from other provinces. Some provinces will enjoy the benefits of an elected group of Senators, empowered with the legitimacy and mandate that comes from being elected. Other provinces, however, will suffer in relative terms by being represented by a group of Senators who will be increasingly viewed as lacking democratic legitimacy. In my opinion, this hybridization of the Senate will have a serious impact on the Senate's representational role, and it is a direct consequence of the changes to be made in the selection of Senators under Bill C-7.

The political and practical context of Bill C-7 provide ample grounds to conclude that this measure is intended to transform the Senate from an appointed body into an elected one. The elections held to select future Senators are not consultative in nature but amount to true elections, operating similarly to elections held to select members of provincial legislatures and the House of Commons. Once they take up their seats, the winners of these elections would be considered elected Senators in all meanings of the term. They will possess a democratic legitimacy and mandate that was intended by the government to redress the perceived deficiencies of the current, appointed Senate. The provincially administered elections authorized by C-7 are intended to provide the direct participation of provincial political parties in the national legislative process. A substantial number Senators would be elected within a few years, profoundly altering fundamental characteristics of the Senate. Inequalities in

provincial representation would soon emerge as some provinces enjoyed representation by elected Senators while other provinces would continue with increasingly discredited appointed Senators. The potential for conflict between a democratically elected Senate and the House of Commons must also be accounted for. In my opinion C-7 would radically transform fundamental characteristics of the Senate through changes to the method of selecting Senators.

### **The Legislative Context**

Final answers to fundamental questions about the impact of Bill C-7 on the constitutionally protected method of selecting Senators, and on the powers of the Prime Minister, hinge on the legal context. There are important issues to consider in both the actual terms of C-7 as well as the application of unwritten constitutional principles.

The specific terms key sections in Bill C-7 need to be appreciated in order to understand the impact of the bill as a whole. The most relevant passages are the following:

#### **PART 1**

##### **SENATORIAL SELECTION**

2. The framework in the schedule sets out a basis for the selection of Senate nominees.
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.

## SCHEDULE

(Sections 2 and 3)

### FRAMEWORK FOR THE SELECTION OF SENATORS

#### PART 1

#### GENERAL

#### BASIC PRINCIPLES

1. Senators to be appointed for a province or territory should be chosen from a list of Senate nominees submitted by the government of the province or territory.
2. The list of Senate nominees for a province or territory is to be determined by an election held in the province or territory

Even if the only obligation in the legislation were the statement that the Prime Minister “must consider names from the most current list of Senate nominees,” this duty to consider imposes a substantive burden on the Prime Minister. This wording may not, on its own, impose a mandatory obligation to appoint the election winners to the Senate. But neither is it merely a permissive statement that election winners may be included in a larger pool of potential appointees. It is more than a duty to have the list cross the Prime Minister’s desk. At a minimum, in my opinion, it assumes a higher priority for elected candidates than any other individuals who might be considered; if not, there would be no reason to hold an election. On closer examination of the whole bill and of its constitutional context, however, the consideration due to the list of election winners must logically be even more substantial: a presumption in favour of their appointment.

Taken in combination with the principles declared in the first two clauses of Part 1 of the Schedule, the obligation in C-7 amounts to a direction to select election

winners for appointment. A plain English reading of the extracts of Bill C-7 cited above provides the following directive obligation given in the legislation: where elections are held, the list of winners “must be considered” by the Prime Minister and the winners “should be” appointed to the Senate. The bill does not say that winners may be appointed to the Senate, but that they should be.

This phrase is one that appears far less frequently in legislation than the permissive “may” or the mandatory “shall” or “must.” For example these latter phrases were found thousands of times in a search of the federal Justice Department’s database of Canada’s Consolidated Statutes. But the phrase “should be” appears only 309 times. (Search conducted October 14, 2012 at <http://laws-lois.justice.gc.ca/Search/Advanced.aspx>) One helpful interpretative example is found in s.45.1(2) of the Federal Courts Act (R.S.C., 1985, c. F-7). Section 45.1(1)(c) stipulates that among members of the Rules Committee of the Court there are to be “five members of the bar of any province designated by the Attorney General of Canada, after consultation with the Chief Justice of the Federal Court of Appeal and the Chief Justice of the Federal Court.” Section 45.1(2) then provides an essential context for the selection of those five members: “The persons referred to in paragraph (1)(c) should be representative of the different regions of Canada and have experience in fields of law in respect of which the Federal Court of Appeal and the Federal Court have jurisdiction.” Quite clearly this statement is intended to require the regional selection of members, rather than merely permit it. Some variation in the details of the regional representation might occur, but the principle is to be respected. In my opinion, the use of the term “should be” in C-7 directs that new Senators are to be chosen from the list of elected winners in normal circumstances, but that there may be occasions to deviate from the rule.

A principled reason for the Prime Minister to choose an unelected individual over a winner of a general election would arise if there were some serious defect in

an individual's ability or qualification to sit as a Senator. Barring such a defect, the winners of nomination elections are to be appointed to fill vacancies in the Senate. The option to occasionally reject an elected nominee because of a defect makes practical sense, since there may well be a period of some years between their election and the opportunity to fill a vacancy in the Senate. It is possible for new information or circumstances to emerge which would render the individual unsuitable for appointment. For example, the person may subsequently suffer mental or physical incapacity or be found guilty of a serious offence. The possibility of rejecting a candidate in such rare circumstances, however, neither negates nor undermines the obligation to appoint elected nominees in the absence of such a deficiency.

This understanding of the type of obligation arising from Bill C-7 has the benefit of being consistent with the wording of the legislation as well as with the expectations that will undoubtedly arise in the minds of the general public. There will be a clear expectation on the part of voters that their choice of representative will be respected by the Prime Minister and Governor General. And this obligation will be believed to bind future Prime Ministers, not just the one proposing this legislation. It should be noted, too, that the obligation that Senators "should be chosen" from the list of election winners has no specific duty holder. As such, it would appear to be relevant to all involved in the decision to appoint new Senators, from the Prime Minister to the Governor General.

Any obligation arising from the wording of the legislation is compounded by the constitutional principles within which it would operate. As the Supreme Court emphasized in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, the principle of democracy is one of the bedrock principles of the Canadian Constitution. The ability of the citizenry to choose their representations is the core of a democratic form of governance. Indeed an inherent element of modern

democratic consolidation is that no-one has a general veto power over the results of an election. Democracy involves not just free and fair elections, but a respect for citizens' rights and an encouragement of citizen participation in the affairs of state (Anthony H. Birch, *The Concepts and Theories of Modern Democracy*, 3<sup>rd</sup>.ed., New York, Routledge, 2007). If Bill C-7 were to authorize general elections but allow the Prime Minister of the day full freedom to appoint someone else to the Senate, this would amount to a regressive discretionary power that would contradict the very principle of democracy called upon in the opening words of C-7's preamble: 'Whereas it is important that Canada's representative institutions, including the Senate, continue to evolve in accordance with the principles of modern democracy and the expectations of Canadians...' It is illogical, and antithetical to both the principles of modern democracy and the expectations of Canadians, for the Prime Minister and Governor General to retain an unfettered discretion to simply ignore the results of province-wide elections authorized by the Parliament of Canada.

An assertion that this legislation may authorize elections which the Prime Minister is not bound to respect, indeed may legally ignore, can only contribute to a cynicism and disenchantment that underlies a growing phenomenon called the democratic deficit (Pippa Norris, *Democratic Deficit: Critical Citizens Revisited*, Cambridge: Cambridge University Press, 2011). Instead of reinforcing the democratic principle, such an interpretation of the legislation risks undermining it.

By its very nature, C-7 directly engages both the federalism and democracy principles. At its heart, C-7 is directed towards finding suitable candidates to fill vacancies in the Senate, which is a national institution founded as part of the initial federal bargain in 1867. This bill is clearly intended to give the people in each province the opportunity to choose their representatives in the Senate. The legislation authorizes provincial governments to enact measures providing for

elections and implicitly requires those governments to pay for the elections. The people voting in these elections would be exercising a fundamental right to vote and choose their representatives. The importance and complexity of this right to vote, with its dimensions of effective representation and meaningful participation, has been underlined in a variety of Supreme Court of Canada decisions, inter alia: *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158; *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519; *Figueroa v. Canada (Attorney General)*, [2003] 1 S.C.R. 912. In this context, clear obligations arise from fundamental constitutional principles of democracy and federalism to require the appointment to the Senate, as vacancies arise, of those individuals who have won elections authorized by Bill C-7. In my opinion, it is inconceivable that the citizens of Canada who voted in these elections, the candidates and parties who contested these elections, and the provincial governments who organized and paid for these elections, could be ignored when it came time to fill a vacancy in the Senate. The right of citizens to choose their representatives, once engaged by Parliament's own legislation, cannot be constitutionally set aside at the whim of the executive.

The wording of Bill C-7 invokes clear obligations upon the Prime Minister and Governor General when faced with vacancies in the Senate. If a province has conducted elections, those winners must be considered and ought to be appointed. As noted previously, the possible principled exception to this obligation might be the rare instance when an individual becomes fundamentally unsuitable, such as through a conviction or infirmity, between the time of their election and when a vacancy occurs.

## **Conclusion**

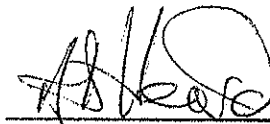
In my opinion, Bill C-7 has a major impact on the method of selecting Senators, both by introducing elections into the process and by giving rise to obligations to appoint the winners of those elections. It is intended to correct a perceived democratic deficiency and lack of legitimacy from which the Senate is viewed by the government to suffer because of its appointed nature. Bill C-7 is explicitly intended to redress these deficiencies by engaging voters in an election to select their preferred representatives to fill future vacancies. The consultative electoral process is in substance a direct election to select future Senators. Once they take office, those Senators will in every sense of the term be elected Senators. The basic logic of holding these elections is said by a variety of government actors to provide the Senate with the democratic legitimacy and accountability they perceive it currently lacks. Bill C-7 is intended to, and will, transform the Senate from an appointed body into an elected one. In the short term, it will create a hybrid body, with a growing number of elected members who will soon compromise the nature and effectiveness of representation of some provinces relative to others. Bill C-7 is not a complement to the existing method of selecting Senators, but a transformative graft whose purpose and effects are to fundamentally alter not just the selection of Senators, but the Senate itself through the selection process.

These are profound effects that, in my opinion, are exactly the type of constitutional reform which are supposed to be protected from unilateral legislation by Parliament. The history of the patriation process and the creation of domestic amendment procedures clearly demonstrate that substantial changes to the method of selecting Senators are supposed to be achieved only through a national consensus. A clear bargain was struck in 1981 between the federal government and nine of the provincial governments, in an event as foundational to our federation as the original agreements in 1867, to secure the



enactment of the Constitution Act, 1982. The multi-faceted amending formulas contained in that Act embody the Supreme Court's positions in the *Senate Reference*. The Senate's most fundamental features, which the Court said should be protected from unilateral action by Parliament, have been protected in the exceptions to Parliament's powers under s.44. Bill C-7 represents, in my opinion, a deliberate attempt to circumvent the federal principle and to both unilaterally alter the method of selecting Senators and convert the Senate into an elected body.

The cumulative result of this legislation is a fundamental fetter on the discretion of the Prime Minister and Governor General which presently exists under the Constitution Act, 1867. In my opinion, the enactment of Bill C-7 would give rise to obligations to fill vacancies as they arise in the Senate with the winners of these elections. The terms of the legislation create a directive obligation: where elections are held, the list of winners "must be considered" by the Prime Minister and the winners "should be" appointed to the Senate. In my opinion, this obligation would require that vacancies be filled with elected nominees unless some serious defect were to arise in the interval between their election and possible appointment. Fundamental, unwritten constitutional principles would also be engaged by the passage of C-7. The federalism and democracy principles would apply to the results of elections authorized by Parliament, administered and funded by the provinces, fought by candidates and provincial political parties, in which the citizens are asked to select their future Senators. It is unthinkable in a modern democracy for the executive to retain complete legal freedom to ignore the results of elections authorized by their own Parliament.

A handwritten signature in dark ink, appearing to read 'A. Heard', is written over a horizontal line.

ANDREW HEARD

