

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 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 recount the history of the Senate, first as a subject of constitutional negotiations and, second in relation to the unilateral power of the Federal Parliament to amend the Constitution. I have also been asked to assess, from the standpoint of our constitutional history, if Bill C-7 falls within the scope of the federal unilateral power.

EXECUTIVE SUMMARY

La Loi constitutionnelle de 1982 comprend différentes procédures de modification constitutionnelle dont l'une (l'article 42) porte spécifiquement sur des questions relatives à la réforme du Sénat. Ces procédures de modification sont le produit d'une longue histoire de débats constitutionnels dont l'objet était, notamment, de définir le rôle du Sénat par rapport aux provinces, de se pencher sur l'opportunité de réformer le Sénat et, le cas échéant, d'examiner les modalités souhaitables d'une telle réforme. En 1982, les constituants ont cherché à établir un équilibre qui permettrait aux provinces de jouer un rôle dans une éventuelle réforme du Sénat sans toutefois compromettre toute possibilité de changement. Cet objectif a été atteint par l'entremise des différentes procédures de modification constitutionnelle et tout particulièrement par l'inclusion de l'article 42.

L'ajout d'une procédure de modification constitutionnelle était nécessaire puisque la Loi constitutionnelle de 1867 ne comportait pas une procédure claire permettant de modifier la Constitution canadienne : en tant que loi du Parlement britannique, les modifications voulues étaient apportées par ce Parlement. Cependant, une preuve historique permet de démontrer que dès les premières années de la Confédération, plusieurs provinces, à l'instar d'experts constitutionnels, étaient d'avis que l'absence d'une procédure « canadienne » de modification constitutionnelle était voulue pour protéger les droits et compétences

des provinces, ce qui incluait le rôle joué par le Sénat dans la protection de ces droits. En outre, une convention constitutionnelle fut rapidement établie : en temps normal, le Parlement britannique n'apporterait des modifications à la Constitution canadienne qu'à la demande du Canada. Néanmoins, sans être unanime, il y avait une forte acceptation chez les provinces et les experts constitutionnels de l'idée que de telles demandes ne pouvaient être effectuées sans le consentement des provinces. Cet avis, largement partagé, se reflétait dans les arguments soulevés par les différentes délégations provinciales participant aux multiples conférences constitutionnelles dédiées à obtenir un consensus entourant une procédure « canadienne » de modification constitutionnelle, un consensus (ou presque consensus) qui ne devait survenir qu'à la suite du rapatriement de la Constitution en 1982.

En ce qui a trait plus spécifiquement au projet de Loi C-7, la présente expertise remet en question la prétention voulant que le pouvoir unilatéral du Parlement fédéral de modification constitutionnelle (prévu à l'article 44) ait une portée parallèle, et conséquemment équivalente, au pouvoir provincial unilatéral de modification constitutionnelle (prévu à l'article 45). Elle fait également valoir qu'en vertu de l'article 44, le Parlement du Canada n'a pas hérité de l'ensemble des pouvoirs de modification constitutionnelle qui lui avaient été attribués en vertu de la Loi constitutionnelle de 1949. Enfin, la présente expertise soutient que les moyens employés pour élire les sénateurs ainsi que la limitation de la durée de leur mandat

représentent une tentative de modifier à la fois les pouvoirs du Sénat (incluant ses caractéristiques fondamentales) et le mode de sélection des sénateurs et que, conséquemment, ces modifications devraient tomber sous l'empire de l'article 42.

The Constitution Act 1982 contains several amending formulae, one of which specifically addresses the question of Senate reform (section 42). These formulae were written in response to a long history of constitutional debate in Canada, which included discussions of just what the role of the Senate was in relation to the provinces, and how this chamber could and should be reformed if and when such reforms were necessary. The framers of the 1982 constitution sought to strike a balance that would allow for provincial involvement in any reform, but would not be so restrictive as to prevent such changes. The framers succeeded in their goal through the various amending formulae now found in the Constitution Act 1982, including and especially section 42.

That such amending formulae were necessary is because the original British North America Act 1867 did not contain a clear procedure for amending the Canadian constitution; as an act of the British Parliament, necessary amendments would be made by that parliament. However, historical evidence reveals that in the years immediately following Confederation in 1867, several provinces and certain constitutional experts believed that the absence of a "Canadian" amending formula was designed to protect provincial rights and powers, and that included the role of the Senate in protecting such rights. Furthermore, before long a constitutional

convention was established: normally, the British Parliament would only amend the Canadian constitution at Canada's request. However, while not universally accepted, there was a strong belief held by the provinces and several constitutional experts that such requests could not be made without provincial consent. Such a belief informed the arguments made by various provincial delegations to the several constitutional conferences that attempted to achieve a consensus on a "Canadian" amending formula, a consensus (or near consensus) that was not achieved until the patriation of the Constitution in 1982.

As for the specific legislation in question – Bill C-7 – this paper challenges the argument that the Parliament of Canada's unilateral amending power (section 44) is meant to be a parallel and therefore an equivalent to the provincial unilateral power of section 45. It also argues that under section 44, the Parliament of Canada did not inherit the full range of amending powers it had achieved with the BNA 1949 (2). Finally, the paper maintains that the means of electing senators and limiting their tenure, as authorized by Bill C-7, is an attempt to alter both the powers of the Senate (including its character) and the method of selecting senators, and so would be more properly achieved through section 42.

OVERVIEW:

In this expert opinion, I address the following two tasks. The first is: *To recount the history of the Senate as a subject of constitutional negotiations and in relation to the unilateral power of the Federal Parliament to amend the Constitution.* The second is: *To assess, from the standpoint of our constitutional history, if Bill C-7 falls within the scope of this federal unilateral power.* These two tasks determine the basic structure of the paper; Part One deals with the first task, and Part Two, the second task.

In Part One, I have further divided this task into five sections. Section one speculates on why the original British North America Act 1867 (BNA 1867) did not contain an amending formula. The second section addresses a related question as to what was, in the years immediately following the enactment of the BNA 1867, the understanding concerning the authority to amend the Canadian Constitution. At what point did it become the convention that the British Parliament would (normally) only amend the Constitution at Canada's request, and what was considered an appropriate request from Canada (ie, were the provinces to be consulted)?

The third section looks at the failed attempts to find an appropriate amending formula for Canada in the wake of the Statute of Westminster (1931), under which the British Parliament renounced its authority to pass legislation

binding on the Dominions. Canada, unable to come to an agreement on how it should amend its own constitution, famously requested that, for the time being anyway, the British Parliament should retain the right to amend the Canadian Constitution, at Canada's request. Again, the question of just what was meant by a "Canadian request" is discussed.

The fourth section looks at the years following the Second World War and up to the patriation of the Constitution in 1982. The passage of the 1949 amendment to the BNA 1867, known as the BNA 1949 (2), provided the Parliament of Canada with "sweeping powers" to amend the Constitution, a measure said to have been temporary and carrying with it the full expectation that the federal and provincial governments would now finally agree on an amending formula. Of course, this did not happen until 1982, and even then only nine of the ten provinces agreed.

Because this paper is meant to cast light on the Government of Canada's attempt to reform the Senate through Bill C-7, the discussion concerning amendments to the Constitution described above are for the most part focussed on those amendments which affected or would have affected the Senate.

Part Two examines the legislation in question – Bill C-7 – and is also divided into sections. The first summarizes the historical survey of Part One, and tries to show how this history informed the creation of the several amending formulae

found in Part V of the Constitution Act 1982 (CA 1982).

The second section challenges the argument that the Parliament of Canada's unilateral amending power (section 44) is meant to be a parallel and therefore an equivalent to the provincial unilateral power of section 45. It also argues that under section 44, the Parliament of Canada did not inherit the full range of amending powers it had achieved with the BNA 1949 (2).

Section three then examines whether the means of electing senators authorized by Bill C-7 is in violation of the amending formula, section 42 (b). Section four asks the same question concerning the limitation of senate tenure. In both cases, my conclusion is that C-7 is in fact a violation of section 42 (b).

Finally, I would like to point out that this paper is meant to provide a broad historical context and an expanded argument focussed on the question of the Parliament of Canada's constitutional powers to reform the Senate of Canada. As such, it is based on, but not identical to, the author's previously published work, "'Whither 91.1?' The Constitutionality of Bill C-19: An Act to Limit Senate Tenure."¹ New material has been added and other material removed. The structure has also been altered. There is, however, overlap with the text of the published piece referred to above.

¹ Chapter 7 of *The Democratic Dilemma: Reforming the Canadian Senate*, ed. Jennifer Smith, Montreal: McGill-Queen's University Press, 63-80.

"... the analogy is faulty."

Alexander Brady²

INTRODUCTION:

Much of the history of Canada's quest for a patriated constitution has been a struggle between the federal and provincial governments over who should be able to amend what and how.³ The federal government, speaking on behalf of Parliament, has tried to guard or enhance what it believed was its unilateral and residuary right to amend much of the Constitution, including institutions such as the Senate. However, the provinces, albeit usually more concerned with cultural or economic issues, nevertheless worried that were the Senate reformed unilaterally by the Parliament of Canada, its ability to protect provincial interests would be compromised. In the end (that is, by 1982), the provinces secured this important victory: they wrestled the general amending power away from the Parliament of Canada, and narrowed the scope of Parliament's unilateral amending power. Parliament retained its veto: its approval, save for amendments to a province's own constitution, is still required for any amendments. Nevertheless, Parliament's

² Alexander Brady, "Constitutional Amendment and the Federation," *The Canadian Journal of Economics and Political Science*, 29 (1963): 486-94 (489).

³ For the early history of Canada's attempts to agree on an amending formula, see Paul Gérin-Lajoie, *Constitutional Amendment in Canada*, Toronto: University of Toronto Press, 1950; Bayard William Reesor, *The Canadian Constitution in Historical Perspective: with a Clause-by-Clause Analysis of the Constitution Acts and the Canada Act*, Scarborough: Prentice-Hall, 1992; and James Ross Hurley, *Amending Canada's Constitution: History, Processes, Problems and Prospects*, Ottawa: Canada Communication Group, 1996.

amending powers as now contained in the CA 1982 are the most restricted of all the various proposals over the years. As Stephen Scott wrote immediately following the 1982 patriation, "[t]he language of section 44 creating the unilateral federal procedure is framed in terms distinctly narrower than those of its predecessor, section 91.1 of the amended 1867 Act."⁴

I would go so far as to say that the amending formulae contained in the CA 1982 should be seen not just as the repeal of the powers granted to Parliament under the BNA 1949 (2), but their refutation. Any argument that suggests that under the CA 1982 Parliament retained its amending powers formerly found under 91.1 must face the fact that the provinces never accepted that 91.1 provided, or should have provided, broad unilateral amending powers under a federal system. Therefore, the provinces would not have agreed (and did not agree) that such power should stand. Furthermore, although Quebec has been consistent and persistent in its opposition to the federal parliament assuming a unilateral amending power, Quebec has not been the only province to so oppose a federal unilateral amending power.

In the next section of this paper, I will examine the question as to why the BNA 1867 did not contain a "Canadian" based amendment formula; this matters, because it is important to understand just what powers the British Parliament

⁴ Stephen Scott, "The Canadian Constitutional Amendment Process," *Law and Contemporary Problems*, 45 (1982): 249-81 (277, n. 94).

transferred (or meant to) when it consented to pass the BNA 1949 (2). This discussion will be followed by an historical survey covering the efforts by the provinces to ensure that their federal rights were protected, leading to a discussion of the efforts post-World War II to create the amending formulae that were eventually incorporated into the Constitution Act 1982.

PART ONE

Prior to its patriation in 1982, the authority to amend the Constitution of Canada was undisputedly in the hands of the British Parliament. The BNA 1867 was an act of the British Parliament and was therefore amendable by that legislative body. Nevertheless, there had been an on-going (if somewhat sporadic) debate questioning why neither the Fathers of Confederation nor the framers of the BNA 1867 thought to include an amending formula. To this was added a related question of whether constitutional conventions, or even the text of the BNA 1867 itself, provided guidelines and limitations on how and when the British Parliament would proceed to enact such amendments.⁵

With the amending formulae now entrenched in the CA 1982, these questions may now seem moot, or of interest only to constitutional historians. After all, whatever other rules were in place before 1982, the fact remains that amending the Canadian Constitution today must follow those rules set out in Part V of the

⁵ See, for example, Hugh McDowall Clokie, "Basic Problems of the Canadian Constitution," *The Canadian Journal of Economics and Political Science*, 8 (1946): 1-32.

CA 1982. Therefore, it is important to understand what informed the framers of the CA 1982, and what the various formulae were designed to achieve. That, in turn, requires us to reconsider how the constitutional amendment process prior to 1982 was understood, and to note what problems or concerns were then identified to be overcome. More specifically, with such a review, we can gain a better understanding of what concerns motivated the provinces to make consistent demands that they have a say in constitutional amendments affecting the federation.

SECTION ONE: WHY WAS THERE NO GENERAL AMENDMENT FORMULA IN THE ORIGINAL BRITISH NORTH AMERICAN ACT OF 1867?

The most common answer to the question of why the Founding Fathers did not include an amending formula in the BNA 1867 was well articulated by R. MacGregor Dawson in 1947. In his classic text *The Government of Canada*, Dawson concluded that the absence of an amending formula simply meant that the framers did not worry too much about the matter. After all, the BNA 1867 was a statute of the British Parliament. Therefore, any needed changes would simply be legislated by that body.⁶ But Alexander Brady thought the framers, or at least the Canadian Fathers of Confederation, were somewhat more resolute than what Dawson implied:

⁶ R. MacGregor Dawson, *The Government of Canada*, Toronto: University of Toronto Press, 1947, 138.

The omission of an amending procedure did not result from absence of mind or a feeble sense of reality. It was conscious and deliberate, and so grounded in conviction that the Founding Fathers hardly took pains to explain it.

The plain truth is that the Fathers of Confederation did not want it. Macdonald and his colleagues of course assumed that in approaching Westminster the initiative would rest with the national executive and parliament; that is, at the outset with themselves.⁷

James Mallory also thought that the reasons for not including an amendment formula were somewhat more deliberate than those implied by Dawson, and he agrees with Brady that the reason why no amending formula was provided in the original BNA Act was due to a desire to retain such powers at the centre. However, Mallory provides an interesting nuance to Brady's reading. Brady rightly points out that Macdonald and the Founding Fathers regarded the provinces with some disdain, dismissing them as "little more than municipalities," as

⁷ Brady, "Constitutional Amendment and the Federation," 487-7. Macdonald was certainly not alone in holding this view. See Archbishop Connolly's letter to Lord Carnarvon (20 January 1867): "... we only ask the British Government to give power to the Central Legislature to deal with the whole question of minorities on one uniform principle which will do away with discontent for ever. The more power that Central Legislature has the better for the Confederacy itself and for the Mother Country and for all concerned." Reprinted in G. P. Browne, *Documents on the Confederation of British North America*, Montreal: McGill-Queen's University Press, 2009, 262.

Macdonald had famously said. Therefore, there was little reason to involve them in such lofty matters as constitutional amendments. However, the British Parliament did not so much accept Macdonald's argument as to recognize its potential danger. As Mallory explains, the British Parliament was indeed "jealous of delegating its legislative powers to subordinate bodies." Furthermore, "[i]t still regarded itself as the supreme constituent power in the British Empire and would not lightly have been persuaded to grant an entirely Canadian procedure of amendment." But the reasons for so jealously guarding British prerogatives were not entirely the result of imperial hubris. Concern over the constitutional rights of the provinces and the new Dominion's minorities also figured in the British Parliament's reasoning. "The Imperial authority," concludes Mallory, was "thus considered as the ultimate safeguard of the rights granted to the provinces and to minorities by the constitution."⁸ In other words, the lack of a "purely Canadian" amendment formula in the BNA 1867 was itself a recognition of the need to limit the ability of the Parliament of Canada to amend the Constitution unilaterally.

Finally, consider the arguments provided by Samuel LaSelva in 1983.⁹ LaSelva's intriguing conclusion is that the original BNA Act did, in fact, at least imply an amendment formula. LaSelva directs our attention to section 94, whereupon the Parliament of Canada is empowered to "make Provision for the

⁸ James Mallory, *The Structure of Canadian Government*, Toronto: MacMillan of Canada, 1971, 24.

⁹ Samuel V. LaSelva, "Federalism and Unanimity: The Supreme Court and Constitutional Amendment," *Canadian Journal of Political Science*, 16 (1983): 757-70.

Uniformity of all or any of the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and of the Procedure of all or any of the Courts in those Three Provinces." As early as 1889, legal scholars such as A.V. Dicey noted that this section did provide a limited capacity for a Canadian-made constitutional amendment. In an appendix to the third edition of his famous *Introduction to the Study of the Law of the Constitution*, Dicey explained that as an Imperial statute, the "Constitution of the Dominion . . . can, therefore, except as provided by the statute itself, be changed only by an Act of the Imperial Parliament. The Parliament of the Dominion cannot, as such, change any part of the Canadian Constitution." However, were it to work in conjunction with the provinces, it did have "to a limited extent" the power to "modify the Constitution for the purpose of producing uniformity of laws in the Provinces of the Dominion."¹⁰

LaSelva takes this argument much further by reading backwards from the inclusion of section 94 in the BNA 1867 to answer the question of why such a provision was necessary in the first place. Under section 94, a province would relinquish its rights under section 92.13, "Property and Civil Rights in the Province." But such legislation would only come into effect if it was also "adopted and enacted as Law" by the affected provincial legislature. Section 94, then, is an amending procedure for section 92.13, one requiring the consent of the affected province. However, Quebec is not included under section 94. This, LaSelva argues, was

¹⁰ Albert Venn Dicey, "Note Two: The Division of Powers in a Federal State," *Introduction to the Study of the Law of the Constitution*, 3rd ed., London: MacMillan and Co., 1889, 404.

because Quebec had (and has) a different civil code than did the other provinces, and evidently saw little advantage in having its civil laws made uniform with the other provinces. The other provinces, however, seem to have thought the idea worth considering. So section 94 was added to deal with the possibility that in the future, the provinces with the exception of Quebec might consent to relinquish their rights under section 92.13, and as such, a special amending formula pertaining to that section was added.

LaSelva sees this addition as providing an exemption to what must have been understood as the rule governing constitutional amendments affecting the provinces. To provide a specific measure to allow three of the four provinces to make such a constitutional amendment would only make sense if it was already understood that constitutional amendments affecting the provinces could *only* be made with the consent of all four. Or to put it another way, section 94 was added to prevent Quebec from vetoing such an amendment, and could only be necessary if it was understood that, under the terms of unanimity, Quebec had in fact such a veto on constitutional amendments. Section 94, then, provides an exception to the unanimity principle: in the case of amendments to section 92.13, such unanimity would not be necessary; instead, a bi- or multilateral arrangement could be made. LaSelva writes:

A federal government, committed to uniform law, would surely not proceed by way of a provision which made provincial consent

mandatory and excluded Quebec when it could accomplish its objective without provincial consent and include Quebec through the amending power. This consideration also tells against the argument – originated by Scott and developed by Chief Justice Laskin and Justices Estey and McIntyre – that federalism can have no place in the amending process because the BNA Act ‘has not created a perfect or ideal federal state’ but has ‘accorded a measure of paramountcy to the federal Parliament.’ That the Fathers intended to confer a measure of paramountcy upon the federal Parliament cannot be doubted. But they cannot have intended to confer upon it power to modify the division of powers at its whim. Had they intended that, they would not have included section 94 in the BNA Act.¹¹

If LaSelva is correct, an unstated but well-understood convention existed in 1867: amendments to the Canadian Constitution affecting the provinces required provincial consent, and with one exception (section 94), such consent was to be unanimous.

LaSelva wrote this article in the wake of the Supreme Court's 1981 decision in the Patriation Reference.¹² While he may have overstated his case, LaSelva shares one common interpretation with the other scholars referred to above: All

¹¹ LaSelva, “Federalism and Unanimity: The Supreme Court and Constitutional Amendment,” 762.

¹² *Reference re: A Resolution to amend the Constitution*, [1981] 1 S.C.R. 753.

maintain that original perceptions of the role of the provinces in constitutional amendments have been forgotten over time. Therefore, it should be possible to review the writings and statements of scholars and politicians living closer to the time of the actual formation of the BNA 1867 to see if we can find any evidence for such a hypothesis (that an implicit unanimity principle was either present or understood, at least by some). In the next section of the paper, I examine the discourse surrounding the amendment process in the years following the enactment of the BNA 1867 up to the passage of the Statute of Westminster in 1931. The Compact Theory of Confederation dominated this discourse.

SECTION TWO: THE POWERS OF AMENDMENT AND THE COMPACT THEORY, 1867 TO 1931

The first "Interprovincial Conference" held in Quebec City in 1887 was organized by the premier of Quebec, Honoré Mercier, and chaired by the premier of Ontario, Oliver Mowat. It focussed on the importance of provincial consent in constitutional amendments. What we now refer to as the Compact Theory of Confederation – that Confederation was a contract among the founding provinces – is thought to have had its origins in this conference. As Christopher Armstrong writes, concerning Mowat's push for a provincial veto over constitutional amendments:

Sir Oliver was quick to realize that [his] objectives could better be attained if Ontario were to secure a veto over constitutional change.

He could not only torpedo those amendments of which he disapproved but demand favours in return for his assent. Since the British North American Act contained no formula for its own amendment, there was no statutory basis for such a demand, but the "Compact theory" of Confederation, which explained the constitution as a treaty between the provinces, offered a historical and conventional justification for this claim.¹³

The Conference produced a lengthy resolution requesting a transfer of certain powers to the provinces, and protection from federal interference in other provincial powers. Provincial delegates then took these resolutions back to their respective provinces for ratification; Quebec, for example, ratified the resolution 28 May 1888. Given the context of the current debate surrounding the federal government's attempts to reform the Senate as outlined in Bill C-7, there is some irony in citing the resolutions passed at the 1887 Interprovincial Conference,

¹³ Christopher Armstrong, "The Mowat Heritage in Federal-Provincial Relations," *Essential Readings in Canadian Constitutional Politics*, eds Christian Leuprecht and Peter H. Russell, Toronto: University of Toronto Press, 2011, 170-182 (171). I realize and acknowledge that the Compact Theory has been effectively attacked by such scholars as Norman Rogers in 1931 and J.A. Corry in 1946. My point, however, is not to support the accuracy of the theory itself. Rather, I maintain that the very fact that such a theory was conceived, presented and argued by the provinces is evidence of their concern over what they saw as the usurpation by the Canadian parliament of the power to amend the Constitution, and that this in turn informed their arguments, which eventually were manifest in the several formulae found in the CA 1982. For discussion, see Paul Romney, "Provincial Equality, Special Status and the Compact Theory of Canadian Confederation," *Canadian Journal of Political Science*, 32 (1999): 21-39.

particularly in terms of Senate reform.¹⁴ Consider Resolution No. 4:

That a leading purpose of the Senate was to protect the interests of the respective Provinces as such; that a Senate to which the appointments are made by the Federal Government, and for life, affords no adequate security to the Provinces; and that, in case no other early remedy is provided, the British North America Act should be so amended as to limit the term for which Senators hold office, and to give the choice, as vacancies occur, to the Province to which the vacancy belongs, until, as to any Province, one half of the members of the Senate representing such Province are Senators chosen by the Province; that thereafter the mode of selection be as follows: if the vacancy is occasioned by the death, resignation or otherwise of a Senator chosen by a Province, that Province to choose his successor; and if the vacancy is occasioned by the death, resignation or otherwise of any other Senator, the vacancy to be filled

¹⁴ The first textbook on the Canadian Constitution appears to be *The Constitution of Canada*, written by Joseph Munro and published in 1889. Munro does not address the question of provincial involvement in formal amendments (that is, those enacted by the British Parliament), referring only to "important but limited powers" afforded to both the Dominion Parliament and the provincial Legislatures "to enable them from time to time to amend their Constitutions." However, he writes, the "only powers conferred on the Dominion Parliament over the Senate [were] those for varying the number necessary to form a quorum and of hearing and determining any question that arises relating to the qualification of a senator or to a vacancy in the Senate." Furthermore, Parliament could neither "abolish the Senate . . . nor prescribe what qualifications a senator should possess." J. E. C. Munro, *The Constitution of Canada*, Cambridge: University Press, 1889, 229-30.

as now provided by the act, but only for a limited term of years.¹⁵

However, and at the risk of jumping ahead, this paper is not addressing the question of whether allowing the provinces to choose senators, whose terms would be limited, is a good or bad idea; rather, this paper is arguing that the means by which this (or any other Senate reform) must be accomplished, is necessarily through the General Amendment formula of the CA 1982, that is, section 42 and so section 38. Furthermore, this paper maintains that the provincial concern over the powers and terms of the Senate has been consistent and long-standing, and that such concern informed the creation of the amending formulae found in the CA 1982.

In any case, by 1922 (and almost a decade before the Statute of Westminster, 1931), constitutional experts such as W. P. M. Kennedy W. R. Riddell and had concluded that the ability of the British Parliament to pass legislation applying to Canada had now become limited to constitutional amendments, so amendments to the BNA 1867. Furthermore, such amendments would only occur at Canada's request and such requests would require substantial provincial support. Kennedy's *The Constitution of Canada* maintained that "in future no imperial legislation will bind Canada unless concurred in by resolution of the federal parliament." However, a unilateral proposal from the federal parliament to

¹⁵ Reprinted in Michael Bliss, *Canadian History in Documents, 1763-1966*, Toronto: Ryerson Press, 1966, 179-80.

alter the BNA 1867 would not be well received: "Imperial legislation would undoubtedly be refused were there signs of serious provincial opposition," Kennedy wrote.¹⁶

A year later, in 1923, Justice of the Supreme Court of Ontario William Riddell wrote that the reason the BNA 1867 did not contain an amending formula was because of the need to ensure support from "the old Province of Lower Canada." Riddell wrote: "While the French-Canadians were willing to enter into a contract with their English-speaking brethren, they were not willing to enter into a contract which could be varied by the more numerous English without their consent." Of course, amendments to the "written constitution" were not difficult to achieve: all that was required was an Address to the Sovereign, passed by both Houses of Parliament. However, the convention was that the vote on such an Address be unanimous, "or practically unanimous" to satisfy such concerns.¹⁷ While Riddell does not explicitly argue that provincial consent was required, the implication here is clear (and foreshadows Mallory's own analysis): requests to amend to the Constitution could not be made unilaterally by the federal government. Such requests required, if not the consent of (for example) the province of Quebec, at least the consent of the parliamentary representatives of the province of Quebec, in

¹⁶ W. P. M. Kennedy, *The Constitution of Canada: An Introduction to its Development and Law*, London: Oxford University Press, 1922, 449-50.

¹⁷ William Renwick Riddell, *The Canadian Constitution in Form and in Fact*, New York: Columbia University Press, 1923, 3.

both houses of Parliament.

In 1925, Mackenzie King's Liberal government passed a resolution calling for a Dominion-provincial conference to discuss Senate reform. As Armstrong explains, such conferences had already become little more than forums designed to provide the federal government with "a means of ratifying a decision already taken, giving it an official, ceremonial imprint."¹⁸ Nevertheless, that the federal government thought to consult with the provinces at all was greeted with enthusiasm by the provinces, including Quebec. That same year, the Legislative Assembly of Quebec resolved in the affirmative that:

This House is of the opinion that the creation of two Houses was one of the essential conditions of the Pact of Confederation. It expresses its satisfaction that the Parliament of Canada, before considering any change relating to the Constitution and powers of the Senate, should have approved the project of the Government of Canada to call a conference between all the Provinces of the Dominion in order to study the opportunity of a change that could be made only with the consent of all the provinces.¹⁹

¹⁸ Christopher Armstrong, "Federal-Provincial Meetings Before the Second World War," in *National Politics and Community in Canada*, eds R. Kenneth Carty and W. Peter Ward, Vancouver: University of British Columbia Press, 1986, 112-50 (121).

¹⁹ R. MacGregor Dawson, ed., *Constitutional Issues in Canada, 1900-1931*, London: Oxford University Press, 1933, 281.

Meanwhile, the subservient role of the Dominions within the British Empire was being called into question in Great Britain. At the Imperial Conference of 1926, the Inter-Imperial Relations Committee released a report known as the Balfour Declaration 1926, which would become the basis for the Statute of Westminster (1931). The declaration asserted that the Dominions were "autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations."²⁰

The logic of the Balfour Declaration appealed to the provinces: if the Dominions were autonomous communities within the British Empire, and equal in status to Britain, were not Canada's provincial legislatures similarly equal in status, and in no way subordinate to the federal Parliament? The logic may not have been sound, but the sentiment was strong, and it informed the deliberations of the 1927 Federal-Provincial conference. According to Hugh McDowall Clokie:

Constitutional matters occupied one-half of the time of the delegates, and one morning was devoted specifically to 'procedure in amending the British North America Act.' It was there that the Minister of Justice (M. Lapointe) introduced his noted proposal for dividing amendments

²⁰ Inter-Imperial Relations Committee, "Report, Proceedings and Memorandum: the Balfour Declaration 1926," *Imperial Conference, 1926*, E (1.R./ 26) series, 2.

into two classes – those requiring the consent of a majority of the provinces, and those requiring unanimity (affecting Sections 93, 133, and subsections 12,13, and 14 of 92).²¹

No agreement was reached, but the pattern and model for an amending formula was now set and a consensus of sorts reached: instead of engaging in a futile search for a single, all-encompassing amendment formula, what was now needed was a division of constitutional matters into different subjects or groups. One group would certainly be amendments that required unanimous consent. But another group would include those requiring the consent of the majority of the provinces, variously calculated. This would protect certain minority rights, particularly regarding language and religion, but allow for flexibility for others. In all cases, provincial involvement would be guaranteed.

SECTION THREE: THE STATUTE OF WESTMINSTER AND ITS AFTERMATH

In 1931, the British Parliament passed the Statute of Westminster, under which it renounced its constitutional authority over its former colonies: "the Dominion of Canada, the Commonwealth of Australia, the Dominion of

²¹ Clokie, "Basic Problems of the Canadian Constitution," *The Canadian Journal of Economics and Political Science*, 30. Section 92.12 refers to the "The Solemnization of Marriage in the Province;" 92.13, "Property and Civil Rights in the Province;" 92.14, "The Administration of Justice in the Province." Section 93 is the right of a province to "exclusively make Laws in relation to Education," and contains the guarantees for the protection of Roman Catholic education in Ontario and Protestant education in Quebec. Section 133 is the right to use either French or English in the Parliament or the Quebec Legislature. All these provisions have been seen as measures designed to protect language and minority rights in Canada.

New Zealand, the Union of South Africa, the Irish Free State and Newfoundland." The intention was that these colonies, now equal members of the Commonwealth, would attend to their own constitutional affairs without recourse to the British Parliament. They would either adopt or use exclusively their own amending formula. However, Canada requested that Britain retain some powers over constitutional amendment as it pertained to Canada, the federal and provincial governments having yet to agree on a Canadian amending formula. This delay in achieving consensus on a Canadian amending formula was temporary, or so it was claimed, and therefore Britain's role in maintaining this power would not be for long; as Bora Laskin would explain, quoting Supreme Court Justice Ivan Cleveland Rand, the British Parliament was to act only as "a legislative trustee" for Canada.²²

Meanwhile, the federal government and the provinces promised to get down to work and figure out their own formula. Given that other more pressing concerns of the 1930s no doubt provided a distraction, it is to the credit of the federal and provincial governments that, after a few false starts, a draft proposal for constitutional amendment was ready by 1935, and a remarkable one it was.²³ Under the 1935 proposal, an amending section (section 148) would be added to the BNA 1867. Under section 148, all amending initiatives, save those affecting a

²² Bora Laskin, "Amendment of the Constitution," *The University of Toronto Law Journal*, 15 (1963): 190-94 (190).

²³ For a description and overview, see E. R. Alexander, "A Constitutional Strait Jacket For Canada," *The Canadian Bar Review*, XIII (1965): 282-313.

province alone (the substance of section 92.1 was retained), would come from the House of Commons (148.1). The Senate's approval remained necessary, but a Senate defeat of an amendment, or a Senate amendment of an amendment, could be overridden by a joint session in which a majority vote of all members would prevail (148.2). When provincial consent was required, provinces would be deemed to have accepted the amendment if they had not dealt with the amendment resolution within one year (148.3).

Under the 1935 proposal, Parliament would have the unilateral right to make changes to, among other subjects, the qualifications of Senators (with an exception made for Quebec), the "Summons of Senators" (that is, method of appointment), resignation and disqualification of Senators, the choice of Senate Speaker, quorum and voting in Senate, and the rule prohibiting senators also holding a seat in the Commons.²⁴ However, other amendments would also require the concurrence of the legislative assemblies of two-thirds of the provinces whose aggregate population was 55% of the total. Under this section were included the number of senators, provincial representation in Senate, the addition of senators and reduction to normal number, the maximum number of senators, and the "Tenure of place in Senate".²⁵

The proposal possessed several remarkable features, including the forward-

²⁴ Gérin-Lajoie, *Constitutional Amendment in Canada*, 306.

²⁵ Gérin-Lajoie, *Constitutional Amendment in Canada*, 310.

thinking "two-thirds of the provinces with 55% of the population" formula for some amendments. Also notable is its use of a joint session to override Senate intransigence, revealing that those who drafted the proposal anticipated that reforms made under it would affect that body. Some senate reform, then, was likely contemplated. Finally, as best I can tell, this is the one and only time in which senate tenure is explicitly mentioned in a Canadian amending formula. Most subsequent proposals mention the powers of Senate, and often the method of selecting senators, but none mention the tenure of senators.

Nevertheless, and like so many that followed, this proposal for a comprehensive amending formula did not succeed; once again, subsequent events intruded on the process. But even the spectre of world war did not prevent the provinces and the federal government from trying once again, which they did in 1940, this time with the magisterial and comprehensive Rowell-Sirois Report to guide them.

As the Depression took its toll, the Liberal government of Mackenzie King asked the Chief Justice of Ontario, the Honourable Newton W. Rowell, to chair a Royal Commission on Dominion-Provincial Relations. Rowell was later joined by Professor Joseph Sirois from Laval. Under its terms of reference, the Commission was to try to find a way so that the federal government could free itself from the limitations imposed upon it by the BNA 1867 and so take on a more significant role in dealing with the Depression. The terms of reference explained:

That, as a result of economic and social developments since 1867, the Dominion and the provincial governments have found it necessary in the public interest to accept responsibilities of a character, and to extend governmental services to a degree, not foreseen at the time of Confederation.²⁶

The report of that Commission remains one of the most significant documents ever produced on federal-provincial relations. However, it is interesting, and informative to note that not all provinces regarded the Commission's mandate with enthusiasm. The Government of Quebec explained its concerns this way:

... nous devons déclarer que le gouvernement de la province de Québec ne comparaît devant cette Commission, ni en qualité de demandeur, ni en qualité de défendeur; et qu'il n'entend être lié en aucune façon par les conclusions de votre rapport.

Si le gouvernement de Québec a cru devoir se faire représenter à cette séance initiale, c'est qu'il n'a pas voulu manquer de courtoisie envers la Commission; c'est aussi parce que son silence aurait pu être considéré comme un acquiescement au principe qu'a posé le gouvernement fédéral, en confiant à une Commission nommée par lui seul la mission de faire enquête en vue d'amender l'acte fédératif

²⁶ Newton W. Rowell and Joseph Sirois, "Terms of Reference," *Royal Commission on Dominion-Provincial Relations: Report*, Book 1, Ottawa: Queens Printer, 1954 [1940], 9.

de 1867.²⁷

Once again, we find a province worried over any attempt to expand the power of the Parliament of Canada to amend the Constitution.

Meeting the just a few months after the Rowell-Sirois Report was released, the Dominion-provincial conference, 1941 already had a difficult task ahead of it. The War had already begun, and the federal government was able to take advantage of the sense of emergency it generated to argue that it needed considerable powers to finance and conduct the military effort. Nevertheless, the provinces still insisted that they be involved in any constitutional amendments. The federal government refused and the conference broke up on the second day.

Still, a small window of opportunity had been opened. In the Parliamentary debate that followed, the Liberal member from Selkirk (Manitoba), Joseph Thorson (himself a lawyer, law professor and dean), asked for guarantees that the federal government had not conceded too much (or anything at all) to the provinces, as he "would not wish this debate to conclude with an acceptance, either direct or implied, of the doctrine that it is necessary to obtain the consent of the provinces before an application is made to amend the British North America Act."²⁸ The broad-minded Minister of Justice, Ernest Lapointe, put his honourable friend's fears

²⁷ Ibid, Book 1, 16.

²⁸ Clokie, "Basic Problems of the Canadian Constitution," *The Canadian Journal of Economics and Political Science*, 31.

to rest: "May I tell my honourable friend that neither the Prime Minister nor I have said it is necessary." However, he added, "it may be desirable."²⁹

Thorson's concern could only emerge from what was becoming an increasingly accepted principle that such consultation was indeed necessary. The Liberal government's concession, that such consultation might well be desirable, is also testimony to the fact that the provincial partnership in constitutional amendment was now recognized.

SECTION FOUR: THE AFTERMATH OF THE SECOND WORLD WAR AND THE BRITISH NORTH AMERICA ACT OF 1949

Dissatisfaction with Canada's constitutional relationship with Great Britain began to percolate in the years immediately following the end of the Second World War. With the hostilities now at an end, Canada began to look towards the second half of the 20th century, and did so with an optimism it would not see again until its centennial in 1967. The Depression and the Second World War had been difficult, but Canada emerged strong and stood ready to take its rightful place on the world stage. As befitted such a nation, Canada needed its own constitution. But what did that mean? Clokie expressed his concerns over the current state of the Canadian constitution in an article published in the *Canadian Journal of Economics and Political Science* in 1946:

²⁹ Canada, *House of Commons Debates*, 1940, vol. 11, 1122. Quoted in Clokie (ibid), 32.

Canadian constitutional lore is full of the most amazing paradoxes. The Dominion has a written constitution; but, if the function of a written constitution is to introduce certainty and finality into a polity, this is precisely what Canada's written constitution fails to accomplish. Preposterous as it may seem, no one knows where the constitution begins or ends.³⁰

Clokie acknowledged that by "well-established convention, the Parliament of the United Kingdom will act only in response to a voice representing a Dominion as a whole." However, this was meant to last only until "other organs had been developed."³¹ And to date, the federal government and the provinces could not agree as to what that other organ would be.

Clearly, others shared Clokie's impatience with Canada's constitutional dependence on Great Britain, and the five years or so following the end of the War seemed to have been particularly fruitful in terms of Canadian nationhood.³² Certainly, the constitutional pieces were falling nicely into place. By virtue of the Citizenship Act 1946 (27 June 1946, coming in to force 1 January 1947) Canadians

³⁰ Ibid, 1.

³¹ Ibid, 25.

³² In Allan Cairns, *Charter versus Federalism: The Dilemmas of Constitutional Reform*, Montreal: McGill-Queen's University Press, 1992, 21. Note that Newfoundland entered Confederation in 1949, through (what was then) termed the BNA 1949 and passed 23 March 1949. The BNA 1949 (2), then, was a separate act, while the first BNA 1949 was renamed the Newfoundland Act 1949 under the amendments contained in the Canada Act 1982.

were now citizens of Canada, not the United Kingdom. Also in 1947, King George VI issued new Letters Patent authorising the office of the Governor General, so the office was now issued under the "great seal of Canada," a (literally) symbolic proclamation of Canada's constitutional maturation.³³ Finally, with the Supreme Court Act (1949), appeals were no longer heard by the British Parliament's JCPC.³⁴ All that was left was for Canada to patriate its constitution. And so, with bold confidence, Prime Minister Louis St. Laurent asked the Canadian Parliament to provide a joint address to the King, requesting that the British Parliament amend the BNA 1867 so that the Parliament of Canada could now amend "the Canadian constitution" under its own authority. The last piece of the constitutional puzzle would be put into place. Alexander Brady described St. Laurent's initiative this way:

The issue is that of Canada assuming a normal responsibility of nationhood, and in 1949 it was put forcibly by Mr. St. Laurent: 'The United Kingdom authorities, I will not say resent, but do not like the position in which they are placed of having to rubber-stamp decisions for Canadians, made by the representatives of Canadians, and

³³ W. P. M. Kennedy, "The Office of Governor-General in Canada," *The University of Toronto Law Journal*, 7 (1948): 474-83 (474).

³⁴ Frederick Vaughan, *Canadian Federalist Experiment: From Defiant Monarchy to Reluctant Republic*, Montreal: McGill-Queen's University Press, 2003, 118. See also W. R. Lederman, "Notes on Recent Canadian Constitutional Developments," *Journal of Comparative Legislation and International Law*, 3rd Ser., 32 (1950): 74-77.

having to do it because no other procedure has yet been devised in Canada for implementing these decisions. I believe we must recognize that either Canada is a sovereign state or she is not. If the former is true, then Canada must act as an adult nation and assume her own responsibilities.³⁵

St. Laurent assured all concerned that the new powers afforded Parliament by the BNA 1949 (2) were not meant to be permanent. All that was needed were "general over-all amending procedures." Were the federal and provincial governments able to agree on such procedures, "the federal power granted by the 1949 amendment would be *ipso facto* subject to re-definition and could be limited to its *true intent* by more precise terms."³⁶ Furthermore, St. Laurent made his defence in a highly simple formula: whenever the amendments affected the powers and privileges of the provinces, the national government would request their consent; whenever these were not affected, it would seek amendments without their consent.³⁷

However, not everyone was comforted by St. Laurent's assurances. Even in the British Parliament, questions were asked whether the amendment would give

³⁵ *Debates of the House of Commons, 2nd Session, 1949, I, 832*, quoted in Brady, "Constitutional Amendment and the Federation," 493-4.

³⁶ Lederman, "Notes on Recent Canadian Constitutional Developments," *Journal of Comparative Legislation and International Law*, 76 (emphasis added).

³⁷ Brady, "Constitutional Amendment and the Federation," 488.

the federal parliament a disproportionate share of constitutional authority. What role would the provinces play were the Parliament of Canada to seek constitutional amendment? St. Laurent satisfied British concerns by promising to hold a Dominion-Provincial conference on the constitution without delay, with the express purpose of finding a proper amending formula. Once an agreement was found, St. Laurent promised to request that the British Parliament repeal section 91.1.³⁸ Rowat, writing in 1952, explained it this way:

[St. Laurent] did not intend the amendment to be the final word on defining the extent of the provinces' participation in the amending process. In fact, he has indicated that he is willing to consider any reasonable plan that the provinces may develop for amending the various sections of the constitution. Actually the change seems to have been intended as a sort of club to be held over the heads of the provinces in order to force them to agree.³⁹

This point needs to be emphasised. It was understood, by the government of Canada and by the British Parliament, that while the amendment to the BNA 1867 adding section 91.1 gave the parliament of Canada considerable power to amend the Canadian constitution, this was a power delivered to Parliament in

³⁸ F. R. Scott, "The British North America (No. 2) Act, 1949," *The University of Toronto Law Journal*, 8 (1950): 201-07 (207).

³⁹ D. C. Rowat, "Recent Developments in Canadian Federalism," *The Canadian Journal of Economics and Political Science*, 18 (1952): 1-16 (11).

trust, just as it had formerly been held by the British Parliament. Therefore, section 91.1 was not intended to be a power the Parliament of Canada would retain, at least not in its entirety. In consultation with the provinces, the federal government was supposed to find common agreement for an amending formula which would include the provinces.

Commentators of the time considered the 1949 amendment highly significant. F. R. Scott worried over the vagueness of the phrase "the Constitution of Canada," a phrase he referred to as "novel" and unknown under "Canadian constitutional law." The phrase could conceivably encompass every aspect of the Canadian political and legal system, and as such might provide Parliament with near-limitless amending powers. While the British Parliament would retain "a ghostly legal authority over Canada" (204), it was clear to Scott that the Canadian constitution was now almost entirely amendable by the Canadian Parliament. In any case, wrote Scott, the provinces were left out and clearly the "compact theory of Confederation" (207) was now dead.

Similarly, Rowat wrote that:

No doubt several sections of the British North America Act affect the national government alone and should be alterable by that government acting alone. The amendment under discussion [91.1], however, gives it power over many other important sections of the Act which have to do with the federal system. In fact, almost any

important change that the central government might initiate on its own, *such as an alteration in the form or powers of the Senate*, would directly involve the provinces as protectors of regional minorities. This means, then, that the federal Parliament has for the time being assumed a power of unilateral amendment which does not accord with the principle of federalism.⁴⁰

Similarly, Guy Favreau's 1965 report, *The Amendment of the Constitution of Canada*, explained the problems with the 1949 amendment this way:

The problem posed by section 91 (1) was that it defined Parliament's powers in broad general terms – broader, for example, than those that had been contemplated in 1935-36. The intention in 1949 was to give Parliament power to amend the Constitution of Canada in its purely federal aspects only, but to leave it to the Courts to determine precisely what matters were included in or excluded from the powers conferred.⁴¹

As to the federal government's argument that 91.1 merely paralleled the provinces' own amending authority found in 92.2., critics pointed out that the federal parliament was not a parallel government to the provinces: it is, instead, a

⁴⁰ Rowat, "Recent Developments in Canadian Federalism," *The Canadian Journal of Economics and Political Science*, 11 (emphasis added).

⁴¹ Guy Favreau, *The Amendment of the Constitution of Canada*, Ottawa: Queen's Printer, 1965 (25, 30).

government whose authority extends over the entire country, while a province's authority is restricted to just that province. As Alexander Brady explained in 1963:

the analogy is faulty: the enactments of the federal legislature are unlimited within the boundaries of Canada and unlike the provincial not in practice subject to disallowance. Moreover, the structure of many if not all federal institutions must necessarily concern the provinces because it affects them. Representation in the Senate or Commons, for example, and the composition of the Supreme Court are obviously relevant to the interests of any province and its people. Yet the structure of these institutions is subject to alteration by the national parliament alone. Thus the act of 1949 is unsatisfactory in terms of strict federalism because it did not provide for an amending procedure wherein the provinces would have a voice in matters that concerned them.⁴²

Finally, former Prime Minister John Turner, then a lawyer with Stikeman & Elliot in Montreal, discussed the implications of 91.1 for Senate reform. Writing in a volume of essays dedicated to Dean Henry Angus of the University of British Columbia, Turner acknowledged that section 91.1 gave the Parliament of Canada unprecedented power to amend the Canadian Constitution; however, he did not believe that such power extended to reforming the Senate: "Undoubtedly, a

⁴² Brady, "Constitutional Amendment and the Federation," 489.

measure seeking the reform or abolition of the Senate would be beyond the competence of the Canadian Parliament and could not be achieved solely in virtue of the B.N.A. Act (No. 2), 1949."⁴³

Understandably the provinces were not pleased with BNA 1949 (2). St. Laurent did indeed host a Dominion-Provincial conference on the constitution, and the first order of business was the provinces' demand that 91.1 be altered.⁴⁴ Prime Minister Maurice Duplessis led the charge. He explained that, while Quebec was supportive of the principle that a more convenient procedure for amending the Canadian constitution be found, such a procedure had to respect the constitutional rights of the provinces and their role in the federation: "Il nous semble qu'à l'heure actuelle certains amendements à la Constitution canadienne sont désirables, mais c'est notre conviction irrévocable que l'âme de la Constitution canadienne doit être respectée dans son intégrité."⁴⁵

Some of the provinces were placated when St. Laurent agreed that "if general over-all amending procedures could be agreed by the conference, the federal power granted by the 1949 amendment would be *ipso facto* subject to re-

⁴³ John Napier Turner, "The Senate of Canada – Political Conundrum," in Robert M. Clark, ed., *Canadian Issues: Essays in Honour of Henry F. Angus*, Toronto: University of Toronto Press, 1961, 78.

⁴⁴ E. Russell Hopkins, *Confederation at the Crossroads: The Canadian Constitution*, Toronto: McClelland and Stewart, 1968, 270.

⁴⁵ *Proceedings of the Constitutional Conference of Federal and Provincial Governments (January 1-12, 1950)*, Ottawa: King's Printer, 1950, 18.

definition and could be limited to its *true intent* by more precise terms." Such, however, was not to be the case, and the 1950 conference broke up without reaching an agreement.⁴⁶

1960s AND THE FULTON-FAVREAU FORMULA:

A decade would pass before another serious attempt was made to find a new amending formula. The first attempt produced the Fulton formula, named after John Diefenbaker's minister of justice, E. Davie Fulton. This formula was meant only to restore provincial consent to the amendment powers taken away by the BNA 1949 (No. 2). It would have patriated the constitution with a formula requiring unanimous consent for most changes; the expectation was that a more flexible amending formula would follow. However, the unanimity provisions proved too inclusive, and again no agreement was reached.

Provincial concerns with Parliament's powers under section 91.1 remained, and so it fell to Lester Pearson's minister of justice, Guy Favreau, to rewrite the Fulton formula. The formula which emerged, now known as the Fulton-Favreau formula, attempted to satisfy provincial concerns by establishing (among others) this principle: "those characteristics of the national government linked to or identified with the federal nature of Canada (e.g., the Senate) should not be passed by Parliament alone. As a result the idea of limiting the scope of

⁴⁶ Lederman, "Notes on Recent Canadian Constitutional Developments," 76 (emphasis added). See also Philip Buckner, *Canada and the End of Empire*, Vancouver: University of British Columbia Press, 2004, 220.

Parliament's exclusive authority to amend parts of the Constitution was firmly established."⁴⁷

The Fulton-Favreau formula is similar to the Fulton formula which preceded it; indeed, most sections are identical.⁴⁸ However, there is a significant difference. In the Fulton-Favreau model, a new section has been added between what was under the Fulton model sections 5 and 6. This new section, numbered 6 through 8, was meant to revise section 91.1. The proposed revisions matter. First, the phrase "in relation to the executive Government of Canada, and the Senate and House of Commons" was added to clarify the scope of Parliament's exclusive amending authority. Second, the exclusions to this exclusive power were expanded to include several provisions affecting the Senate, including (section 6.e), "the requirements of the Constitution of Canada for the summoning of persons to the Senate by the Governor General in the Queen's name."

Under the Fulton-Favreau formula, and like the 1935 agreement, the Parliament of Canada would retain the general amendment power, subject to certain restrictions:

(Sec. 6): Notwithstanding anything in the Constitution of Canada, the Parliament of Canada may exclusively make laws from time to time

⁴⁷ J. Peter Meekison, "The Amending Formula," *Queen's Law Journal*, 8 (1982-1983): 99-122 (115-6).

⁴⁸ For a clause by clause comparison, see Alexander, "A Constitutional Strait Jacket For Canada," *The Canadian Bar Review*.

amending the Constitution of Canada in relation to the executive Government of Canada, and the Senate and House of Commons, except as regards

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

(e) the residence qualifications of Senators and the requirements of the Constitution of Canada for the summoning of persons to the Senate by the Governor General in the Queen's name;

(f) the right of a province to a number of members in the House of Commons not less than the number of Senators representing such province;

Unanimous approval of all provinces was required before any changes could be made to: The power of the legislature of a province;

The rights and privileges of the government of a province;

The assets or property of a province;

The use of English or French;

The provinces' rights over Education.

If a change affected only some provinces, then the consent of those

provinces was also required. For other changes, the Fulton-Favreau formula required that the consent of two-thirds of the provinces, whose aggregate population comprised at least 50% of the population. But the Fulton-Favreau formula was dropped after the Quebec government under Jean Lesage decided it posed potential problems for Quebec's own development, and refused to ratify it.

THE VICTORIA AND VANCOUVER FORMULAS, 1970s:

The next attempt at an agreement over patriation would not come until June 1971, when the federal and provincial governments agreed to a constitutional amendment package named the Victoria Charter. Just like the negotiations that eventually produced the Fulton-Favreau formula, the discussions prior to the writing of the Victoria Charter focussed on "limiting the scope of Parliament's exclusive authority to amend parts."⁴⁹ Under the Victoria Charter's article 53, Parliament retained its right to "exclusively make laws from time to time amending the Constitution of Canada," but the Fulton-Favreau's restriction remained as well; that is, such power was again clarified to mean specifically "in relation to the executive Government of Canada and the Senate and the House of Commons." As well, article 52 allowed the provinces to initiate amendments, something they had not been permitted previously (save for amending their own constitutions). Parliament's veto remained; however, with this new provincial power to initiate

⁴⁹ Meekison, "The Amending Formula," *Queen's Law Journal*, 115-6.

amendments, Parliament would no longer be able to simply ignore provincial calls for constitutional reform. To borrow a classic phrase in parliamentary history, the provinces had seized (some of) the constitutional initiative.

The Victoria Charter also allowed for considerable flexibility: no provisions, not even the offices of the Queen or Governor General, required unanimous provincial consent. Instead, amendments would be made under an amending formula which provided for a balance of provinces and population. Article 55 specified what areas would fall under the general formula, three of which were Senate related: "(4) the powers of the Senate; (5) the number of members by which a Province is entitled to be represented in the Senate, and the residence qualifications of Senators; [and] (6) 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."⁵⁰ Also significant, the Senate's power over constitutional amendment was reduced to a ninety-day suspensory veto.

The Victoria Charter, however, also failed to be ratified. Undoubtedly frustrated by such continual failures, in 1978, Prime Minister Pierre Trudeau put forth a constitutional amendment package known as Bill C-60.⁵¹ Trudeau had released a white paper titled *A Time for Action* in which he complained about the

⁵⁰ Hurley, *Amending Canada's Constitution: History, Processes, Problems and Prospects* Appendix 4.

⁵¹ See Gregory Brandt, "The Constitutional Amendment Act (Bill C-60)," *University of Western Ontario Law Review*, 17 (1978-1979): 267-294.

current state of the Canadian Constitution.⁵² Canada's constitution was an odd collection of written and unwritten laws, some of which could only be amended by the British Parliament, and many of which were unknown to most Canadians. As well, there was no preamble with a statement of philosophic principles, and the role of the Supreme Court in interpreting the constitution was uncertain. The white paper was followed by the introduction of C-60, one of (if not the) most ambitious and far-reaching constitutional proposal in Canadian history, indeed much more ambitious than what finally took place in 1982. In addition to adding a Charter of Rights and amending formulae, C-60 would have entrenched the Supreme Court, defined and limited the powers of the prime minister and cabinet, and provided for a House of the Federation in place of the Senate whose members would be "elected" jointly by the House of Commons and the appropriate provincial legislatures. Just as they did after the Statute of Westminster and the BNA 1949 (2), the provinces reacted with alarm and they pressed upon the federal government to first request a ruling from the Supreme Court on the constitutionality of the proposed reforms, specifically those affecting the Senate. This time, the federal government agreed, and the result was "Reference re: Authority of Parliament in Relation to the Upper House (1979)," commonly known as the Upper

⁵² P. E. Trudeau, *A Time for Action: Toward the Renewal of the Canadian Federation*, Ottawa: Supply and Services, 1978.

House Reference.⁵³

Bill C-60 never did get implemented; it died on the order paper as a federal election was held in 1979, one which Joe Clark and the Progressive Conservatives took power with a minority government. However, the Court's decision was delivered before the election and remains the subject of some discussion today. In its decision, the Court ruled that while not all limits on senate tenure were necessarily *ultra vires* Parliament, neither did Parliament have the unilateral right to impose such limitations. "At some point," said the Court, "a reduction of the term of office might impair the functioning of the Senate in providing what Sir John A. Macdonald described as 'the sober second thought in legislation'."⁵⁴ Furthermore, Parliament's unilateral power to reform the Senate was restricted to "mere housekeeping" changes.⁵⁵ The Court ruled that the provinces had a stake in the integrity of the Senate and its ability to function, and so any changes that touched on the Senate's constitutional role required some level of provincial consent.⁵⁶ Furthermore, the Court excluded from section 91.1 those matters that

⁵³ See David E. Smith, "Empire, Crown and Canadian Federalism," *Canadian Journal of Political Science*, 24 (1991): 451-73.

⁵⁴ *Reference re: Authority of Parliament in Relation to the Upper House* (1979), [1980] 1 S. CR. 54, 76.

⁵⁵ Changing the number needed for quorum is commonly cited as an example of a "housekeeping matter." Another might have been Bill S-16, An Act to amend the Constitution Act, 1867 and the Parliament of Canada Act (Speakership of the Senate), introduced in October, 2003 (it did not receive second reading).

⁵⁶ Smith, "Empire, Crown and Canadian Federalism," *Canadian Journal of Political Science*, 468.

could affect "the federal-provincial relationships in the sense of changing federal and provincial legislative powers," as well as "certain sectional and provincial interests such as the Senate."⁵⁷

At this point, it could be useful to recap. Over many years of constitutional negotiations, the provinces achieved several victories. While these victories were not constitutionally entrenched (a patriation agreement having yet to be achieved), they nevertheless provided the basis for what would be accomplished in 1982. These victories were: (1) the scope of Parliament's unilateral amending power was clarified and restricted so that it applied only to its own institutions; (2) the Senate was now acknowledged as a special case; that is, a federal institution in which the provinces had a stake. Therefore some level of provincial consent was needed before amendments affecting the Senate could be made, save for "mere housekeeping" matters. Finally, (3) the principle that some combination of provinces representing the regions of the country as well as the population should form the basis for a comprehensive amending formula. In the next chapter of constitutional negotiations, beginning in 1978 and culminating in the patriation of the constitution in 1982, this last principle would become entrenched as the new general amending formula.

⁵⁷ Luc Tremblay, *Rule of Law, Justice, and Interpretation*, Montreal: McGill-Queen's University Press, 1997, 84.

PATRIATION OF THE CONSTITUTION: INTENTIONS OF THE FRAMERS

If, in the wake of the 1978 initiative, the provinces needed any more evidence that the Trudeau government was quite prepared to patriate the Constitution unilaterally, they certainly found it in 1980, when the Liberals returned to power and Trudeau to the prime minister's office. Trudeau had followed his advisors' recommendations that he leave constitutional issues out of the 1980 campaign, and the ploy seemed to work: the Liberals won a substantial majority. However, during the campaign preceding Quebec's referendum on separation (20 May 1980), he was not so circumspect, and boldly promised a renegotiated constitution if Quebec voters rejected the sovereignty-association vote. That ploy worked too, the "no" votes totalling just under 60%. So Trudeau promptly threatened to request unilaterally that the British Parliament amend the Constitution to allow for an entrenched charter of rights and a Canadian amending formula. Once again, the provinces were alarmed.⁵⁸

The conflicts and controversies, not to mention the drama, surrounding the constitutional negotiations that followed have been well told by others,⁵⁹ and won't be repeated here. My interest at this point in the paper is in discussing the consequences of the federal-provincial negotiations over the various amending

⁵⁸ In general, see Peter H. Russell, *Constitutional Odyssey: can Canadians become a sovereign people?* Toronto: University of Toronto Press, 1992, chapter 8.

⁵⁹ For example, Keith Banting and Richard Simeon, eds, *And No One Cheered: Federalism, Democracy, and the Constitution Act*, Toronto: Methuen, 1983.

formulae for senate reform.

Of course, much of what ended up in the CA 1982 was the result of compromise. The "notwithstanding clause" (section 33), for example, was the compromise allowing the provinces to agree on an entrenched Charter of Rights. What, then, did the provinces get in 1982 and what did they give up, concerning senate reform? For that matter, what did the Senate itself get? Here the compromises become interesting. Stephen Scott explains that in the earlier drafts of what became the CA 1982, written at a time when the federal government stood very much alone in its decision to patriate the constitution unilaterally, the Senate's role in future constitutional amendments was significant:

In the revised proposal of April 24, 1981, the Senate had full co-ordinate power in *all* cases. A beleaguered federal government was in no position to press forward to Westminster, not only against the opposition of eight provinces, but without the concurrence of the upper house in the traditional joint address to the Queen. Co-ordinate power for the Senate was in effect to be the price of the Senate's co-operation.⁶⁰

However, this changed when the federal and provincial governments (without Quebec) agreed on a new constitution in November 1981. No longer

⁶⁰ S. Scott, "The Canadian Constitutional Amendment Process," *Law and Contemporary Problems*, 265.

needing the Senate's support (at least not so much), the federal government inserted provisions for overriding Senate intransigence, in particular over its own reform. The compromise for the provinces was section 42. By involving the provinces through the general formula, section 42 could now "provide the Senate with a substantial degree of entrenchment" (265). On the one hand, then, the Senate actually lost power with the CA 1982. It had been an equal partner in constitutional amendments, but now it could be overruled. On the other hand, the provinces gained power over amendments affecting the Senate, providing a measure of constitutional protection for that body. Therefore, one consequence of CA 1982 was a shift of power over senate reform away from Parliament to the provinces, thereby buttressing the provinces' claim that they had a constitutional stake in the function and position of the Senate.

The second compromise benefiting the provinces was the promotion of the formula now found in section 38. In all previous proposals, the listing of the amending powers began with a general statement under which Parliament was acknowledged as having the power to amend the constitution. Parliament's power in this regard was accepted and assumed to be general and residuary. Over the history of these constitutional negotiations and the proposals associated with them, the scope of the general power was narrowed, as more restrictions were imposed (although sometimes removed again). Soon, however, a principle emerged: the provinces had a general stake in much of the constitution, including certain federal institutions, such as the Supreme Court and, more specifically for our purposes,

the Senate. Amendments affecting such institutions, then, should involve the provinces at some level. Rather than add a long and growing list of restrictions to Parliament's general power, a new general power was created. This became entrenched with the CA 1982 as the general authority for amendment under section 38, the formula that requires, in addition to Parliament, the consent of two thirds of the provinces with 50% aggregate population. It is no accident that Part Five, the amending formulae of the CA 1982, begins with section 38, nor is it a coincidence that section 38 – and it alone – is referred to as the “general formula” by the gloss.

What of the general language still contained in section 44? Here we can turn again to the context in which this section was written. The intention of section 44 was clearly explained to the 1981 Special Joint Committee on the Constitution by then-justice minister, Jean Chretien. Clark's former minister for Indian and Northern Affairs, the Honourable Jake Epp, was a member of the 1981 Special Joint Committee, which examined earlier drafts of what would become the CA 1982. Epp expressed concerns with the powers that section 44 provided Parliament in respect to reforming the Senate, and so introduced an amendment to remove the term “Senate” from the clause “in relation to the executive government of Canada or the Senate and House of Commons.” In doing so, Epp maintained that “[t]his amendment would assure that the role and scope of the Senate could not be changed simply through the House or a federal initiative.” However, Epp was satisfied with the assurances provided by Chretien, who suggested that the

amendments to the Senate foreseen by the framers of this section were well in keeping with the "housekeeping" measures insisted upon by the Court in the Upper House Reference, such as, in Chretien's own example, changing quorum.⁶¹

In the end, agreement was achieved amongst a sufficient number of provinces; sufficient, anyway, to satisfy the requirements established by the ruling in the Patriation Reference case (Quebec's refusal to "sign" the new constitution being the notable exception). The British Parliament passed the Canada Act (1982),⁶² which in turn provided Canada with an amended constitution, including, among other items, a Charter of Rights and Freedoms and a complex set of formulae by which constitutional amendments could now be completed entirely in Canada. The provinces retained their unilateral right to amend their own constitutions with section 45, and the Parliament of Canada's veto role in all other amendments were guaranteed in the other sections, that is, 38, 41, 42, 43 and 44. Section 47 provides a means of overriding possible Senate intransigence. But the role of the provinces to be directly involved in constitutional amendments was now fully affirmed and entrenched.

⁶¹ *Minutes of proceedings and evidence*. Nov. 6, 1980-Feb. 13, 1981, Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada (53:50). I am indebted to Professor John McEvoy, whose testimony before the Senate Standing Committee on Legal and Constitutional Affairs pointed me to this reference (cited below).

⁶² Which included the text of what would be the Canadian Constitution Act 1982, and so was printed in both French and English, marking (I believe) the first time since the Middle Ages that the British Parliament passed an act in French.

PART TWO

In this part of the paper, I examine the constitutionality of the legislation in question, Bill C-7. Part Two is also divided into sections. The first summarizes the historical survey of Part One, and tries to show how this history informed the creation of the several amending formulae found in Part V of the Constitution Act 1982. The second section challenges the argument that the Parliament of Canada's unilateral amending power (section 44) is meant to parallel, and therefore be equivalent to, the provincial unilateral power of section 45. It also argues that under section 44, the Parliament of Canada did not inherit the full range of amending powers it had achieved with the BNA 1949 (2). Section three then examines whether the means of electing senators authorized by Bill C-7 is in violation of the amending formula, section 42 (b). Section four asks the same question concerning the limitation of senate tenure.

Introduction:

Through Bill C-7, the Government of Canada is attempting to do two things, both of which it has tried previously.⁶³ The first is to limit the term of senators' tenure. At present, there are no term limits on a senator's tenure. Senators are

⁶³ See Sebastian Spano, *Legislative Summary of Bill C-7: An Act respecting the selection of senators and amending the Constitution Act, 1867 in respect of Senate term limits*, Publication No 41-1-C&-E 27 June 2011.

required to retire at age 75; however, retirement does not constitute a term limit (as I explain below). The second is to provide a means by which provinces can select (or elect) the senators representing their provinces.

The Government of Canada is attempting to accomplish both these goals through Bill C-7. The bill, however, is an odd amalgam of a constitutional amendment and ordinary legislation. The essence of the Government of Canada's justification for Bill C-7 is that, one, it has the constitutional power to limit the term of senators under the Constitution Act 1982, section 44. Therefore, the legislation limiting senators' tenure to one non-renewable nine-year term would be a constitutional amendment, authorised under section 44.

However, the Government acknowledges that it cannot use section 44 to formally change the method of selecting senators. At present, senators are appointed by the Governor General, as explained in section 24 of the Constitution Act 1867. To provide for the election of senators would require an amendment to that act through the use of section 42 (1), which in turn requires the procedure described in section 38(1). The Government of Canada is arguing that the changes it proposes are not an attempt to amend the Constitution, because the methods of selecting senators found in CA 1867, section 24, remains the same: senators are still appointed by the Governor General. The elections envisioned by Bill C-7 are meant only to provide guidance to the Prime Minister in his or her choice of nominees. This argument is problematic, and I will address it further on in this

paper.

My conclusion in reading Bill C-7 is that in its entirety the bill falls outside the Government of Canada's unilateral amendment power (section 44). The bill's attempt to limit senate tenure constitutes a change in the powers of Senate, and therefore cannot be changed except through section 42. As well, the bill's attempt to provide a means by which the provinces can participate in the selection of senators, while clever, is in fact a real attempt to modify the means by which senators are selected, and therefore is also beyond the amendment powers contained in section 44. My argument in this respect examines, first, the constitutional history of section 44, the study of which I maintain is essential in understanding the limitations of section 44, and which has been provided above. Second, I examine the impact of both the limitation of senator tenure in terms of the effect this would have on the power of the Senate. Third, I examine the impact of the method of selecting senators proposed by Bill C-7 on the current practice, including the current constitutional convention. Finally, I argue that the framers of the Constitution Act 1982 were well aware of the "constitutional odyssey" (to borrow Peter Russell's phrase) that preceded their deliberations, and were therefore trying to find a way to cover (and balance) all possible contingencies. Bill C-7 is an attempt to undermine those efforts.

SECTION ONE:

The first part of this paper examined the constitutional history of section 44. In this historical survey, I argued that Part V of the CA 1982 was meant to be a corrective for the BNA 1949 (2), which in turn amended section 91 of the BNA 1867 and provided "sweeping" amending powers to the Parliament of Canada. Although the Government of Canada at the time claimed that BNA 1949 (2) was not meant to undermine the constitutional rights of the provinces, this was not the way the BNA 1949 (2) was regarded, either by the provinces or by constitutional scholars. Prior to 1949 and after, and continuing up to their victory in 1982, Canada's provinces argued consistently and persistently that they had a stake in federal institutions such as the Senate and that any changes to that body required their consent. The several amending formulae found in the CA 1982 (Part V) represent the culmination of a very long struggle, but one which the provinces finally secured their constitutional rights concerning amendments which affected the federation.

SECTION TWO:

In this section of the paper, I will first focus on the claim that section 44 was meant to provide the Government of Canada with the same unilateral constitutional authority that was found in the BNA 1867, section 92.1 and that is now found in CA 1982, section 45.

The argument advanced by the Government of Canada maintains that there is a direct parallel between the provincial amendment powers found in CA 1982 section 45 and the federal amendment powers found in CA 1982 section 44. Furthermore, the historical evolution of the BNA 1867, 92.1, by which it became CA 1982 section 45, corresponds directly to the historical evolution of BNA 1949 (2), section 91.1. That amendment power is now found in CA 1982 section 44. The preface to BNA 1867, section 92, granted to the provinces the power to "exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated." Subsection 92.1 read as follows: "The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province." In 1867, the three colonies united by the BNA 1867 had upper assemblies. Over time, each province abolished these assemblies and did so under the authority granted to them under the BNA 1867, section 92.1. Abolishing an upper assembly certainly constitutes an amendment to the Constitution of the Province. With the patriation of the constitution in 1982, section 92.1 was repealed, and replaced with what is now section 45 of the CA 1982. Were a province to decide, perhaps, to reconstitute an upper assembly, it could do so under section 45. Were a province then to decide to change the means of selecting members for such an assembly, or the tenure of such members, it could do so under section 45. The federal government should, then, have the same powers under section 44.

However, to quote Alexander Brady again, "the analogy is false." First, the two sections (44 and 45) are not parallel constructions. Section 44 reads: "Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons." Section 45 reads: "Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province." In section 44, the powers to amend the Constitution of Canada, which are to be "in relation to the executive government of Canada or the Senate and the House of Commons," are nevertheless subject to sections 41 and 42. Section 42, in turn, qualifies what amendments to the Senate can be made under section 44. Amendments to the "powers of the Senate and the method of selecting Senators" (subsection 1.b) must instead follow the amending procedure found in section 38.

Furthermore, section 42 does not allow for a province to opt out, as it could under a section 38 amendment were it to invoke section 38.3-4. Neither does it require that section 38.2 be applied, in the case in which a specific province were it to argue that the amendment derogated from its legislative powers.⁶⁴ At first glance, this might seem surprising; however, both these provisions were designed

⁶⁴ Section 38.2: "Majority of members; An amendment made under subsection (1) that derogates from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province shall require a resolution supported by a majority of the members of each of the Senate, the House of Commons and the legislative assemblies required under subsection (1)."

to provide provinces (probably the smaller provinces primarily) with some comfort that they would not find themselves outmanoeuvred by the other parties in an amendment campaign. It was, then, designed to help facilitate the amending process, to make it easier to obtain provincial consent. Amendments to the Senate, however, were not supposed to be easier, and so the stakes for amending the Senate were set a bit higher.

As well, although the unilateral power to amend a provincial constitution might seem to be quite extensive, the several amending formulae found under Part V make it clear that provinces can only so amend their constitutions if such changes do not affect the rights and powers of the other provinces or the Parliament of Canada. I have already mentioned the protections for provinces found in section 38.2-4, although admittedly these do not apply in the case of Senate reform. They do, however, articulate a principle that provinces affected by a constitutional change have certain rights to consent. Such a principle is also found in section 43, the "bilateral formula."

Section 44, then, is a limited amending power, and cannot be used to alter the power of the Senate nor the method by which senators are protected. It was not meant to be a parallel power to section 45, nor is it the equivalent to the repealed BNA 1867, section 91.1.

SECTION THREE:

In the next section, I will address the question of whether the method of selecting senators proposed by Bill C-7 does in fact constitute an alteration as understood by section 42. The CA 1867, section 24, empowers the Governor General "in the Queen's Name, by Instrument under the Great Seal of Canada," to appoint senators. By constitutional convention, such appointments are made on the advice of the Prime Minister. This convention in turn is grounded in CA 1867, section 13: "The Provisions of this Act referring to the Governor General in Council shall be construed as referring to the Governor General acting by and with the Advice of the Queen's Privy Council for Canada." In 1935, under Prime Minister Mackenzie King, an Order-in-Council (P.C. 3374, 25 October 1935) titled "Memorandum Regarding Certain of the Functions of the Prime Minister" stipulated that the nominations to the Senate was a prime ministerial prerogative. We can also say, then, that the method of selecting a senator in Canada is through the nomination of a candidate by the Prime Minister to the Governor General. This too is a constitutional convention.

The question, then, is whether Bill C-7 changes this convention. I concede that Bill C-7 does not directly affect the convention that the Governor General must accept the nomination provided by the Prime Minister. But it does limit the scope of the Prime Minister's discretion in so choosing who he or she will nominate, and it changes the means by which those nominations are determined. It thus

compromises, or at least alters the nature of, the advice the Prime Minister is obliged to provide the Governor General. Furthermore, Bill C-7 clearly states that it is designed to provide for the election of senators.⁶⁵ It seems strange then to argue that the bill is constitutionally defensible, simply because it cannot guarantee that its objectives will be realized. Electing senators constitutes a change in the method of selecting senators. Bill C-7, constitutionally flawed or not, is an explicit attempt to do just this. Therefore, Bill C-7 is in violation of the amendment procedure set out in the CA 1982, section 42 (b).

SECTION FOUR:

We can now turn to the question of whether limiting senate tenure affects the power of the upper assembly. I am not addressing the question of whether a limited term for senators is a good or bad idea. My focus here is whether changing senate tenure from the present system to one of nine-year, non-renewable terms, changes the nature and so the power of the Senate.⁶⁶

⁶⁵ Note the Preamble to C-7: "Whereas it is appropriate that those whose names are submitted to the Queen's Privy Council for Canada for summons to the Senate be determined by democratic election by the people of the province or territory that a senator is to represent."

⁶⁶ Others have argued this point with greater emphasis, eloquence and precision. See, for example, University of New Brunswick constitutional law professor John McEvoy's brief delivered 22 March 2007 before the *Senate Standing Committee on Legal and Constitutional Affairs*. Bill S-4, an earlier attempt to limit senate tenure to eight years, was the focus of the testimony. Professor McEvoy concluded by arguing that: "The decision to alter Senate tenure to eight years . . . is of such importance that, in my opinion, it goes beyond a matter of interest to the federal Parliament alone. It is not an internal modification to the Senate; it is a structural change that should involve a level of provincial consent. The historical and structural approaches to constitutional interpretation support

This is a very difficult question to answer, because all of our examples must be entirely hypothetical. But one way to address this question is to speculate whether limiting senate tenure to, say, one year, and which the Supreme Court itself wondered in the Upper House Reference, would mean that the power of Senate was now altered? Surely a one-year term would place serious constraints on the Senate's ability to do its job. A one-year term would certainly not permit the Senate to provide its intended role of a chamber of sober, second thought. It must be true, then, that limitations on terms can affect the Senate's ability to perform its duties as expected by the Constitution. The question becomes one of degree.

This point was addressed by the Supreme Court in the reference case, *Authority of Parliament in Relation to the Upper House*.⁶⁷ One of the questions asked of the Court in that case dealt with the limitation of tenure, and argued that such a limitation was in keeping with the previous 1965 amendment which imposed the mandatory retirement of senators at age seventy-five. However, the Court disagreed that mandatory retirement and limited terms were constitutionally similar: "The imposition of compulsory retirement at age seventy-five did not change the essential character of the Senate." However, limiting tenure might very well. A common retirement age would not, in itself, determine a specific tenure for senators, and would preserve one of the characteristics of the Senate as a

this conclusion." *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, Issue 23 - Evidence, 22 March 2007.

⁶⁷ Re: Authority of Parliament in relation to the Upper House, [1980] 1 S.C.R. 54 (1979).

chamber in which people served for a variety of years, thus providing a range of life and legislative experiences. Limiting tenure, on the other hand, could eventually create a body in which all senators had the same or close to the same periods of office. Furthermore, if tenure limitations were permissible, then what would prevent a government from limiting tenure to five years, three years, one year? Sure a senate with a term of one year would be a different senate than the one we have now (or had then).⁶⁸

This is not a frivolous point; constitutional law is, by necessity, fundamentally vague. Drawing an absolute line between when a term limit is too short and acceptably short is impossible. Therefore, constitutions find other means for dealing with such questions. One is to avoid answering the question and instead substituting a process for the answer. No, we don't know how long an optimal term for a senator is, so instead we will force any changes to such terms to be conducted through a complex process. Then, by the time the process is over, we can at least be assured that most, and maybe all, of the contingencies will be discussed and incorporated in whatever decision emerges.⁶⁹

⁶⁸ For discussion, see Ian Bushnell, *The Captive Court: A Study of the Supreme Court of Canada*, Montreal: McGill-Queen's University Press, 1992, 574, and Serge Joyal, *Protecting Canadian Democracy: The Senate You Never Knew*, McGill-Queen's University Press, 2003, 115.

⁶⁹ On vagueness in law, see Timothy Endicott, "Law is Necessarily Vague," *Legal Theory*, 7 (2001): 379-85, and Dorothy Edgington, "The Philosophical Problem of Vagueness," *Legal Theory*, 7 (2001): 371-78.

We do not know what effect a nine-year term will have. The debate so far seems to be caught up in trying to decide whether the effect of a nine-year term would be deleterious. It is quite possible that nine-year terms may be salubrious. But this is not the point. The point is that limiting the terms to nine years constitutes a change warranting careful consideration, and is of such a nature that provincial interests will be involved. Furthermore, senate reform is a complex and entwined affair, so that changes to tenure affect many other aspects, including the powers of Senate and senators. The effects of senate reforms cannot easily be predicted, nor can such effects be determined with any certainty. However, their unpredictable nature is precisely why such attempts at senate reform should only be conducted through the general formula. That is, I repeat, one of the reasons why the general formula is there: to give all interested parties a chance to consider hitherto unforeseen effects of proposals for constitutional change.

Finally, consider the amending formulae themselves. Amendments to the amending formulae can only be made under the unanimity formula found in section 41. But with the exception of Section 45 and the exceptions provided by the override procedures in section 47, all amendments to the Constitution require the approval of the Senate. Indeed, the Senate can initiate amendments. What, then, is the Senate as it is defined under the Constitution, specifically in relation to amendments? More specifically, would changing the Senate constitute a change to some of the amending formulae? If so, such a change could require the unanimous consent of the provinces.

Certainly, it will be argued, this cannot be right. If unanimous consent were always required, then no amendments affecting the Senate could be made except with the approval of Parliament and all ten provinces; the other amending formula would be redundant and impossible to use. Yet surely this is precisely why section 42 is there. It anticipates that changes to the Senate may affect other parts of the constitution. It recognizes that those effects are not always clear or apparent. Under this clause, the provinces have an opportunity to consider whether their interests are affected, as does the public at large. But rather than impose an impossibly-rigid formula, section 42 provides a compromise. I am arguing, then, that section 42 is specifically designed to deal with such amendments whose effects are fundamentally difficult to determine.

CONCLUSION:

Constitutional change in Canada is a complicated, tedious and at times impossible affair. However, the rules governing amendments are there precisely to ensure that changes made to the Constitution, and to those institutions defined by it, are conducted with the appropriate level of consultation. The amending formulae found under Part Five of the CA 1982 are not perfect. Some are probably too strict; perhaps others are too lenient. But they provide a balance between the expedience of unilateral powers of amendment and the rigidity of unanimity. Section 38 provides that compromise, and section 42 enhances it.

I do not claim the case that I have made here against unilaterally imposing nine-year terms on the Senate is airtight. I doubt such a case could be concocted. And were the Government restricted to choosing between unilateral amendment or one requiring unanimity in making its reforms, then I might well be sympathetic to the unilateral argument. However, the CA 1982 provides a third option. It is there to provide a sensible compromise between those two extremes. Section 38 and its companion section 42 are there precisely because it is difficult to know what effects constitutional changes will have, in particular over those institutions meant to serve the nation as a whole, like the Senate. But both these sections recognize that changes will need to be made, so they provide a reasonable way of doing so, and one befitting a federation. To circumvent these sections is to undermine the federal integrity of the Constitution.



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