THE CANADIAN BAR ASSOCIATION

L'ASSOCIATION DU BARREAU CANADIEN

Bill C-7 – *Senate Reform Act*

NATIONAL CONSTITUTIONAL AND HUMAN RIGHTS LAW SECTION
CANADIAN BAR ASSOCIATION

January 2012

500-865 Carling Avenue, Ottawa, ON, Canada K1S 5S8
tel/tél : 613.237.2925 | **toll free/sans frais** : 1.800.267.8860 | **fax/téléc :** 613.237.0185 | info@cba.org | **www.cba.org**

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 National 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 National Constitutional and Human Rights Law Section of the Canadian Bar Association.

TABLE OF CONTENTS

Bill C-7 − *Senate Reform Act*

Bill C-7 − *Senate Reform Act*

I. INTRODUCTION

The Canadian Bar Association's National Constitutional and Human Rights Law Section (the CBA Section) appreciates the opportunity to provide comments and recommendations on Bill C-7,[1] the *Senate Reform Act*. The CBA is a national organization representing 37,000 jurists in Canada, including lawyers, notaries, law teachers and students. Members of the CBA Section practice constitutional and human rights law throughout Canada.

In 1983, the CBA recommended an elected Senate with the following attributes: (1) an increased weighting of representation by regions; (2) the provision of fixed election dates and the election of senators for fixed terms; (3) the provision for staggered elections of part only of the Senate, e.g. one-third or one-half, at any one election; and (4) the use of the transferable ballot[2] for election of senators, as measures likely to enhance the political independence of senators, and their ability to enforce accountability.[3] The election of senators by a "transferable ballot" was recommended as one way of preventing the Upper House or Senate from evolving into a "second" House of Commons. The CBA was concerned that if Senate reform resulted in an Upper House that was too similar in structure and function to the House of Commons, U.S.-type legislative deadlocks between the two houses of Parliament would ensue. The election process for senate nominees and the attributes of a reformed Senate proposed by Bill C-7 are not consistent with CBA's past recommendations.[4]

While the CBA may have advocated in the past for a Senate having the attributes set out above, the CBA is primarily concerned that the means proposed by Bill C-7 to "amend the method of selecting Senators" is unconstitutional. By foregoing the multilateral constitutional amending

---

1 Bill C-7, An Act respecting the selection of senators and amending the Constitution Act, 1867 in respect of Senate term limits.

2 A transferable voting system requires that voters rank the list of candidates in order of preference on their ballot. Surplus votes from winning candidates are transferred to voters' next choice of candidates.

3 CBA Resolution 83-09-A.

4 For example, ss. 21 and 22 of Bill C-7 propose the election of senate nominees by Canada's traditional "first-past-the-post" voting system, with political party involvement, and not by transferable ballot.

procedure required by s. 38(1) of the *Constitution Act, 1982,*[5] there is a serious risk that Bill C-7 will be held *ultra vires* and of no force and effect. The CBA Section recommends that the government either comply with the constitutional amending procedure or refer the question of Bill C-7's constitutionality to the Supreme Court of Canada. Otherwise, if Bill C-7 becomes law, the validity of legislation passed by a Senate reformed in this manner may well be in doubt.

II. BACKGROUND

In 1867, when the colonies of Canada (United Upper and Lower Canada), New Brunswick and Nova Scotia joined in a federal union, it was agreed that a rough parity between the three regions (Upper Canada, Lower Canada and the Maritimes) was essential. Ontario and Quebec were each granted 24 Senate seats, while New Brunswick and Nova Scotia were granted 12 seats each. Prince Edward Island was assigned 4 Senate seats when it joined Confederation, and New Brunswick and Nova Scotia dropped to 10 Senate seats each, thus maintaining regional equality. When the Western provinces joined, they received 24 seats (6 seats per province). In 1949, Newfoundland and Labrador received 6 Senate seats when it became a province. The territories each received 1 Senate seat (Yukon and Northwest Territories in 1976 and Nunavut in 1999). The result is a total of 105 Senate seats in Canada's Upper House.[6]

Under the *Constitution Act*, *1867*,[7] the Senate is composed of members appointed at the discretion of the Prime Minister. Senators were appointed for life. In 1965, the Constitution was amended to require that senators retire at 75 years.[8]

While the Constitution allows the Senate to defeat legislative bills, this power has been rarely exercised. The primary reason for this reluctance has been attributed to the fact that the House of Commons is an elected parliamentary body and its legislative will reflects that of the Canadian populace.

Senate reform has been a topic of discussion in Canada for decades. Some commentators have advocated for Senate abolition, while others have championed an elected, equal (each province

---

5 *Constitution Act, 1982*, Schedule B *to Canada Act* 1982 (U.K.) 1982, c. 11.

6 The breakdown of Senate seats is 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; and Nunavut: 1.

7 *Constitution Act, 1867*, U.K., 30 & 31 Victoria, c. 3.

8 *Constitution Act, 1965*, S.C., 1965, c. 4.

having the same number of senators) and effective Senate. Other variations have been proposed from time to time.

The *Constitution Act, 1982* clarified some requirements that must be met before certain constitutional amendments can be made. Under s. 44, Parliament is granted the authority to amend the Constitution "in relation to … the Senate and House of Commons." However, any exercise by Parliament of the authority in s. 44 is subject to ss. 41 and 42. Paragraph 42(1)(*b*) requires that a constitutional amendment to "the method of selecting Senators" may only be made in accordance with the general multilateral amending procedure in s. 38(1) of the *Constitution Act, 1982*.

Constitutional scholar Peter W. Hogg noted that "[t]he effect of paras. [42(1)] (*b*) and (*c*) is to withdraw these matters [including amending the method of selecting senators] from the federal Parliament's unilateral amending power under s. 44, and to require that any amendment be adopted by the seven-fifty formula of s. 38."[9]

The multilateral amending procedure set out in s. 38(1) is often referred to as the seven-fifty formula or rule because it requires the agreement of two-thirds or *seven* out of ten provinces having at least *50* per cent of the Canadian population.

Section 38(1) states:

> An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by
>
> (a) resolutions of the Senate and House of Commons; and
>
> (b) 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 fifty per cent of the population of all the provinces.

Warren Newman, legal author and constitutional lawyer, examined the different amending formulae in his 2007 paper, "Living with the Amending Procedures: Prospects for Future Constitutional Reform in Canada,"[10] and specifically examined the purposes of the multilateral constitutional amending procedures. Mr. Newman stated:

---

9 Peter W. Hogg, *Constitutional Law of Canada*, 5th Ed. Supplemented, Volume 1, (Toronto: Carswell Publishers, 2007) at 4.3(g).

10 Newman, W., "Living with the Amending Procedures: Prospects for Future Constitutional Reform in Canada" (2007), 37 S.C.L.R. (2d) 383.

> The multilateral amending procedures serve a dual purpose: (1) to permit constitutional amendments where the legal requirements of the formulae have been met, through authorizing resolutions of the relevant federal legislative chambers and provincial assemblies; (2) to protect constitutional provisions and entrenched guarantees from change where the requisite conditions of Part V [of the *Constitution Act, 1982*] have not been met. This may seem to some to be inimical to the principle of democracy, but it is essential to the principles of constitutionalism and the rule of law.[11]

In support of this proposition, Mr. Newman quoted from paragraphs 76 and 77 from the decision of the Supreme Court of Canada in *Reference re Secession of Quebec.*[12] Those paragraphs are instructive, especially when read in conjunction with paragraph 75:

> 75 The argument that the Constitution may be legitimately circumvented by resort to a majority vote in a province-wide referendum is superficially persuasive, in large measure because it seems to appeal to some of the same principles that underlie the legitimacy of the Constitution itself, namely, democracy and self-government. In short, it is suggested that as the notion of popular sovereignty underlies the legitimacy of our existing constitutional arrangements, so the same popular sovereignty that originally led to the present Constitution must (it is argued) also permit "the people" in their exercise of popular sovereignty to secede by majority vote alone. However, closer analysis reveals that this argument is unsound, because *it misunderstands the meaning of popular sovereignty and the essence of a constitutional democracy*.
>
> 76 Canadians have never accepted that ours is a system of simple majority rule. Our principle of democracy, taken in conjunction with the other constitutional principles discussed here, is richer. Constitutional government is necessarily predicated on the idea that the political representatives of the people of a province have the capacity and the power to commit the province to be bound into the future by the constitutional rules being adopted. These rules are “binding” not in the sense of frustrating the will of a majority of a province, but as defining the majority which must be consulted in order to alter the fundamental balances of political power (including the spheres of autonomy guaranteed by the principle of federalism), individual rights, and minority rights in our society. Of course, *those constitutional rules are themselves amenable to amendment, but only through a process of negotiation which ensures that there is an opportunity for the constitutionally defined rights of all the parties to be respected and reconciled*.
>
> 77 *In this way, our belief in democracy may be harmonized with our belief in constitutionalism*. Constitutional amendment often requires some form of substantial consensus precisely because the content of the underlying principles of our Constitution demand it. By requiring broad support in the form of an "enhanced majority" to achieve constitutional change, the Constitution ensures that minority

---

11 *Ibid* at 385-6.

12 *Reference re Secession of Quebec,* [1998] 2 SCR 217.

> interests must be addressed before proposed changes which would affect them may be enacted.[13] [emphasis added]

Part of the rationale for the multilateral amending process is to ensure protection of minorities and minority interests within Canada's regions. While the Senate's role in reflecting Canada's regionality will be discussed at greater length below, the CBA Section notes that this function is similar to the concept of protecting minorities that was identified by the Court as a core principle of Canadian federalism.

The composition of the Senate and its role as an appointed body giving "independent, sober second thought" to legislative initiatives while reflecting the regional nature of our country has been part of the Canadian federal landscape since Confederation. This is why changes to its powers and the method of selecting senators were expressly made subject to the constitutional requirement of an "enhanced majority," i.e., the amending procedure in s. 38(1), as opposed to a unilateral or simple majority vote of both Houses of Parliament.

III. ANALYSIS OF BILL C-7

Bill C-7 is clear in its intent: it seeks to democratize the Senate. While the preamble is not an operative part of the statute, it assists in understanding the purpose of the legislation. The preamble, replete with references to "democracy," "democratic values," "democratic election" and "democratic principles," leaves no doubt that Bill C-7 seeks to pursue the lofty (and, other considerations such as constitutionalism aside, laudable) goal of creating a democratically elected Senate. It states:

> Whereas it is important that Canada's representative institutions, including the Senate, continue to evolve in accordance with the principles of modern democracy and the expectations of Canadians;
>
> Whereas the Government of Canada has undertaken to explore means to enable the Senate to reflect the democratic values of Canadians and respond to the needs of Canada's regions;
>
> Whereas in 1987 the First Ministers of Canada agreed, as an interim measure until Senate reform is achieved, that any person summoned to fill a vacancy in the Senate is to be chosen from among persons whose names have been submitted by the government of the province or territory to which the vacancy relates;

---

13 *Ibid* at paras. 75-77.

> 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;
>
> Whereas it is appropriate that a framework be established to provide guidance to provinces and territories for the text of legislation governing such elections;
>
> Whereas the tenure of senators should be consistent with modern democratic principles;
>
> Whereas the *Constitution Act*, 1965, enacted by Parliament, reduced the tenure of senators from life to the attainment of seventy-five years of age;
>
> Whereas Parliament, by virtue of section 44 of the *Constitution Act*, 1982, may make laws to amend the Constitution of Canada in relation to the Senate;
>
> And whereas Parliament wishes to maintain the essential characteristics of the Senate within Canada's parliamentary democracy as a chamber of independent, sober second thought;[14]
>
> ….

The reference to the Senate as "a chamber of independent, sober second thought" originates with Canada's first Prime Minister, Sir John A. MacDonald.[15] The Senate was to be an Upper House based on the British parliamentary model and in the commonwealth tradition: It "would primarily play a revising role, although its power was that of absolute veto."[16] Members were appointed and tasked with "the revision and correction of legislation from the popular chamber, which would require [from senators] impartiality, expert training, patience and industry, in tandem with the representation of provinces, regions and minorities."[17]

It is unlikely that a Senate reformed by Bill C-7 would be content to remain only "a chamber of independent, sober second thought in legislation" tasked with reviewing and revising, but rather would evolve into a second chamber that would see itself as a popular assembly, as capable as the lower house of, reflecting the will of its electorate, not necessarily regional interests or the interests of minorities within those regions.[18]

---

14 The last paragraph of the preamble stands out from the earlier paragraphs. The earlier paragraphs speak of democratizing the Senate, meaning that the Senate would have to become a more effective legislative body. One would not fight for election to a legislative body simply to rubber stamp legislative initiatives from the House of Commons. This last paragraph speaking of "independent, second sober thought" is therefore incongruous with the preceding paragraphs.

15 Committees and Private Legislation Directorate, The Senate of Canada, *The Canadian Senate in Focus, 1867-2001*, May 2001. Online: http://www.parl.gc.ca/About/Senate/LegisFocus/focus-e.htm.

16 *Ibid*.

17 *Ibid*.

18 *Ibid*.

There are two Parts to Bill C-7. Part 1 deals with Senatorial Selection. Part 2 deals with Senate Term Limits.

A. Part 1 − Senatorial Selection

Part 1 of Bill C-7 provides that if a province or territory enacts legislation generally consistent with the legislative framework outlined in the Schedule to the Act, then, in making recommendations to the Governor General as to who should be summoned to serve in the Senate, the Prime Minister "must consider names from the most current list of Senate nominees selected for that province or territory."[19] [emphasis added]

The Schedule to Bill C-7 provides a framework for the election of Senate nominees in a province or territory. Sections 1 to 4 outline the guiding principles for the rest of the Schedule:

1. Senators to be appointed for a province or territory should be chosen from a list of Senate nominees submitted by the government of the province or territory.
2. The list of Senate nominees for a province or territory is to be determined by an election held in the province or territory
    a. at the same time as a general election is being held to elect members of the legislative assembly of the province or territory;
    b. on a date to be determined by order of the lieutenant governor in council or commissioner in council as the case may be; or
    c. if the provincial or territorial legislation so provides, at the same time as municipal elections are held if the province or territory has a common election day for all of its municipalities.

3. (1) To be a candidate for election as a Senate nominee in a province or territory that has registered provincial or territorial political parties, a person must be nominated by a registered provincial or territorial party as the party's official candidate or be a person who, after the issuance of the election writ, declares himself or herself to be an independent candidate and is nominated to stand for election.

3. (2) To be a candidate for election as a Senate nominee in a territory that has no registered territorial political parties, a person must be a person who, after the issuance of the election writ, declares himself or herself to be an independent candidate and is nominated to stand for election.

4. A person remains as a Senate nominee until whichever of the following occurs first:
    a. the person is appointed to the Senate;
    b. the person resigns as a Senate nominee by submitting a resignation in writing to the provincial or territorial minister determined to be responsible for the administration of the laws that govern the selection process for Senate nominees;
    c. the sixth anniversary of the person's election as a Senate nominee;

19 Section 3, Bill C-7.

d. the person takes an oath or makes a declaration or acknowledgement of allegiance, obedience or adherence to a foreign power;

…

The Schedule also deals with the mechanics of the various types of election (tied to provincial or territorial election, tied to province- or territory-wide same day municipal elections or stand-alone Senatorial election).[20]

The question that must be answered is: does Bill C-7 amend "the method of selecting Senators"?

If Bill C-7 is passed and a province enacts legislation that accords substantially with the framework in the Schedule, the Prime Minister would have to consider the list of Senate nominees provided by the government of that province. The list would consist of successful individuals in that province's senatorial electoral process. According to the first provision of the Schedule, those appointed to the Senate from that province "should be chosen" from that list.

In other words, while the final step of appointment to the Senate by the Governor General on the recommendation of the Prime Minister is preserved and there is not a direct election to the Senate, the senators for that province would be for all intents and purposes "elected." Their elections would be no less vigorously contested than those for the House of Commons or for provincial assemblies. Their "democratic" mandate would be no less legitimate than that of any other elected office. Over time, as provinces and territories adopt senatorial electoral legislation, the Senate would become an elected Senate, and just like candidates for the House of Commons, candidates for the Senate may be nominated by a political party.

The CBA Section believes that once Bill C-7 becomes law, Senate elections will be treated as full-fledged elections by the public and candidates. While the Prime Minister will still have the "legal" power to recommend Senate appointees to the Governor General, the Prime Minister with a list of Senate nominees from a province or territory – individuals who ran for the privilege of being on that list and who obtained the democratic mandate from the electorate – would be hard pressed to recommend a candidate other than those on the list. Much like the

---

20 The Schedule also provides for the election call, election officials, nomination processes, handling and printing of ballots, tabulating and announcing results, appeals and recounts, publication of names of the elected Senate nominees, controverted elections, campaign funding, and preservation of records.

Senate's present reluctance to ignore the democratic voice of the House of Commons, the Prime Minister will be reluctant to ignore the direct and democratic expression of the electorate.[21]

Part 1 of Bill C-7 thus affects the legal authority of the Prime Minister to select nominees to be appointed to the Senate. He or she "must consider" the list of Senate nominees elected by provincial and territorial electoral processes established according to Bill C-7's Schedule. Bill C-7 will effectively remove the Prime Minister's practical ability to consider nominees other than those on that list. Consequently, the "method of selecting senators" will have been amended unilaterally, instead of multilaterally as required by Canada's Constitution.

B. Part 2 − Senate Term Limits

The electoral processes need to be considered in conjunction with the term limits in Part 2 of Bill C-7. Part 2 makes the term of office nine years, for those senators appointed after October 14, 2008.

The senatorial term limit of nine years together with the senatorial electoral process make the democratization of the Senate complete. As the preamble notes, the tenure of senators would become more in keeping with "modern democratic principles." It appears from the schedule to Part 1 of Bill C-7 that senators could not seek consecutive mandates. To run for Senator, according to s. 8(a)(ii) of the Schedule, one could not already be a member of the Senate. The proposed amendments to section 29 of the *Constitution Act, 1867* would make the term of office "one term of nine years". It is conceivable, however, that a senator may run again for office and, if successful in subsequent elections, be elected again to the Senate.

Under proposed s. 29A of the *Constitution Act*, *1867*, senators would cease to be senators at age 75, regardless of when they were appointed. This provision is incongruous with the concept of democratic reform. If Canadians elect senators, then they choose the adult Canadian to represent them and can consider the age of the candidates in the ballot box, just as with Members of Parliament. Proposed s. 29(A) seems to fly in the face of that general democratic principle and also seems contrary to s. 15 of the *Canadian Charter of Rights and Freedoms*.

---

21 As the Supreme Court of Canada noted in *Reference re Resolution to Amend the Constitution*, [1981] 1 SCR 753 at 883 (the *Patriation Reference*), "a constitutional convention occupies a place somewhere between a usage or custom on the one hand and constitutional law on the other ... [it] is a rule which is regarded as obligatory by the officials to whom it applies." Constitutional conventions evolve over time and may eventually develop into rules that are closer to laws than to usage or custom.

The government proposes to pass Bill C-7 pursuant to the power of Parliament to amend its own constitution under s. 44 of the *Constitution Act, 1982*. It will not involve any consultation with or agreement of the provinces or territories. It will only involve the House of Commons and the Senate approving its provisions, and the Governor General's imprimatur. However, Parliament's exercise of power under s. 44 is subject to ss. 41 and 42, and para. 42(1)(*b*) only permits Parliament to amend "the method of selecting Senators" if it does so in accordance with the amending formula in s. 38(1) of the *Constitution Act, 1982*.

IV. CONCERNS WITH BILL C-7

The CBA Section has three concerns with Bill C-7:

(a) the constitutionality of Bill C-7;

(b) Senate composition; and

(c) the potential ramifications of an unconstitutionally "elected" Senate.

A. Constitutionality of Bill C-7

The CBA Section is supportive of and encourages the enhancement of Canadian democracy. However, as the Supreme Court of Canada noted in *Reference re Secession of Quebec,*[22] democracy is but one of the fundamental and organizing principles of the Constitution, others include "federalism," "constitutionalism and the rule of law" and "respect for minorities."[23]

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*,[24] 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*]."[25] The Court went on to note that the first recital of the Preamble to the *Constitution Act, 1867* stated:

> 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:[26]

---

22 *Supra* note 12.

23 *Ibid* at 240.

24 *Reference re Legislative Authority of the Parliament of Canada in Relation to the Upper House*, [1980] 1 SCR 54.

25 *Ibid* at 66.

26 *Ibid.*

The Court then observed:

> 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.[27]

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

> 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, Quebec 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.[28]

The Court was asked whether Parliament had the authority to change the method of selection of members of the Upper House, including 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

---

27 *Ibid.*

28 *Supra* note 24, at 67.

> (iv) ***providing for the direct election of all or some of the members of the Upper House by the public.***[29] [emphasis added]

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), namely, the direct election of all or some of the members of the Upper House by the public:

> 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 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.***[30] [emphasis added]

While Parliament seeks to use its authority under s. 44 of the *Constitution Act*, *1982* to unilaterally amend the constitution through the passage of Bill C-7, it must be certain that the proposed electoral process would not constitute an amendment to the "method of selecting Senators."[31]

Bill C-7 arguably amends the "method of selecting senators." The Prime Minister's legal authority to select nominees for appointment to the Senate will be constrained: He or she "must consider" the list of successfully elected Senate nominees from a province and territory.

---

29 *Ibid* at 58.

30 *Ibid* at 77.

31 *Supra* note 5, at para. 42(1)(b).

The Prime Minister's practical ability to consider nominees other than those on the list will be impaired by Bill C-7, and yet the multilateral procedure required by Canada's Constitution to make such a fundamental change will have been ignored by Parliament.

The CBA Section is of the view that, in light of the Supreme Court of Canada's decisions discussed above, there are serious doubts about the constitutionality of Bill C-7.

B. Senate Composition

The Senate will over time become a *de facto* elected body as senators are gradually replaced through an electoral process. With more "elected" senators, the reason for the Senate not to exercise the full breadth of its constitutional powers would evaporate. The Senate would become an effective legislative body.

This would occur notwithstanding the fact that the composition of the Senate was intended to represent the "regions" of Canada. 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 separate regions (British Columbia has argued for separate regional status in numerous constitutional discussions over the last 50 years and this appears to have been accepted by Parliament for the purposes of constitutional amendment).[32] Their population per senator ratios exceeds the national average of 301,075. Aside from historical evolution, it is difficult to justify why Nova Scotia and New Brunswick should each have ten senators when, in the Atlantic region, Newfoundland and Labrador has six and Prince Edward Island has four.

If Bill C-7 becomes law, these historical peculiarities will continue to exist in a "fundamental" legislative organ recognized by the land's highest court as being "vital" to the federal system,

---

[32] 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.

but one that will consequently become increasingly democratically selected, more powerful and more meaningful within the Canadian democratic framework.

Without more complete reform of the Senate, its composition will likely remain in its current format rendering some regions, such as Ontario or the Atlantic region, more powerful than others and ignoring the vast population changes since the middle of the last century. While the Supreme Court of Canada has 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" has some value in constitutional considerations and may be offended unless the format and underlying purpose of Senate composition is first addressed.

The CBA's 1983 Resolution and submission called for broad Senate reform, including "an increased weighting of representation by regions."[33] While the democratization of the Senate is desirable, the CBA Section believes that as the Senate would gain effectiveness with the passage of Bill C-7, the ability to change its composition may become more difficult. Some regions or provinces will increasingly advocate for more senators to reflect current population and others will be increasingly reluctant to give up the power based on the Senate's historical evolution. This concern underlies the reason why the method of selecting senators was made expressly subject to the multilateral amending procedure in s. 38(1) of the *Constitution Act*, *1982*.

C. Ramifications of an Unconstitutionally "Elected" Senate

If Bill C-7 becomes law and is eventually challenged, and the courts conclude that the *Senate Reform Act* is unconstitutional, a number of issues would arise, including:

- Would senators appointed following the senatorial elections lose their seats?
- Would legislation passed by an unconstitutionally reformed Senate be 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 underscore the importance of Parliament clarifying whether it is correct in proceeding unilaterally to amend the method of

---

33 *Supra* note 3. Canadian Bar Association, *Submission to Special Joint Committee of the Senate and of the House of Commons on the [sic] Senate Reform*, September 1983.

appointing senators, instead of complying with the multilateral amending procedure in s. 38 of the *Constitution Act, 1982*.

V. RECOMMENDATIONS

THE CBA SECTION RECOMMENDS THAT:

1. The Government of Canada refer Bill C-7 to the Supreme Court of Canada before it receives Royal Assent, to ensure it is constitutionally valid; or
2. The Government of Canada hold inter-governmental discussions with the provinces and territories and comply with ss. 42 and 38(1) of the *Constitution Act, 1982* to amend "the method of selecting Senators."

VI. CONCLUSION

The CBA Section believes a reference to the Supreme Court or an amendment in accordance with s. 38(1) of the *Constitution Act*, *1982* will remove any doubt on the constitutional validity of Bill C-7, and will lead ultimately to a stronger and more effective Parliament and a more unified and better governed Canada.

The CBA Section trusts our comments will assist Parliament in its deliberations on this critical matter.