THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Bill C-20
Senate Appointment Consultations Act

NATIONAL CONSTITUTIONAL AND HUMAN RIGHTS SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the Constitutional and Human Rights Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the Constitutional and Human Rights Law Section of the Canadian Bar Association.

Bill C-20
Senate Appointment Consultations Act

I. INTRODUCTION

The Constitutional and Human Rights Law Section of the Canadian Bar Association (the CBA Section) is pleased to provide its comments on Bill C-20, the *Senate Appointment Consultations Act* to the Legislative Committee. While the CBA Section applauds the movement towards improved democracy represented by the Bill, we are concerned about how it may affect the functioning of Parliament within the framework of Canada's federal system.

II. BACKGROUND FACTS

In order to put this Bill in its proper context, it is important to consider the historical background of the Senate. When the colonies of Canada (United Upper and Lower Canada), New Brunswick and Nova Scotia were first joined in a federal union in 1867, a rough parity between the three regions (Upper Canada, Lower Canada and the Maritimes) was selected. Ontario and Québec were each granted 24 Senate seats. New Brunswick and Nova Scotia were granted 12 each. Later, when Prince Edward Island joined Confederation, it was assigned four Senate seats and New Brunswick and Nova Scotia dropped to 10 Senate seats each, maintaining a regional equality. When the Western provinces eventually joined the Canadian federation, the West also received 24 seats (six seats per province). When Newfoundland and Labrador became a province in 1949, it received six Senate seats. The territories each received one Senate seat (Yukon and Northwest Territories in 1976 and

Nunavut in 1999). This has resulted in the current Senate seat total of 105 Senators. The breakdown of the Senate seats can be listed as follows:

Newfoundland and Labrador	6
Prince Edward Island	4
New Brunswick	10
Nova Scotia	10
Quebec	24
Ontario	24
Manitoba	6
Saskatchewan	6
Alberta	6
British Columbia	6
Yukon	1
Northwest Territories	1
Nunavut	1
Total	**105**

Under the *Constitution Act, 1867,*[1] the Senate is an appointed body, with its members appointed at the discretion of the Prime Minister.[2] Initially, the Senate's members were appointed for life.[3] In 1965, the Constitution was amended so that Senators held office until they reached the age of 75.[4]

While, under the Constitution, the Senate has the power to defeat legislative bills, this power has been rarely exercised. The reason for this reluctance to utilize the Senate's full constitutional powers is largely accepted to be that the House of Commons is the only elected parliamentary federal body and that the House of Common's legislative will reflects that of the Canadian populace.

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1 (U.K.), 30 & 31 Victoria, c. 3 [*Constitution Act, 1867*].

2 Under the *Constitution Act, 1867,* s. 24, the Governor General "summon[s] qualified Persons to the Senate," In practical terms the Governor General summons those who the Prime Minister selects. Reference to the appointment of Senators by the Prime Minister throughout this submission is shorthand for this technical process.

3 *Constitution Act, 1867*, s. 29.

4 *Constitution Act, 1965.*

For decades, there have been ongoing discussions about reforming the Senate. Some have advocated for an outright abolition of the Senate. Others have sought to have an elected, equal (each province and territory having the same number of Senators) and effective Senate. There are many other variations. To provide effective regional representation and greater accountability, the CBA has advocated for an elected Senate with the following attributes:

- an increased weighting of representation by regions;
- the provision of fixed election dates and the election of senators for fixed terms;
- the provision for staggered elections of part only of the Senate, e.g. one-third or one-half, at any one election; and
- the use of the transferable ballot for election of senators, as measures likely to enhance the political independence of senators, and their ability to enforce accountability.[5]

The CBA did, however, reject the principle of proportional representation on the basis of party lists for election of senators as a system of election that would reduce the independence of senators.[6]

In 1982, the passage of the *Constitution Act, 1982* clarified some of the requirements that must be met before certain constitutional amendments can be made. The general constitutional amendment process is found under s.38 of the *Constitution Act*, *1982*, which requires resolutions of the House of Commons and of the Senate and resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least 50 per cent of the population of all the provinces.[7]

Parliament is given authority to make amendments to the Constitution of Canada "in relation to the executive government of Canada or the Senate and House of Commons".[8]

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5 CBA Resolution 83-9-A.

6 Ibid.

7 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Constitution Act, 1982*], s. 38.

8 *Ibid*, s. 44.

However, certain matters are specifically noted as requiring the general amendment process as outlined by s.42 of the *Constitution Act*, *1982*:

> 42. (1) An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with subsection 38(1):
>
> (a) the principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada;
>
> (b) the powers of the Senate ***and the method of selecting Senators***;
>
> (c) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators;
>
> (d) subject to paragraph 41(d), the Supreme Court of Canada;
>
> (e) the extension of existing provinces into the territories; and
>
> (f) notwithstanding any other law or practice, the establishment of new provinces. [9]

The question that must be answered from a Constitutional perspective is: does Bill C-20 affect the method of selecting Senators?

III. BILL C-20, *SENATE APPOINTMENT CONSULTATIONS ACT*

Bill C-20 seeks to create a form of electoral "consultation" which the Prime Minister could use to assist him or her in determining which persons should be appointed as a Senator for a given province or territory. The consultation could take place either during a federal election[10] or a provincial election if the Governor General in Council so determined.[11] The electors would rank the candidates in order of the preference[12] and the preferences would be determined by the Chief Electoral Officer.[13] A report would be sent to the Prime Minister following the consultation outlining the ranking of preferences between the various candidates.[14]

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9 Emphasis added.

10 S. 12.

11 S. 13.

12 S. 47.

13 Ss. 51-57.

14 S. 58.

Bill C-20 will be passed pursuant to the power of Parliament to amend its own constitution under s.38(1) of the *Constitution Act*, 1982. It will not involve any agreement of the provinces or territories. It will only involve the House of Commons and the Senate approving of its provisions and the Governor General's imprimatur.

Bill C-20 would also bring to bear all the trappings of an election. Just like candidates for the House of Commons, candidates for the Senate may be nominated by a political party.[15] Similar to House of Commons elections, Senate "consultations" will have restrictions on advertising,[16] when and how opinion surveys can be released,[17] third party advertising,[18] and on financial contributions to campaigns.[19] In summary, these consultations would be elections in everything but name.

It should also be borne in mind that the Government also has tabled Bill C-19, *Constitution Act, 2007 (Senate tenure)*, which would change the tenure of new Senate appointees to a limit of eight years rather than until the age of 75, rendering the tenure more like an elected term. This submission does not comment on Bill C-19.

In summary, Bill C-20 does not affect the legal authority of the Prime Minister to select nominees to be appointed to the Senate. It will affect his or her practical ability to select such nominees.

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15 S. 20.

16 S. 60 *et seq.*

17 S. 67 *et seq.*

18 S. 72 *et seq.*

19 S. 86 *et seq*.

IV. CONCERNS OF THE CBA SECTION

Constitutionality of Bill C-20

As noted above, the CBA Section supports and encourages the enhancement of Canadian democracy, particularly with respect to the Senate. That said, as the Supreme Court of Canada noted in *Reference re Secession of Québec*,[20] democracy is but one of the fundamental and organizing principles of the Constitution, others including "federalism", "constitutionalism and the rule of law" and "respect for minorities".

The Senate is an important element of the Canadian constitutional framework. In *Reference re Legislative Authority of the Parliament of Canada in Relation to the Upper House*,[21] the Supreme Court of Canada held that "[t]he Senate has a vital role as an institution forming part of the federal system created by the [*Constitution*] Act, [1867]".[22] The Court went on to note that the first recital of the Preamble to the *Constitution Act*, *1867* states:

> Whereas the Provinces of Canada, Nova Scotia and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:[23]

The Court then observes pointedly:

> Under the Constitution of the United Kingdom, to which reference is made in the first recital, legislative power was and is exercised by the Queen, by and with the advice and consent of the House of Lords and the House of Commons. The Upper House was not and is not an elected body, the Lower House was and is.[24]

The Court held as well that the Senate was created as part of the federal Parliament as a means of protecting "sectional" interests:

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20 [1998] 2 SCR 217

21 [1980] 1 SCR 54

22 *Ibid,* at. 66.

23 *Ibid*, cited at 66.

24 *Ibid*.

> A primary purpose of the creation of the Senate, as a part of the federal legislative process, was, therefore, to afford protection to the various sectional interests in Canada in relation to the enactment of federal legislation. The Act, as originally enacted, provided, in s.22, that in relation to the constitution of the Senate, Canada should be deemed to consist of Three Divisions, to be equally represented, i.e. Ontario, Québec and the Maritime Provinces (Nova Scotia and New Brunswick). This provision was later amended and s.22 now provides for Four Divisions, the Western Provinces of Manitoba, British Columbia, Saskatchewan and Alberta being added as a Fourth Division. The Act now makes provision for representation of Prince Edward Island (as one of the Maritime Provinces), Newfoundland, the Yukon Territory and the Northwest Territories.[25]

The Supreme Court of Canada was asked, amongst other questions, whether Parliament had the authority to change the method of selection of members of the Upper House to one of the following methods:

> (i) conferring authority on provincial legislative assemblies to select, on the nomination of the respective Lieutenant Governors in Council, some members of the Upper House, and, if a legislative assembly has not selected such members within the time permitted, authority on the House of Commons to select those members on the nomination of the Governor General in Council, and
>
> (ii) conferring authority on the House of Commons to select, on the nomination of the Governor General in Council, some members of the Upper House from each province, and, if the House of Commons has not selected such members from a province within the time permitted, authority on the legislative assembly of the province to select those members on the nomination of the Lieutenant Governor in Council,
>
> (iii) conferring authority on the Lieutenant Governors in Council of the provinces or on some other body or bodies to select some or all of the members of the Upper House, or
>
> (iv) ***providing for the direct election of all or some of the members of the Upper House by the public.***[26]

In the end, the Court declined to rule on parts of this question as it did not have a sufficiently developed factual basis upon which to adjudicate, but it did directly deal with method (iv):

> Sub-question (e), paragraphs (i), (ii) and (iii), contemplates changing the method of appointment of senators, presently the function of the Governor General, by having "some" members selected by provincial legislatures, "some" members by

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25 *Ibid*, at 67.

26 *Ibid*, at 58, emphasis added.

> the House of Commons, "some" members selected by the Lieutenant Governor in Council or "some other body or bodies". The selection of senators by a provincial legislature or by the Lieutenant Governor of a province would involve an indirect participation by the provinces in the enactment of federal legislation and is contrary to the reasoning of this Court in the Lord Nelson Hotel case previously cited.
>
> Again, we do not feel that we have a factual context in which to formulate a satisfactory answer.
>
> Sub-question (e) paragraph (iv) deals with the possible selection of all or some members of the senate by direct election by the public. The substitution of a system of election for a system of appointment would involve a radical change in the nature of one of the component parts of Parliament. As already noted, the preamble to the Act referred to "a constitution similar in principle to that of the United Kingdom", where the Upper House is not elected. In creating the Senate in the manner provided in the Act, it is clear that the intention was to make the Senate a thoroughly independent body which could canvass dispassionately the measures of the House of Commons. This was accomplished by providing for the appointment of members of the Senate with tenure for life. ***To make the Senate a wholly or partially elected body would affect a fundamental feature of that body. We would answer this sub-question in the negative.***[27]

Parliament seeks to use its authority under s.44 of the *Constitution Act, 1982* to amend its own constitution to pass Bill C-20. In doing so, Parliament must be certain that the new "consultative" process would not be an amendment to the "method of selecting Senators."[28] The CBA Section submits that, in light of the pronouncements of the Supreme Court of Canada in these prior constitutional decisions, there are serious doubts about the constitutionality of Bill C-20.

The CBA Section submits that the Senate consultations will be viewed and ultimately treated as elections by the public and the political actors alike. While the Prime Minister will still have the formal power to select, a Prime Minister faced with a report from the Chief Electoral Officer outlining the electorate's preferences, following an election-style consultation held contemporaneously with a federal or provincial election, will be hard pressed to choose any candidate other than those preferred by the consultation vote. Much like the Senate's present reluctance to ignore the democratic voice of the House of

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27 *Ibid.*, at 77, emphasis added.

28 *Constitution Act, 1982, supra,* note 7, s. 42(b)

Commons, the Prime Minister will be reluctant to ignore the direct expression of the electors. As the Supreme Court of Canada noted in the *Patriation Reference*, while some constitutional amendments may be legal, constitutional conventions may develop and evolve over time that may render those actions "unconstitutional"[29]. It is conceivable that the conditions for the creation of a convention may arise over time such that a Prime Minister would always respect the electorate's choice.

The result over time, as Senators are replaced by a democratic consultation process, is that the Senate would become a *de facto* elected body. As the number of "elected" Senators increased, the reason for the Senate not to exercise the full breadth of its constitutional powers would evaporate. In other words, not only would the Senate become a *de facto* elected body, it would become a legislative body answerable to the electorate.

Entrenched Regional Distribution of Senate Seats

While these fundamental changes to the Senate occurred, the current regional distribution would remain in place. British Columbia with a population per Senator of 685,581 and Alberta with a population per Senator of 548,391 (based on the 2006 census) arguably constitute regions of their own. British Columbia has argued for separate regional status in constitutional discussions numerous times over the last 50 years and this appears to have been accepted by Parliament for the purposes of constitutional amendment.[30] The population per Senator ratio in Alberta and British Columbia far exceeds the national average of 301,075. On the east coast, aside from historical evolutionary fact, it is difficult to see the justification for 10 seats for each Nova Scotia and New Brunswick

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29 *Reference re Resolution to Amend the Constitution*, [1981] 1 SCR 753 at 880-81 and 883-84.

30 See *Constitutional Amendment Act,* SC 1996, c. 1, s. 1(1) which provides in part:

> **1.** (1) No Minister of the Crown shall propose a motion for a resolution to authorize an amendment to the Constitution of Canada, other than an amendment in respect of which the legislative assembly of a province may exercise a veto under section 41 or 43 of the *Constitution Act, 1982* or may express its dissent under subsection 38(3) of that Act, unless the amendment has first been consented to by a majority of the provinces that includes
> (*a*) Ontario;
> (*b*) Quebec;
> (*c*) ***British Columbia***;
> (*d*) two or more of the Atlantic provinces that have, according to the then latest general census, combined populations of at least fifty per cent of the population of all the Atlantic provinces; and
> (*e*) two or more of the Prairie provinces that have, according to the then latest general census, combined populations of at least fifty per cent of the population of all the Prairie provinces.

when, within the Atlantic region, Newfoundland and Labrador has six and Prince Edward Island four.

If Bill C-20 becomes law, these historical facts and peculiarities will continue. Yet, the Senate will become increasingly more powerful and their input to the legislative process increasingly more meaningful. Without more complete reform of the Senate, some regions would become far more powerful than others, and the vast changes in the make-up of the Canadian federation since the mid 20th century would be ignored. While the Supreme Court of Canada has clearly held that Canadian democracy does not mean that every vote guaranteed by s. 3 of the *Canadian Charter of Rights and Freedoms* must have equal weight, the concept of "one person one vote" does have some value in constitutional considerations and may be offended unless the underlying purpose of the Senate's regional composition is first addressed.

It is beyond the scope of this submission to suggest whether and how the number of Senators per province or territory should be adjusted. While the democratization of the Senate is a desirable objective, as the Senate gains effectiveness, the ability to change its composition may become more difficult. Some regions, provinces or territories may increasingly advocate for more Senators to reflect current realities, and others may be increasingly reluctant to give up the power base they have by virtue of the historical evolution of the Senate. This underscores why the method of selecting Senators was made expressly subject to the general amendment formula.

Potential Long-Term Ramifications

Another matter that should be addressed is the potential ramifications of an unconstitutionally "elected" Senate in the long term. If Bill C-20 is successfully challenged 20 years from now, and declared an unconstitutional attempt to amend the Constitution of Canada, a number of issues would arise, including:

- Would Senators appointed following the consultative elections lose their seats?
- Would legislation passed by the Senate populated by Senators appointed following consultative elections be rendered invalid?

- How could the composition of the Senate be reformulated or remedied to deal with the unconstitutional appointment of the "elected" Senators?

There are no clear answers to these questions, but they do illuminate the importance of knowing that Parliament is right in proceeding unilaterally pursuant to s. 44 of the *Constitution Act, 1982,* instead of using the general amendment procedures as outlined by ss. 38 and 42 of the *Constitution Act, 1982.*

V. RECOMMENDATIONS AND CONCLUSION

Because of our serious concerns about the constitutionality of Bill C-20, the CBA Section recommends the following:

- The Government of Canada should refer Bill C-20, before it receives Royal Assent, to the Supreme Court of Canada, to ensure that its provisions are constitutionally valid; or
- The Government of Canada should hold inter-governmental discussions with the provinces and territories and seek a constitutional amendment to the Constitution of Canada respecting the method of selecting Senators.

The CBA Section is of the view that a reference to the Supreme Court of Canada or an amendment pursuant to s.38 of the *Constitution Act*, 1982 will remove any doubt about the legitimacy of Bill C-20 and will lead ultimately to a stronger and more effective Parliament and a more unified and better governed Canada.