

Whose Senate is it anyway?

Peter J. Carver*

This is no way to reform the Senate of Canada — but it just may be the only way. That is the dilemma that will face the Supreme Court of Canada when it hears a Reference case on proposals to turn the Senate into a partly or somewhat elected body in November 2013.

For the second time in just over 30 years, the Government of Canada is asking the Supreme Court of Canada whether Parliament has the unilateral authority to make changes to the Senate without agreement of the provinces. In 1980, the Government of Prime Minister Pierre Trudeau sought not merely to alter the role of the Senate and the method for appointing its members, but to change the very name of the institution — making it the House of the Federation. The Supreme Court said “no”.¹

One year later in the *Patriation Reference*² the Court sent the eleven governments of Canada off to find a ‘substantial consensus’ on constitutional reform. This the governments famously did, with the exception of Quebec, but not with respect to the Senate. That question was left for another day, a day which has never since come. And so, three decades later, a different Canadian government, with significantly different priorities, is returning to the Court in pursuit of a different answer.

I. The proposal

The precipitating event leading to the reference to the Court that is now scheduled to be heard over three days in mid-November 2013 is the Harper Government’s introduction of Bill C-7, the *Senate Reform Act*. He introduced this Bill into Parliament shortly after winning a majority

government in May 2011.³ The proposed *Senate Reform Act* purports to make changes to both the process for appointing and the tenure of Senators. First, the statute would oblige the Prime Minister of the day to “consider” the names of those persons who won election at the provincial level for Senate nomination when recommending appointees to the Governor-General.⁴ Second, newly appointed Senators would be limited to a non-renewable nine-year term, rather than the current lifetime appointment to the mandatory retirement age of 75.⁵ Of these two changes, only the second is proposed to be effected by amendment to the *Constitution Act, 1867*.⁶ The first change operates on the basis of the existing system for appointment of Senators by the Governor General, which by convention, is made on the advice of the Prime Minister. What the *Senate Reform Act* would add to this process is a standard model for Senate elections to be held by willing provinces, and the aforementioned obligation on the Prime Minister to consider the results of those elections. It is the clear hope and intention of the Government that in this way, a new convention will come into being, binding future governments to appoint only election winners to vacant Senate seats.

On its merits this is a dubious proposal. This is not because the idea of electing Senators is an inherently bad one. Recent scandals about the place of residence and expense accounts of Senators like Mike Duffy have brought the reputation the current appointed institution to an all-time low. Apart from outright abolition, election of Senators has long seemed like a logical part of any solution. The problem with Bill C-7, however, is its improvised and ill-

considered nature. The Bill introduces a process of election without making any changes to the role and authority of the Senate in the Canadian political system. In addition, it rests on province-by-province adoption and elections that will not align with Senate vacancies, leading to a hodge-podge of outcomes and statuses.

With respect to the first issue, it is important to recall that under the Constitution of Canada, the Senate exercises virtually equal power in the legislative process to that of the House of Commons. The only difference lies in the inability of Senators to introduce money bills into Parliament. The lawful power of the Senate largely explains why the framers in 1867 chose to make it an appointed body. As Christopher Moore points out, most of the framers were devoted to the principles of responsible elected government and representation by population.⁷ They believed that an unelected Senate would lack the political legitimacy to exercise its full authority, and in so doing to obstruct the will of the elected House. In this, they proved prescient. With Bill C-7, Canada moves in the direction of the United States, which famously divides legislative power between three electorally legitimated branches. One might think that the worsening governing gridlock which that country has experienced over the last ten to twenty years would serve as a cautionary tale for Canadians and their federal government, but that seems not to be the case.

A similar quality of improvisation characterizes the proposed move to term limits and the electoral and nomination processes. The former is necessary to produce any meaningful regularity to Senate elections. By making the terms non-renewable, however, the accountability of elected Senators is severely reduced. Elections will be held in those provinces that agree to adopt the federal formula, but not in others. Where elections are held, they will not necessarily coincide with vacancies in the Senate, but may happen years in advance.

In short, the *Senate Reform Act* would plunge the country into a new era of governance, but with little discussion or forethought of the consequences. This does not seem like the way a mature democracy should function.⁸ In Canada,

when a 'maturity deficit' threatens our basic political institutions, we have sometimes called on the Supreme Court to sort things out. Can we expect that to happen in this instance?

II. The references

Shortly after the announcement of Bill C-7, the government of Quebec, then led by the federalist Premier Jean Charest, declared its opposition to this unilateralist proposal. In May 2012, Quebec referred the constitutionality of the *Senate Reform Act* to the Quebec Court of Appeal. In the Fall of 2012, Prime Minister Harper announced that his government would seek to pre-empt the Quebec reference by initiating its own reference concerning Bill C-7 to the Supreme Court of Canada. However, it took another four months before the Attorney General of Canada got around to filing the reference questions with the Court. And what a set of questions they are!

If you are going to go to the trouble of asking the Supreme Court of Canada to rule on a major government initiative, you might as well ask the Justices a whole host of questions and give them a raft of alternatives. That at least seems to be the Harper government's philosophy. One might say they have gone well past the point of wanting to engage in a dialogue with the Court, to that of looking for a rambling after-dinner conversation. These are the six Questions asked in the federal reference:

1. *In relation to each of the following proposed limits to the tenure of Senators, is it within the legislative authority of the Parliament of Canada, acting pursuant to section 44 of the Constitution Act, 1982, to make amendments to section 29 of the Constitution Act, 1867 providing for*
 - a. *a fixed term of nine years for Senators, as set out in clause 5 of Bill C-7, the Senate Reform Act;*
 - b. *a fixed term of ten years or more for Senators;*
 - c. *a fixed term of eight years or less for Senators;*
 - d. *a fixed term of the life of two or three Parliaments for Senators;*

- e. *a renewable term for Senators, as set out in clause 2 of Bill S-4, Constitution Act, 2006 (Senate tenure);*
- f. *limits to the terms for Senators appointed after October 14, 2008 as set out in subclause 4(1) of Bill C-7, the Senate Reform Act; and*
- g. *retrospective limits to the terms for Senators appointed before October 14, 2008 ?*

2. *Is it within the legislative authority of the Parliament of Canada, acting pursuant to section 91 of the Constitution Act, 1867, or section 44 of the Constitution Act, 1982, to enact legislation that provides a means of consulting the population of each province and territory as to its preferences for potential nominees for appointment to the Senate pursuant to a national process as was set out in Bill C-20, the Senate Appointment Consultations Act?*

3. *Is it within the legislative authority of the Parliament of Canada, acting pursuant to section 91 of the Constitution Act, 1867, or section 44 of the Constitution Act, 1982, to establish a framework setting out a basis for provincial and territorial legislatures to enact legislation to consult their population as to their preferences for potential nominees for appointment to the Senate as set out in the schedule to Bill C-7, the Senate Reform Act?*

4. *Is it within the legislative authority of the Parliament of Canada acting pursuant to section 44 of the Constitution Act, 1982 to repeal subsections 23(3) and (4) of the Constitution Act, 1867 regarding property qualifications for Senators?*

5. *Can an amendment to the Constitution of Canada to abolish the Senate be accomplished by the general amending procedure set out in section 38 of the Constitution Act, 1982, by one of the following methods:*

- a. *by inserting a separate provision stating that the Senate is to be abolished as of a certain date, as an amendment to the Constitution Act, 1867 or as a separate provision that is outside of the Constitution Acts, 1867 to 1982 but that is still part of the Constitution of Canada;*
- b. *by amending or repealing some or all of the references to the Senate in the Constitution of Canada; or*

- c. *by abolishing the powers of the Senate and eliminating the representation of provinces pursuant to paragraphs 42(1)(b) and (c) of the Constitution Act, 1982?*

6. *If the general amending procedure in section 38 of the Constitution Act, 1982 is not sufficient to abolish the Senate, does the unanimous consent provision set out in section 41 of the Constitution Act, 1982 apply?⁹*

A number of points might be made about the questions in the federal Reference. First, only questions 1a and 3 deal with Bill C-7. The other questions deal with proposals not currently being made by the Government of Canada, including a different proposal made in a Bill placed before Parliament in 2006 that fell off the order paper when that Parliament was prorogued. Second, the idea of abolishing the Senate raised by Questions 5 and 6 has never been a policy option looked on favourably by the governing Conservative Party, and is one largely associated with the opposition New Democrats. Third, Questions 5 and 6 are unique in Canadian constitutional law history for asking the Supreme Court not merely whether a particular proposal is constitutional, but also how it can be accomplished.

The federal Reference is quite distinct in tone and content from the Quebec Reference. The latter asks three questions about Bill C-7: first, does it involve an amendment to the office of the Governor-General that would require unanimous agreement of all eleven governments under section 41(a) of the *Constitution Act, 1982*; second, does it involve an amendment to the Constitution of Canada with respect to the selection of Senators that falls within section 42(1)(b) of the *Constitution Act, 1982* and so must be made pursuant to the '7 + 50' formula in section 38 of the CA, 1982; and third, does it involve an amendment to the Constitution "in relation to the fundamental features and role of the Senate" that would also fall under section 38?¹⁰

The questions in the Quebec Reference go to the heart of the Government of Quebec's constitutional objection to Bill C-7: that the changes proposed in the Bill are not 'housekeeping' matters within the sole authority

of Parliament, but effect changes to a national institution to which the provinces must consent, either unanimously or under the '7 +50' formula. The third question in the Quebec reference directly invokes the ruling made by the Supreme Court of Canada in the 1980 *Upper House Reference*.

III. The law

Quebec and Canada seem likely to offer two distinct legal approaches to the Supreme Court of Canada in the Senate Reference of 2013. Quebec will urge on the Court a broad historical reading of the Senate's role and structure, citing the precedent of the 1980 case. The Government of Canada will argue for a narrower textual approach. In brief, this is what each line of argument entails.

History

Thirty-five years ago the government of Prime Minister Pierre Trudeau referred to the Supreme Court of Canada a series of questions going to Parliament's authority to make unilateral changes to the Senate, changes not embodied in the form of a Bill. The government asked the Court for its opinion concerning abolition of the Senate, changing the proportion of Senate seats held by each province, eliminating the Senate's veto over non-money bills, and altering the tenure and qualifications of Senators. The reference also asked about options for selecting members of the Upper House, including appointment by provincial legislatures and direct election to the Senate. The Court replied that Parliament could not unilaterally abolish the Senate, alter representation of the provinces, eliminate the veto or turn the Senate into an elected body. The Court declined to state an opinion on the other possibilities raised going to the selection of Senators, or on tenure or qualifications, owing to the "absence of a factual context."

The context in which the questions were asked was, of course, the period of intense constitutional wrangling preceding the adoption of the *Constitution Act, 1982* and its formula for amending the Constitution.¹¹ The *Upper House*

Reference turned out to be a form of dry run for the *Patriation Reference* in 1981, in which the Court ruled that while was lawful for the federal government to amend the Constitution in ways that affected provincial powers, this would breach a convention that any such amendments called for a "substantial measure" of provincial consent.

At the time and since it has commonly been said that the *Constitution Act, 1867* contained no domestic amending formula. However, this is not strictly true. As of 1978, the *BNA* contained section 91(1), which listed as the first head of federal legislative power

The amendment from time to time of the Constitution of Canada, except as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces....¹²

Section 91(1) had been inserted into the *BNA* by act of the U.K. Parliament in 1949. Much of the argument and analysis in the *Upper House Reference* concerned the significance of section 91(1), and whether the Senate was encompassed by the phrase "Constitution of Canada", making it subject to unilateral federal amendment.

The Supreme Court concluded that section 91(1) represented a mere formalization of an accepted practice whereby the U.K. Parliament would amend the *BNA* in response to unilateral federal requests with respect to matters that did not touch on federal-provincial powers, i.e., on "housekeeping" matters of sole concern to the federal government. The Court cited several post-1949 amendments which it believed fell into this category, including the 1965 amendment that introduced compulsory retirement for Senators at age 75, and the increase in Senators from 102 to 104 to allow for one appointee from each of the two Territories, enacted in 1975. These changes, the Court said, did not "in any substantial way affect federal-provincial relationships."¹³ Could the same be said for abolition, for changes in provincial representation in the Senate, or for turning the Senate into an elected body?

To answer these questions, the Court felt it necessary to delve into the historical record to

recover what the delegates to the constitutional conferences in the 1860s understood to be the role of the Senate in Canadian federalism. The Justices quoted John A. Macdonald as saying that the Upper House was intended to protect the interests of the three 'sections' making up confederation: Quebec, Ontario and the Maritimes. It was for that reason that each section was to have equal representation. The Court further cited George Brown as having stated that equal representation of the three sections in the Senate was the *sine qua non* of agreement by Quebec and the Maritimes to representation by population in the House of Commons. On this basis, the Senate as structured and empowered in 1867 was an important institution of federalism, and not one 'owned' exclusively by the national government. The Court said this about the "essential features" of the Senate in this regard:

As previously noted, the system of regional representation in the Senate was one of the essential features of the body when it was created. Without it, the fundamental character of the Senate as part of the Canadian federal scheme would be eliminated.¹⁴

With respect to the questions asked in the *Upper House Reference*, that took care of abolition and re-distribution of seats. It also meant that reducing the Senate's veto over all but money bills to a mere suspensive (time-limited) veto was 'impairing' the legislative power of the Senate and thus also beyond unilateral federal reach. However, the Court declined to rule on whether other suggested amendments went to the fundamental character of the Senate, on the basis that this would depend on the specific measures proposed. On the question of reducing Senators' terms of office, the Court said:

At some point, a reduction in 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.' The Act contemplated a constitution similar in principle to that of the United Kingdom, where members of the House of Lords hold office for life. The imposition of compulsory retirement at age seventy-five did not change the essential character of the Senate. However, to answer this question we need to know what change of tenure is proposed.¹⁵

This latter question, in the form of a nine-year term limit, has now been put squarely before the Court in 2013.

Text

By its reference questions, the Government of Canada appears to be largely ignoring the precedent represented by the *Upper House Reference* and relying instead on the text of the amending formula in the *Constitution Act, 1982*. This makes a certain amount of legal sense. After all, the ruling of the Court in 1980 was almost immediately superseded by the new constitutional deal represented by the *Constitution Act, 1982*. A crucial part of that deal was the agreement on express wording for an amending formula. In the circumstances, the formula might well be viewed as exhaustive. Operating on that basis, the issues can be fairly neatly circumscribed. The amending formula is contained in Part V of the *Constitution Act, 1982*, comprising sections 38 through 49. Authority to amend the Senate is referred to in sections 44 and 42, as follows:

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

42(1) An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with section 38(1):

(b) the powers of the Senate and the method of selecting Senators;

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

Section 41 sets out certain matters that can be amended only with unanimous agreement of Canada and all provinces. Only one of these matters, the provision in section 41(b) that guarantees each province a minimum number of seats in the House of Commons equal to those it has in the Senate, touches on the Senate. Section 38(1) is the general amending formula that requires the agreement of Canada together with

two-thirds of the provinces having at least 50% of the country's population (the '7 + 50' formula). In other words, Part V appears to provide that Parliament may unilaterally legislate with respect to the Senate, other than with respect to the "powers of the Senate and the method of selecting Senators", which must follow the 7 + 50 formula.¹⁶

The Government of Canada's argument on the text will be that its proposal to reduce Senate terms to nine years does not touch on the "powers of the Senate", and that the proposal to facilitate merely 'advisory' elections of Senate nominees by the provinces neither affects those powers nor alters "the method of selecting Senators." On the first point, Canada will no doubt argue that the phrase "powers of the Senate" refers to the authority of the Senate as a whole going to such roles as voting on legislation and amending the Constitution¹⁷, and not to the political status of individual Senators. All other Senate activities, including holding committee investigations, follow from the legislative power.

With respect to the "method of selecting Senators", the federal government will argue that this refers simply to the mechanism set out in section 24 of the *Constitution Act*, 1867:

24. The Governor General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon qualified Persons to the Senate; and, subject to the Provisions of this Act, every Person so summoned shall become and be a Member of the Senate and a Senator.¹⁸

Bill C-7, the government maintains, makes no change to this procedure. Senators will continue to be named by the Governor General. The convention will continue whereby the Governor General acts on the advice of the Prime Minister. All Bill C-7 does, according to the federal government, is impose a non-binding obligation on the Prime Minister to consider the outcome of elections for Senate nominees held in provinces that follow the electoral formula set out in the Schedule to the Bill.

The appealing simplicity of these arguments turns in part on saying that there is no longer a

need to consider what forms an "essential feature" or part of the "fundamental character" of the Senate. The Supreme Court identified those as key questions at a time when the Constitution lacked an amending formula. Within two years, those questions were supplanted by the text of Part V. Moreover, section 91(1) of the *Constitution Act*, 1867, under which the *Upper House Reference* was argued and decided, was repealed as part of the 1982 deal.

Quebec's response to this position is that the deal reached in 1982, certainly with respect to the Senate, intended to and achieved no more than to capture the *status quo* following the *Upper House Reference*. That is, Prime Minister Trudeau and the nine Premiers who agreed in November 1981 to a new amending formula, had preoccupations other than Senate reform, and no desire to add the Senate to their agenda. The Court had spoken only the year before and the federal and provincial leaders were content to let a now dormant issue lie. Howard Leeson's record of the *in camera* conference discussions appears to confirm this, noting only a brief exchange between the leaders to the effect that Senate reform would be rolled into the '7 + 50' formula.¹⁹ On this account, when it came to drafting the new constitutional provisions, sections 42 and 44 were intended to replace section 91(1) as interpreted by the Court, not to change the understanding of 'essential features,' nor the distinction between those and 'housekeeping measures.'

This, then, is Quebec's position: Parliament lacks the authority to unilaterally amend "essential features" of the Senate that go to the "fundamental character" of its place in confederation. That place involves a recognition that the Senate is not an internal organ of the federal government and legislature, but an institution that represents regional interests, and most particularly, the political duality that makes up Canada. The effect of the *Constitution Act*, 1982 was to clarify that reform of the Senate requires the consent of Quebec and other provinces, and not to reduce the institution's "fundamental character" to a narrow understanding of the "powers" or "method of selecting Senators."

IV. The politics

An odd feature of 2013's Senate References is that neither of the principal parties appear to be entering into the judicial battle with strong and settled views on the substantive issue of what the Senate should become. Governments of Quebec, federalist and sovereigntist alike, have generally not adopted substantive positions with respect to reform of the Senate. There is little in the public record to suggest that the people or governments of Quebec have a particular fondness for the existing institution, but neither have they made changes to the Senate any significant part of the various proposals with respect to meeting Quebec's historic constitutional interests. What does the Senate represent to Quebec, and why has the province moved to oppose the relatively modest changes proposed by the Harper government? The answer lies in the value the Senate has to Quebec as a matter over which its agreement is needed in order to move forward in the constitutional realm, in other words, as a bargaining chip. The degree to which the Senate can be reformed without Quebec's participation represents a weakening of Quebec's power within Confederation.

For its part, the Conservative government of Prime Minister Harper inherited the grail of a "Triple E Senate" (elected, equal and effective) from its predecessor, the Reform Party of Canada. The proposal in Bill C-7 falls far short of that. In fact, it might be termed the Single E proposal. There is no present prospect for achieving a Senate that gives equal representation to all provinces, a measure that undoubtedly requires unanimous agreement of all provinces, including Quebec, and would come about only as part of a larger constitutional package providing trade-offs for all concerned. "Effectiveness", like beauty, is in the eye of the beholder. As earlier pointed out, the Constitution accords the present Senate considerable power — the principal limit on its exercise of that power is the lack of legitimacy. But how interested is the Harper government in making the Senate more effective? Like previous Canadian governments with safe majorities in the House of Commons, there is much reason to believe that this aspect of Senate reform has

lost much of its charm for the ruling Tories. This may explain why federal reference questions 5 and 6 go to the process under the Constitution for abolishing the Senate. The implicit position suggested by the government's reference questions is that of 'give us the modest change we want, or we may well move to eliminate the institution altogether.'

At this point, it remains unclear what position the other nine provinces will take in the Reference. All have indicated their intention to file interventions. So have organizations representing francophones outside Quebec, who can be expected to argue for recognition of a constitutional convention that Senators be appointed, in part, to represent Canada's English and French language minorities, a convention put in jeopardy by Bill C-7. The interventions add a significant degree of fluidity to the situation.

Twice before, the Supreme Court of Canada has declined to give the simple affirmative answer sought by a federal government with respect to its power to amend the Constitution of Canada. Although the Senate Reference of 2013 does not carry with it the same nation-splitting potential as did the *Patriation Reference* in 1981 and the *Secession Reference*²⁰ in 1998, one wonders if today's Court might also pursue a middle course that tells the parties, as the judgments in those cases did, that democratic legitimacy demands negotiation and consensus, in addition to electoral success. In both those cases, the Court accomplished this goal by issuing a divided decision which allowed both sides to claim victory. Should this happen in 2013, how might the questions be addressed in a way that created momentum for further deliberation over reforming the Senate?

Public cynicism about Canada's appointed Senate is currently very high. This seems likely to still be the case when the Supreme Court hears argument on the *Senate Reform Act* in November. In this context, sending a message that reform of the Senate, and in particular a reform directed at making Senators electorally accountable to the public, is off the table for constitutional reasons, would seem especially difficult. For this (and for legal reasons too), one might expect the

Court to rule that the government's proposal to recognize a role for elections in the appointing of Senators is an acceptable legislative measure. At the same time, however, the Court may well rule that the imposing of a term limit goes to the fundamental character of the institution. Without question, term limits make elections more significant and, as the Court noted thirty years ago, may well impact the independence of Senators charged with a 'sober second thought' function. The Court might well be inclined to

add that while the federal government has the lawful authority to appoint as Senators persons who have won elections in the provinces, it is bound by conventions going to representation of language and other minorities. Together with the spur to thinking about the Senate caused by the Reference itself, such a mixed outcome might be just what is needed to prompt the more thoughtful approach to reform this 'fundamental' institution deserves.

Addendum

October 30, 2013

The article above was written prior to the filing of factums in the *Senate Reference* by the Government of Canada and the fourteen interveners — all ten provinces, two territories, two sitting Senators, and two groups representing the interests of Franco-Canadians living outside Quebec. This short addendum seeks to highlight what we see in the positions taken by the federal, provincial, and territorial governments in the *Reference*.²¹

First, some numbers. The Government of Canada has met with very little acquiescence on the part of the provinces with respect to its Senate reform project. A majority of provinces only agree that Parliament can act unilaterally with respect to the idea of eliminating the property qualification for Senators found in section 24 of the *Constitution Act, 1867*.²² The two major proposals in Bill C-7 going to the imposing of a term limit on Senators and the holding of consultative elections for nominees to the Senate met with widespread rejection by the provinces. Every province except Ontario and Saskatchewan said "no" to the question of whether Parliament can unilaterally impose term limits on Senators.²³ On consultative elections, Alberta and Saskatchewan agree with Canada's position that these do not involve an amendment to the Constitution, while the other eight provinces disagree.²⁴ Finally, the three westernmost provinces — B.C., Alberta, and Saskatchewan — agree with Canada that the

Senate can be abolished pursuant to the '7 + 50' formula set out in section 38 of the *Constitution Act, 1982*, while the other seven provinces believe that such a move requires unanimity. P.E.I. takes the unique position that abolition is not an amendment falling within the terms of Part V.²⁵

It is important to be clear about what concerns the provinces in saying that they largely rejected the position taken by Canada before the Supreme Court. As most of the provincial Attorneys-General point out, the issue is not the substance of Senate reform and the specific reform proposals made by the Government of Canada, but the interpretation of the constitutional amending process set out in Part V of the *Constitution Act, 1982*. They say that the Reference presents the Supreme Court with its first opportunity to consider how sections 38, 41, 42, and 44 interrelate, and as such it raises fundamental issues of federalism and of the respective powers of the federal and provincial levels of government.

As far as they go, the arguments do in a general sense proceed as expected. That is, the Attorney-General of Canada emphasizes the text of the Constitution and argues for a narrow reading. Most provinces agree instead for a broad purposive reading of the Constitution that takes into account the history of the deal-making in 1864-1867 and the 1980-1982 periods, as well as the unwritten aspects of the Constitution

previously recognized by the Supreme Court, particularly the unwritten principle of federalism. The surprise in this regard may simply be the sharpness of the distinction between these two approaches to constitutional interpretation.

Canada maintains that Part V of the *Constitution Act, 1982* is a complete code with respect to amendments to the Constitution and that a linguistic approach is the key to answering the reference questions:

The “linguistic approach” requires close examination of the text of Part V of the Constitution Act, 1982, which comprehensively describes the amending procedures. It introduced a very specific, rules based approach to amendment of the Constitution. (para 78)

In this vein, Canada downplays the import of both the Supreme Court’s decision in the *Upper House Reference* from 1980 and unwritten principles of the Constitution. In the former, the Court advised that Parliament lacked the authority to alter “fundamental features” of the Senate without provincial agreement, without elaborating on what those features might be. Canada argues that the idea of “fundamental features” was wholly subsumed into the wording of section 42 of the *CA, 1982*.²⁶ Section 42 should then be read strictly as a provision that lists the only exceptions to Parliament’s power to amend the Senate unilaterally given by section 44. Consistent with this position, the Attorney-General for Canada argues that the phrase “method of selecting Senators” in section 42(1) (b) refers strictly to the Governor-General’s summoning appointees on the advice of the Prime Minister and not to any process leading to the latter’s exercise of his discretionary power.²⁷

With respect to unwritten principles, Canada argues that the text of Part V is clear, unambiguous and leaves no gaps, and so there is no role for unwritten principles to play. At one point, the AG Canada implies that such principles are mere “extrinsic aides” to interpreting constitutional text (para 96). The factum says little about the unwritten principle of federalism, but directs considerable fire at what Canada anticipated would be a pillar of the arguments made by

the francophone interveners: the idea that the unwritten principle of protection of minorities informs the role of the Senate and points away from selection of Senators by general election. Canada argues that the text says nothing about the Senate’s having a role of protecting minorities, and neither does historical practice.²⁸

Almost all the government interveners argue by contrast that a purposive, not textual, approach to interpretation is needed and that answering the reference questions requires consideration of unwritten principles, especially the principle of federalism. British Columbia is notable in this regard, not only because it might have been thought to be politically sympathetic to the Harper government’s initiative, but also because it mounts such a sharp attack on the federal government’s legal position. Several times B.C. refers to Canada’s argument as “narrow” and “literal,” for instance:

The federal government gives an extraordinarily narrow reading to section 42(1)(a). This interpretation is inconsistent with the language of Part V as well as the fundamental constitutional principle of federalism, which recognizes the provinces’ role as equal partners in Confederation. (para 5)

Central to the position of most provinces is the idea that federal unilateralism in section 44 should be understood as the exception to the rule of the general amending formula in required by sections 38 and 42, rather than the reverse.

Certain specific arguments are worth noting in this brief addendum. The position taken by Quebec has always been of great interest. Quebec, of course, precipitated the reference to the SCC by putting its own questions concerning the constitutionality of Bill C-7 to the Quebec Court of Appeal. There are several interesting features of Quebec’s argument. First, the province is content to say that amendments introducing term limits and an elected Senate could and should be made pursuant to the general amending formula, which of course does not involve a veto for Quebec. The AG Quebec urges a requirement for unanimity only with respect to a proposal to abolish the Senate, which Quebec argues

goes beyond a mere change to the institution's "powers." Quebec's most elaborate argument goes to the issue of elections for Senate nominees. It cites three reasons for finding that Bill C-7 does in fact involve changing the Constitution — including that it impinges on the authority of the Queen's representative in Canada. Speaking with the voice of experience, Quebec argues that the elections contemplated by Bill C-7 cannot be analogized to a referendum, which the Court has said have only a consultative force. (para 146) The votes for Senators are to be organized under the rules of elections for legislators, held at the same time as those elections, and to be supervised by the same officers. As such, Quebec argues, they are intended to and will have a force that goes well beyond 'consultation.'

Alberta has a different kind of experience to offer — that of being the only province to date to have actually held Senate elections, going all the way back to 1989. In its factum, the Government of Canada somewhat proudly states that past Prime Ministers have felt unfettered in their discretion to name whomsoever they wish to the Senate from Alberta irrespective of the outcome of those consultative votes, implying that this would continue to be the case after Bill C-7 were to be enacted. The AG of Alberta agrees that this is the appropriate understanding of the role and effect of its Senate elections. In fact, the province maintains, its legislation governing elections for Senate nominees would comply with the Schedule to Bill C-7, and so represents an example of "cooperative federalism." (para 22).

The factum of the *amicus curiae* appointed by the Court at the outset of the reference was filed with the Court on September 17. The Court appointed two counsel, Daniel Jutras of Montreal and John J.L. Hunter of Vancouver, to make a joint submission. However, the *amicus* counsel were unable to agree between themselves. Their factum contains a section written by M. Jutras arguing that the move to a consultative election process constitutes an amendment to the "method of selecting Senators" requiring approval under the 7/50 formula and a section written by Mr. Hunter arguing that because the elections are merely consultative, they involve

no such amendment. The disagreement between *amicus* counsel highlights the difficulty of the issues faced by the Court, while also adding spice to the argument.

One final note is in order. On October 24, 2013, the Quebec Court of Appeal rendered its judgment on the reference made by the Government of Quebec.²⁹ In a unanimous ruling, five Justices of Appeal ruled that the federal proposals are unconstitutional. The Court found that term limits go to the 'essential character' of the Senate, and further that the proposal for consultative elections is both intended by the government to introduce, and would in effect introduce, a form of elected Senate, something that is beyond the unilateral authority of Parliament to achieve.

The table is set for a lively three days of legal argument before the Supreme Court of Canada. The decision it renders has the potential to chart a new course for Canada's constitutional amending formula, and perhaps even for that most confounding of institutions, the Senate of Canada.

Endnotes

- * Associate Professor, Faculty of Law, University of Alberta.
- 1 *Re Authority of Parliament in relation to the Upper House*, [1980] 1 SCR 54, 102 DLR (3d) 1 [*Upper House Reference* cited to SCR].
- 2 *Re Resolution to Amend the Constitution*, [1981] 1 SCR 753, 125 DLR (3d) 1 [*Patriation Reference*].
- 3 Canada Bill C-7, An Act respecting the selection of senators and amending the Constitution Act, 1867 in respect of Senate term limits, 1st Sess, 41st Parl, 2011 [*Senate Reform Act*].
- 4 Section 3 of Bill C-7 reads
 "3. If a province or territory has enacted legislation that is substantially in accordance with the framework set out in the schedule, the Prime Minister, in recommending Senate nominees to the Governor General, must consider names from the most current list of Senate nominees selected for that province or territory" (*ibid*).
- 5 4*Ibid*, s 4.

- 6 *Constitution Act*, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.
- 7 Christopher Moore, *1867: How the Fathers Made a Deal* (Toronto: McClelland & Stewart, 1997) ch 4 at 104ff.
- 8 For an excellent discussion of the linkages between various reform ideas proposed for the Senate over the years, and an argument that reform without considering the purposes of the institution as a second legislative chamber is unwise, see David E Smith, *The Canadian Senate in Bicameral Perspective* (Toronto: University of Toronto Press, 2003).
- 9 Privy Council, *Order in Council*, No 2013-0070 (2013 February 1).
- 10 Québec Court of Appeal, Press Release, “Reference to the Québec Court of Appeal Regarding the Constitutionality of the Senate Reform Bill” (15 August 2012) online: English version, Releases <<http://www.tribunaux.qc.ca>>.
- 11 *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
- 12 *Constitution Act*, 1867, *supra* note 6, s 91(1).
- 13 *Upper House Reference*, *supra* note 1 at 65.
- 14 *Ibid* at 76.
- 15 *Ibid* at 76-77.
- 16 *Supra* note 11.
- 17 Note that section 47 of the *Constitution Act*, 1982 provides that the Senate has only a suspensive veto, good for 180 days, with respect to constitutional amendments endorsed by the House of Commons and by the requisite number of provincial legislatures.
- 18 *Supra* note 6.
- 19 Howard Leeson, *The Patriation Minutes* (Edmonton: Centre for Constitutional Studies and University of Alberta Press, 2011) at 22-30.
- 20 *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385.
- 21 The factums can be found on the website for the Supreme Court of Canada, at <<http://www.scc-csc.gc.ca/case-dossier/info/fac-mem-eng.aspx?cas=35203>>.
- 22 Quebec argues that, because section 24 expressly refers to Quebec with respect to property and residence, a change to the provision requires the consent of Quebec pursuant to section 43 of the *Constitution Act*, 1982.
- 23 Ontario argues that this can be done, so long as the term is long enough to extend to three parliaments. Saskatchewan takes the similar position that a term limit must be at least 10 years. Nunavut has said “no” while the Northwest Territories take no position on this question.
- 24 Nunavut said “no”, while the Northwest Territories take no position on the question.
- 25 The Northwest Territories argues that the Senate can be abolished only following consultation with the territories — a form of “duty to consult” as first seen in the *Reference re the Secession of Quebec* (1998). Senator Serge Joyal, in his intervention, argues that amendments to the Senate must involve consultation with aboriginal peoples. It is worth noting that no First Nations group sought or obtained intervener status in the *Senate Reference*.
- 26 See para 82.
- 27 “But absent outright removal of the Prime Minister’s authority to propose, or the Governor General’s to summon, or a transfer of the appointment power to the provinces, this is not a change to the ‘method of selecting.’” (140)
- 28 See paras 97-108. With respect to group representation in the Senate the AG Canada points out: “To the extent that there is a pattern in appointments to the Senate, it lies in the fact that almost 95% of those appointed to the Senate have been from the appointing Prime Minister’s own political party.” (102)
- 29 *Projet de loi fédéral relatif au sénat (Re)* [2013] Q.J. No. 7771.

The Senate Reference 2013

Table of Government Positions

	Q1 Can term limits be done unilaterally by Parliament pursuant to s. 44?	Q2 Can Parliament provide for a consultative election process by legislation under s. 91?	Q3 Can Parliament provide a framework for provincial elections?	Q4 Can Parliament repeal property qualifications under s. 44?	Q5 Can the Senate be abolished by the general (7 +50) formula in s. 38?	Q6 can Senate be abolished only by unanimity under s. 41?
Canada	Yes	Yes	Yes	Yes	Yes	No
Quebec	No (7 & 50 needed)	No	No	No (and amendment of Quebec residence requires s. 43)	No	Yes
Alberta	No	Yes	Yes	N/A	Yes	No
B.C.	No	No	No	No	Yes	No
Saskatchewan	Yes (at least 10 years)	Yes	Yes	Yes	Yes	N/A
Manitoba	No	No	No	Yes	No	Yes
Ontario	Yes (3 parliaments)	No	No	Yes	No	Yes
New Brunswick	No	No	No	Yes	No	Yes
Nova Scotia	No	No	No	Yes	No	Yes
Nfld & Lab	No	No	No	N/A?	No	Yes
P.E.I.	No	No	No	Yes	No	No – what’s sought here is a “revision”, not an “amendment”, and so Part V doesn’t apply
Nunavut	No	No	No	N/A	No	Yes
NWT	N/A	N/A	N/A	N/A	No– Parl. must consult with NWT first	No– Parl. must consult with NWT first