Alberta’s Great Experiment in Senatorial Democracy

Kristin Hulme
Department of Political Science, Royal Military College of Canada, Kingston, ON, Canada

ABSTRACT
In 2014, the Supreme Court of Canada ruled that the unelected nature of the Senate is an inherent feature of Canadian parliamentary democracy and is a central pillar of the constitution. Members of the Upper House are appointed by the Governor General, acting on the advice of the Prime Minister. The decision taken by the Prime Minister is not subject to review by Parliament or the provincial legislative assemblies. Patronage appointments have given the Senate a reputation as a dumping ground for political friends and party insiders. In 1989, the province of Alberta enacted the Senatorial Selection Act, arguing that it would serve as a stepping stone for substantive reform to the Senate. The province has held four elections in which the people of the province have chosen senators-in-waiting. This article argues that the Court’s opinion in Reference re Senate Reform undermines the foundation upon which the provincial statute rests.

KEYWORDS
Canadian politics; Canadian senate; Alberta; Supreme Court of Canada; senatorial elections

In the autumn of 2013, the federal government submitted a set of reference questions about senate reform to the Supreme Court of Canada. Ottawa has the authority, under Section 53 of the Supreme Court Act, to refer to the highest court in the land “important questions of law or fact” about the interpretation of the constitution and the constitutionality of legislation. The Court was asked, in essence, to determine whether Parliament has the right to unilaterally effect changes to the senate or whether substantial provincial consent is required. The contemplated changes included the imposition of term limits and the selection of senators using consultative elections. Senators are currently appointed by the Governor General on the advice of the Prime Minister and may serve until the age of 75. The Court was also asked to establish whether the abolition of the Upper Chamber requires the consent of all of the provinces.

This article argues that the opinion of the Supreme Court of Canada may prove to be the death knell for Alberta’s “great experiment in [senatorial] democracy” (Alberta 1989d, 788). In 1989, Alberta passed the Senatorial Selection Act and began to elect “senator-nominees” or “senators in waiting” whose names were forwarded to the Privy Council of Canada for consideration by the Prime Minister. Jeremy Waldron (2006, 1382) argues that “legislators give reasons for their votes just as judges do. The reasons are given in what we call debate and they are published in Hansard.” By looking at the debates that took place in the legislative assembly when the original bill was passed in
1989 and when it was subsequently amended in later years, one can identify a set of arguments whose merits are, at the very least, challenged if not undermined by the 2014 opinion of the Supreme Court of Canada in *Reference re Senate Reform*. Central among those arguments is one rooted in democracy.

The Supreme Court, in its unanimous *Reference re Senate Reform* opinion, rejects the federal government’s argument that unilateral action is constitutionally permissible. In making its decision, the Court characterizes the unelected nature of the Senate as an essential feature of our Parliament. The Court states, at Paragraph 55, that the “contrast between election [of the lower house of Parliament] and appointment [of the upper house] … is not an accident of history.” The Fathers of Confederation, in making their choice, the Court holds at Paragraph 57, sought to “endow the Senate with independence of the electoral process to which members of the House of Commons were subject, in order to remove Senators from a partisan political arena that required unremitting consideration of short-term political objectives.” The appointed nature of the Upper House was also intended to preclude the occurrence of legislative deadlock between it and the lower one. The lack of democratic pedigree, according the Court at Paragraph 58, guaranteed that senators “would confine themselves to their role as a body mainly conducting legislative review, rather than as a coequal of the House of Commons.” The Court concludes, at Paragraph 60, that elections would “weaken the Senate’s role of sober second thought and would give it the democratic legitimacy to systematically block the House of Commons, contrary to its constitutional design.”

Alberta has held four consultative elections to choose individuals whose names were to be forwarded to the Privy Council of Canada for consideration when vacancies occurred in the Upper House. Since 1989, the six Albertan seats in the Senate have been made vacant 17 times by death, resignation, or retirement. In the vast majority of instances, they were filled without the Prime Minister of the day making use of the lists of senator-nominees or senators-in-waiting provided by the provincial government. Only five of the appointments have involved individuals who were chosen by the people of Alberta in senatorial elections. Stan Waters, who won the first election, was named to the Senate in 1990 by Prime Minister Mulroney. In 2007, Prime Minister Harper named Bert Brown, who was designated by the province as a senator in waiting in 1998 and again in 2004. Betty Unger, who was one of two candidates chosen in the election held in 2004, was appointed in 2012. Doug Black and Scott Tannas, who placed first and second in the 2012 election, were named in 2013.

**The Canadian senate**

The Senate is the Upper House of the Canadian Parliament and is composed of 105 members. The establishment of the Senate (Alberta 1985, 9) “was an integral component of the agreement which brought about the nation.” Confederation would not have occurred in its absence (MacKay 1963, 37–9). During the negotiations that led to the creation of Canada, Quebec, New Brunswick, and Nova Scotia feared that the size of Ontario’s population would lead to their needs and interests being marginalized in the decision-making process of the federal government. During the first national election that was held in 1867, the province had almost half of the seats in the House of Commons. These fears of marginalization were assuaged with the creation of the
Senate whose seats are allocated on the principle of regional equality rather than the population densities of individual provinces.

Under Section 22 of the Constitution Act, 1867, the country is divided into four regions. Each of them—the West, Ontario, Quebec, and the Maritime provinces—has 24 seats. While there is relative regional parity, there is, among the provinces, enormous disparity in their representation in the Upper House. Nova Scotia and New Brunswick both have ten senators and Prince Edward Island has four. Each of western provinces—British Columbia, Alberta, Saskatchewan, and Manitoba—only has six senators. Quebec and Ontario both have 24. On joining Confederation in 1949, Newfoundland and Labrador was given six seats. The three territories—Nunavut, the Northwest Territories, and the Yukon—each have one. The asymmetry in the allocation of seats in the Upper House has proven to be an irritant for the western provinces, particularly Alberta. It has twice the population of the three Atlantic provinces combined (Statistics Canada 2013), but only has a quarter of the seats that the eastern region has. Its share of the gross domestic product, at 16 percent of the total, is almost three times greater than that of the Maritime provinces (Statistics Canada 2015).

The Senate was established to serve two key purposes. It was to act as a chamber of “sober second thought.” Sir John A. MacDonald (Canada 1865, 35–36) argued that the Upper House would be a “‘controlling and regulating’ body” whose task was to “calmly consider . . . the legislation initiated by the lower branch.” Ross (1914) notes that responsibilities required, at least in principle, individuals with “impartiality, expert training, patience and industry.” It was decided that persons with such characteristics were to found through appointment rather than election. The Senate was to provide oversight of the decisions of the popularly elected House of Commons, offer improvements to bills, and act as a check on the powers of the Prime Minister and the executive branch. Douglas Sarro (2010, 127) argues that the inability of the Senate to introduce money bills and the lack of democratic legitimacy evidence the conscious decision of the Fathers of Confederation to create an institution that would play a secondary or limited role in the legislative process. The Senate was never intended, in other words, to be the coequal of the House. It was to play a secondary role in the formulation of public policy and the enactment of legislation. Its role was to be limited to the revision and correction of bills already passed by the House of Commons.

Robert MacKay (1963, 91–95) claims that the authority of the Senate to review decisions taken by the House of Commons extends to the alteration of bills that involve the raising or spending of money. Andrew Heard (1991, 94) argues, however, that constitutional convention now precludes the Senate from making such changes. Setting aside debate about its authority to change to “money bills,” there is little disagreement that the powers of the Upper House are, at least in principle, significant. It has, at least on paper, the authority to change and/or veto any and all bills passed by the House of Commons.4 While the Upper Chamber has, in principle, significant powers, it has shown a high degree of reticence in exercising them fully (Docherty 2002, 34). It has rarely rejected or delayed bills passed by the House of Commons (Sarro 2010, 129), passing most without amendment. It has, for example, since 1960 proposed changes to only 116 bills (Canada 2016a). That means that fewer than two bills per year are amended. The Senate has also, since 1867, rejected only 133 bills passed by the
House of Commons (Canada 2016b). Writing in 2008, Heard (2009, 95) argued that the Upper House had, since 1994, rejected only two of 465 bills passed by the Lower House.

The second key purpose that the Senate was to fulfill was to act as a conduit for provincial involvement in the formulation of public policy by the national government. The Supreme Court of Canada explained, at pages 54 and 67, in Reference re Authority of Parliament in relation to the Upper House in 1980 that “the Senate as part of the federal legislative purpose was … [intended] to afford protection to the various sectional interests in Canada in relation to the enactment of federal legislation.” The Upper House was created to ensure that, at least in principle, all regions and their interests are represented in the federal legislative process (Pinard 2006, 462).

The fulfillment of this purpose of the Senate has been undermined by the fact that, convention dictates that, while the Governor General appoints members, it is the Prime Minister who makes the choices. It is, in other words, the prerogative of the Prime Minister to decide who will fill a vacancy in the Upper House and when that vacancy will be filled. His or her decisions, which are not subject to review or approval by Parliament, the provincial legislative assemblies or the people of the individual provinces (Côté 2010, 82), have more often than not been guided by politics. The Senate, as a result, has acquired a reputation for being a dumping ground for friends and party insiders. Patronage has often been the order of the day. David Docherty (2002) argues that “[t]he overwhelming tendency to appoint members of the Prime Minister’s party provides evidence to support the conventional wisdom that appointments are used first and foremost as a political reward for party faithful, both elected and those who toil behind the scenes.” He (2002, 31) estimates that in 95 percent of all instances, the sitting Prime Minister appointed people from his or her party. As a consequence, according to Tom Kent (2009, 1), the Prime Minister is endowed with the “power to make prestigious patronage appointments undemanding of responsibility.” The unfettered nature of his or her power has undermined the Senate’s ability to effectively represent regional interests (Docherty 2002, 29; Sarro 2010, 129; Savoie 1999, 348).

Kent (2009, 1) explains that “in almost all federations, the second chamber is elected. Canada is the exception.” The Fathers of Confederation, however, made a conscious decision in choosing an appointed rather than elected Upper House. Our Parliament is modeled on that of the United Kingdom which has a popularly elected House of Commons and an unelected hereditary House of Lords. Canada, according to the preambles of the Constitution Act, 1867, is to have a constitution “similar in principle to that of the United Kingdom.” While Canada did not adopt the practice of creating hereditary lordships, according to the Supreme Court of Canada, at Paragraph 14 of its reference opinion, the Fathers of Confederation “wanted to preserve the British structure of a lower legislative chamber composed of elected representatives, an upper legislative chamber made up of elites appointed by the Crown, and the Crown as head of state.” They believed that Senate’s inability to introduce money bills, pursuant to Section 52 of the Constitution Act, 1867, coupled with its lack of democratic legitimacy would ensure that control of the executive and its legislative agenda was exercised by the House of Commons, thereby upholding the principle of responsible government (Sarro 2010, 127). Peter Carver (2013, 2) explains that “an unelected Senate would lack the political legitimacy to exercise its full authority, and in doing so to obstruct the will of the elected House.”
Alberta and the senatorial selection act

In 1983, the provincial legislative assembly established the Alberta Select Special Committee on Upper House Reform. Its purpose was to “examine the appropriate role, operations, functions, and structure of an Upper House in the Canadian federal system.” The Committee concluded that reforms to the parliamentary chamber were necessary in order to ensure that the “diverse interests of Canadians” were protected (Alberta 1985, 1). It stated that “Alberta’s proper place in Confederation can only be secured with a Senate constituted in a more credible manner.”

The committee (1985, 1) called for creation of a “Triple E” Senate: “elected,” “equal,” and “effective.” Members of the institution should be elected rather than appointed. Elections would allow (1985, 24) the Senate to “enjoy legitimacy and would be able to exercise fully the significant political and legislative powers necessary to make a valuable contribution to the Canadian Parliament.” The tenure of senators should be limited to the lifespan of two provincial parliaments, regardless of how long or short they might be. The allocation of seats should be based on the principle of provincial rather than regional equality. All of the provinces should have six senators. Each of the territories should have two. The powers of the Senate should be altered in order to make the institution a more effective partner in the legislative process. This would permit it to fulfill its function as a check on the powers of the House and those of the Prime Minister, particularly in a majority government situation. These three attributes would lead to a rebalancing of power between the two houses of Parliament and greater representation of provincial interests. The Committee’s final report was unanimously endorsed by the legislative assembly in March of 1985 and again in March of 1987. Provincial politicians across the political spectrum wanted fundamental changes to be made to the Senate. Many politicians and academics in Alberta argue that senate reform will alleviate or even eliminate western alienation (Lawson 2005). This want has continued unabated and unfulfilled for more than a quarter of a century.

In 1989, the provincial government, headed by the Progressive Conservative Don Getty, passed the Senatorial Selection Act. Douglas Sarro (2010, 135) characterizes the legislation as constitutionally dubious. Its dubiousness stems from the fact that, under Section 24 of the Constitution Act, 1867, appointments to the Senate are made by the Governor General. It was enacted against the backdrop of efforts to salvage the Meech Lake Accord, the constitutional package, which had signed by the federal and provincial governments on April 30, 1987. Alberta had not been successful in its efforts to push for Senate reform to be included in the constitutional agreement. Ottawa committed, however, in the short term, to fill future vacancies in the Senate using lists of names provided by the provinces. Section 4 of the Accord also specified that, in the long term, the institution and its reform would be included on the agenda of annual constitutional conferences. Their inclusion would persist until unanimous agreement was reached about the changes that would be constitutionally entrenched.

In order to come into effect, the Meech Lake Accord had to be ratified, pursuant to Section 41 of the Constitution Act, 1982, by Parliament and all of the provincial governments by June 23, 1990, at the latest. While the Alberta legislative assembly ratified the constitutional agreement in December of 1987, three provinces—New Brunswick, Manitoba, and Newfoundland—ultimately struggled to meet the deadline. The
The possibility of the Accord failing to be ratified in a timely manner prompted Prime Minister Mulroney to convene a First Ministers’ Conference in May of 1990. Negotiations led to the drafting of a companion resolution which every province, with the exception of Manitoba, ultimately adopted. Included in the companion resolution was a commitment to effect changes to the Senate by July 1, 1995. These changes were to have encapsulated the notion of a “Triple E” Senate.

The preamble of the Senatorial Selection Act states that it is appropriate that individuals who are named to the Senate should be chosen through democratic elections. It makes express reference to the unanimous endorsement by the legislative assembly of the final report of the Alberta Select Special Committee on Upper House Reform. This reference demonstrates that the ultimate objective of the provincial government remained the creation of a “Triple-E” senate. The bill was intended, in other words, to be a first step toward substantive and significant reforms to the Upper House.

The preamble also refers to the commitment by the federal government, contained in the Meech Lake Accord, to appoint senators from lists of names provided by the individual provinces until the chamber was reformed. Jim Horsman, the Minister of Federal and Intergovernmental Affairs, (Alberta 1989d, 788) argued that the bill is putting into law the commitments that had been undertaken by Ottawa. These direct references to the constitutional package explain why the provincial law contained a sunset clause. The law, in its original form, included an expiry date of December 31, 1994. The expectation held by the provincial government was that future reforms to the Upper House would render the statute obsolete. The bill was, however, renewed in 1994, in 1998, 2004, and again in 2010.

The Senatorial Selection Act, enacted in 1989, incorporates the constitutional qualifications for senate appointments. In order to be eligible to run in a senatorial election, individuals must, pursuant to Section 23 of the Constitution Act, 1867, be Canadian citizens and be no younger than 30 years old. They must be residents of the province they represent and own no less than $4,000 worth of property in the province. Their real and personal property must be $4,000 greater than any debts and liabilities. In addition to these constitutional qualifications for senators, the provincial law puts in place a number of other requirements. Section 8 specifies that individuals must be residents of Alberta for the six months leading up to the election. They can only run in a senatorial election if they are not: a sitting member of the House of Commons or Senate; a sitting member of the provincial legislative assembly; or a candidate in a provincial or municipal election being held at the same time. They must also not be barred from seeking office for having breached provisions of the provincial Election Act. Section 5 of the law provides three possible options with respect to the timing of senatorial elections. They can be held in conjunction with provincial elections. They can be held in tandem with municipal elections. They can occur on their own. The first two elections, held in 1989 and 1999, took place at the same time as Albertans were electing representatives to local authorities. The third and fourth ones coincided with the election of members to the provincial legislative assembly.

The government advanced a number of reasons for its decision to enact a piece of legislation whose constitutionality and effectiveness were, from the very beginning, both doubtful. First and foremost, the bill was a means to an end rather than an end in itself. The provincial objective remained institutional reform and the creation of a “Triple E” senate (Alberta, Afternoon 1989d, 791; Alberta 1989e, 1081, 1086). The goal
was the establishment of an Upper House which would be an effective actor in the legislative process, protecting and advancing provincial interests rather than those of the political parties to which Senators belonged. The chamber was also to be one in which all members were elected and all provinces had equal representation. Wilma Hunley, the Lieutenant General, (Alberta 1989b, 7) declared during the Speech from the Throne in June of 1989 that the bill is “an innovative and progressive step toward comprehensive reform of the Senate.” Fred Bradley, Minister of the Environment, (Alberta 1989e, 1086) characterized the bill as a stepping stone that would initiate “the movement towards reforming those regional imbalances, reforming the Upper House, reforming the imbalances in terms of Canadian nationhood.” Jim Horsman, Minister for Federal and Intergovernmental Affairs, (Alberta 1989c, 685) claimed that the bill would “forever change the face of the Senate of Canada.” It represented, he argued (Alberta 1989d, 790), “only a first step; it’s only a beginning. We have to continue our efforts towards achieving full senate reform. . . .” Ray Speaker, Minister of Housing and Urban Affairs, (Alberta 1989d, 797) asserted that “we’re going to plant the seed with this act, a seed that will have long-term ramifications and will change the history of Canada . . .”

The government also rooted its defense of the bill in democracy, arguing that elections would give the Senate a degree of legitimacy and effectiveness that it had heretofore not had. Horsman (Alberta 1989d, 788) maintained that it would bring a much needed change to “that antiquated, undemocratic house.” Senators would represent the needs and interests of the province and its people rather than the Prime Minister who appointed them or the political party to which they belonged. The election of members of the Upper Chamber would, according to Horsman, (Alberta 1989d, 788, 790) more accurately “reflect the values and democratic nature of Canada” and “the ideals we hold so dear.” Ray Speaker (Alberta 1989d, 797) explained that, in an elected Senator, “we will have someone who will be able to speak with an elected authority.” Rick Orman, the Minister of Energy, (Alberta 1989e, 1079) asserted that the bill would come to be regarded as “a milestone in the evolution of democratic government in Canada.”

The law was also intended to establish, if only until substantive changes about the senate were made to constitution, a new convention that would constrain the unfettered powers of the Prime Minister when choosing who to appoint. Patrick Malcolmson (1991, 15) argues that the law was an attempt to modify the convention governing the appointment of senators. It was not intended, in and of itself, to effect changes to the constitution itself. The provincial government wanted to force the Prime Minister to alter the bases upon which decisions about who to appoint were made. As discussed earlier in the article, nothing in the constitution, constitutional conventions, or political practices requires him or her to consult the relevant province. The choice is not subject to formal review and does not require approval of the relevant province or the Parliament, either as a whole or in its individual parts. Dennis Anderson, Minister of Municipal Affairs, (Alberta 1989d, 793) explained that what we want to do with this bill is craft something so perfect politically and legally that the Prime Minister cannot weasel out or get out in any way, shape, or form. What we have to do . . . is craft a net no shark can get out of . . . we want something so tight that he cannot get out of.
Fred Bradley (Alberta 1989e, 1086) argued that the Prime Minister would not dare to “not appoint to the Canadian Senate the will of the people of Alberta.”

The bill was characterized by Horsman (Alberta 1989d, 789) as an exercise in “nation-building.” Don Getty, the Premier, (Alberta 1989a, 8) argued that elections would “not only provide a stronger voice for Alberta but will lead to a better and more united Canada.” Horsman (Alberta 1989d, 788) also asserted that the bill would provoke changes that would help in the “building [of] a better nation. . . .” The government also anticipated that the bill would serve as a model for other provinces to emulate. Bradley (Alberta 1989e, 1087) argued that people across the country would demand that their provincial governments act to ensure that they also had the ability to elect their own senators.

The 1989 senatorial selection election

The bill received Royal Assent in the summer of 1989. The government decided, because municipal elections were scheduled for October, to hold the first senatorial election in conjunction with them (Malcolmson 1991, 16). The election was called by Premier Getty at a time when it seemed increasingly unlikely that the Meech Lake Accord would be ratified by all the provinces in a timely manner. In addition, there was a vacancy in the Senate that had resulted from the resignation of Donald Cameron in 1987. In spite of the passage of almost two years, the Prime Minister had still not named his replacement.

Six candidates registered for the election. Each, as required by the provincial law, had to collect 1,500 signatures and deposit $4,000 with the province’s Chief Electoral Officer. Stan Waters won the nomination for the Reform Party of Alberta. Bill Code was acclaimed as the candidate of the Liberal Party of Alberta. Bert Brown ran for the provincial Conservative Party. In addition, there were three individuals—Tom Sindlinger, Ken Paproski, and Gladys Taylor—who ran as independents. The province’s New Democratic Party did not field a nominee. Barry Paskah, a member of the NDP, (Alberta 1989f, 1464) explained that the exercise was wasteful because there’s absolutely no guarantee that the Prime Minister of this country will accept … whatever nominee comes forward out of this process. . . . [I]f we want something that’s truly effective and equal and elected, . . . all of those interests have to be advanced at the same time . . . .

Waters won the election with 42 percent of the popular vote. Code placed second with 22.5 percent. Brown finished third with the support of only 20.5 percent of voters. The number of votes cast was 621,616, representing a voter turnout of only 40 percent (Malcolmson 1991, 16). In an attempt to place the low turnout in context, Malcolmson (1991, 16) explains that this was still 10 percent higher than the average turnout for municipal elections in the province.

As discussed in an earlier section of the article, the possibility of the Meech Lake Accord failing to be ratified in a timely manner prompted Mulroney to convene a First Ministers’ Conference in May of 1990. Negotiations led to the drafting of a companion resolution. Two days after the Conference ended, Stan Walters, the winner of the provincial election in Alberta, was named to the Senate. His appointment occurred only after Mulroney got assurances that the legislative assemblies of Manitoba, New
Brunswick, and Newfoundland would debate and vote on the constitutional package (Vander Ploeg 1998, 2). The timing of the appointment suggests that it was an attempt to salvage the constitutional package. It was also intended to shore up support for the Progressive Conservative Party of Canada in the western provinces where the newly formed Reform Party was gaining popularity.⁸

Malcolmson (17) argues that the appointment was surprising because it might have served as a precedent for the Prime Minister and his unfettered decision-making. As it happens, Mulroney appointed two more Albertans to the Senate before leaving office. He did not choose from among the other candidates who participated in the 1989 election. Following the demise of the Meech Lake Accord, the Premier of Alberta announced that no new elections would be held in the foreseeable future.⁹ As a consequence, the appointment of Waters did not alter the conventions governing the naming of senators.

**The 1998 senatorial selection election**

Stan Waters was appointed to the Senate in April of 1990. In the years between his appointment and the next senatorial election which was held on October 19, 1998, five individuals from Alberta were appointed as Senators. The choices were made unilaterally by the sitting Prime Minister without any consultations with the province’s government or its people. Brian Mulroney appointed Walter Patrick Twinn in 1990 and Ron Ghitter in 1993. Jean Chretien appointed Nicholas Taylor and Jean Forest in 1996. Thelma Chalifoux was named the following year. These appointments were made, according to Casey Vander Ploeg (1998, 2) in spite of repeated requests by the provincial government for vacancies to be filled using elections.

In 1998, the province made significant amendments to the *Senatorial Selection Act*. Section 3 established how long senator nominees would serve. They would retain their positions until they were appointed to the senate, resigned as senator nominee or their term expired. The government subsequently set the length of tenure at six years (Alberta 2004b). Section 5 decreed that elections could be held even when there were no vacancies in the Senate. The provision also gave the Lieutenant Governor the authority to set regulations governing: the duties and functions of senator nominees; their remuneration and expenses; and their performance and accountability. In addition, the expiry clause was changed, extending the life of the bill for another five years.

Leah Wallis (2001, 1) claims that “Ralph Klein, the Premier of Alberta, called the election in 1998 at the request of the Reform Party and the Canada West Foundation in order ‘to send a message to Ottawa’ about the need for senate reform.” She points out that there were no vacancies at the time the election was called. The issue of the constitution and its amendment had fallen by the wayside and was no longer a priority for most politicians at either the federal or provincial level. Klein’s lack of enthusiasm for the exercise in democracy is made clear by the fact that the provincial Progressive Conservative Party, of which he was leader, chose not to field a candidate in the election.

Vander Ploeg (1998, 2) argues that there are two reasons why the Klein government chose to hold a senatorial election in 1998. The first was to protest the unilateral
decisions taken by the Prime Minister in filling vacancies since the last senatorial elections. The 1990 appointment of Waters began increasingly to look like a singular anomaly rather than the laying of a foundational stone that established a new convention governing the exercise of the Prime Minister’s authority. The preemptive holding of an election, while there was no vacancy, was, according to Vander Ploeg (1998, 2) intended to serve as “a clear democratic challenge to Ottawa.”

The second reason for the election was a series of scandals involving sitting senators (Vander Ploeg 1998, 2). Andrew Thompson, a senator for Ontario, was held in contempt by the Upper House because of his attendance record. While he attended the Senate at least once every session in order to meet the minimum requirements, Senator Thompson spent more time in Mexico than in Ottawa. The attendance records of some of the other senators also raised eyebrows. Michel Cogger, a Senator from Quebec, was charged with having accepted payments from a businessman seeking government grants and contracts. He was acquitted in 1993, but in 1997 the Supreme Court of Canada ordered a new trial. Cogger was convicted in 1998. These scandals heightened the sense among Albertans that the Upper House was in serious need of reform. In March of that year, an Environics poll showed that 91 percent of the province’s population favored the election of senators (Wallis 2001, 2).

The government decreed in an Order in Council (Alberta, 1998b) that two senator nominees would be elected in the 1998 elections. Four candidates participated in the election, which was held once again in conjunction with municipal elections. Bert Brown and Ted Morton were both candidates of the Reform Party of Alberta. Guy Desrosiers and Vance Gough ran as independents. The latter had sought and failed the candidacy of the Reform Party. Unlike the first senatorial election, the provincial Liberals did not field a candidate. Howard Sapers (Alberta 1998a, 1492) explained, during the debate over amendments to the Senatorial Selection Act in 1998, that the three “E’s” of the “Triple E” Senate:

are like the legs of a tripod. Taken together they build a sturdy foundation upon which Senate reform can take place. But if you take out any one of those legs of the tripod, what you’re left with is a very shaky foundation indeed, something that ultimately will be unsupportable. It makes no sense to get out of step or out of sequences and simply hold an election without making sure that all of the other components, the other two legs of the tripod, are fixed firmly in place . . . .

The NDP, once again, refused to participate.

Midway through the election, Jean Forest announced her early retirement from the Senate, creating a vacancy. Prime Minister Chretien named Douglas Roche before the vote was held. The Reform Party of Canada attempted to stop him from exercising his prerogative until after the election had been completed. It sought an interlocutory injunction in the Federal Court. Justice McGillis refused to issue it, explaining that the constitution sets out in a clear and unequivocal manner that the Governor General has the authority to appoint senators. This authority is exercised on the advice of the Prime Minister. Justice McGillis also held at Paragraph 6 in Samson v. Canada that “that is a purely political decision to be made by politicians, without the interference or intervention of the Court.”
The two candidates for the Reform Party placed first and second in the election. Brown won just over 37 percent of the popular vote while Morton won 30.75 percent. The two independent candidates both received slightly more 15 percent of the vote. Elections Alberta, the independent body that is responsible for overseeing the senatorial elections, in its final report, discusses the numbers of votes cast. Since Albertans had the right to choose up to two senator nominees, there is uncertainty about what the voter turnout for the election was. As Vander Ploeg (10) explains “the number of votes (900,000) does equal the number of voters.” As a consequence of the election being held in tandem with municipal elections, there was no voter list. Vander Ploeg (11) estimates that the level of participation was slightly below 30 percent.

The 2004 senatorial selection election

Ultimately neither of the two candidates, who had placed first and second in the 1998 election, were appointed to the senate before their six year term as senators-in-waiting came to an end. The third senatorial election was held on November 22 2004. It was held, for the first time, in conjunction with the provincial election. The timing of the election was linked to three facts. First, one of the six senate seats had been empty since Nicholas Taylor retired in November 2002. The second reason was that two more seats would be become vacant in 2005 when Thelma Chalifoux and Douglas Roache reached the age of retirement. The third was that a fourth vacancy was scheduled to occur in 2011 when Tommy Banks would reach retirement age.

In an Order in Council issued on September 29, 2004, Albertans were notified that they would have the right to choose up to four senator nominees (Alberta 2004a). In spite of having called the election, Ralph Klein, the Premier, did not display much enthusiasm for it. Doreen Barrie (2006, 123) argues that he had to be bullied by his caucus into agreeing to allow candidates to run as Progressive Conservative candidates. Barrie (2006, 124) argues that his commitment was “half-hearted: the Party did not provide support to candidates nor did it do anything to promote the selection which was overshadowed by the provincial race.”

Eight of the 10 candidates who participated in the election ran as candidates for right of center political parties. Cliff Breitkreuz, Bert Brown, Jim Silye, Betty Unger, and David Usherwood ran for the Progressive Conservative Party. Vance Gough, Gary Horan, and Michal Roth ran for the Alberta Alliance Party. Link Byfield and Tom Sindlinger ran as independents. Once again, the provincial Liberal Party and the provincial New Democratic Party refused to participate at all. Brown, Unger, and Breitkreuz came first, second, and third, respectively. Byfield, one of the independents, placed fourth. Brown and Unger received just over 14 percent of the popular vote. Breitkreuz and Byfield each received roughly 11 percent (Elections Alberta 2005, 7). The remaining votes were divided among the other candidates. The voter turnout in the 2004 election was 44.2 percent. This was slightly lower than the participation rate in the provincial election which was 44.7 percent (Elections Alberta 2005, 7). Barrie (2006, 124) explains that more than 20 percent of those individuals, who voted in the provincial election, “declined, rejected or spoiled their ballots for the Senate vote.” A total of 2,176,341 votes were cast, but there were only 714,709 valid ballots (Elections Alberta 2005, 8, 27).
The 2012 senatorial selection election

Prime Minister Martin named individuals to the Upper House who had not participated in the 2004 senatorial election. Elaine McCoy, Grant Mitchell, and Claudette Tardif became Senators on March 24, 2005. When Daniel Hayes retired in 2007, Harper appointed Bert Brown, who had placed first in the 2004 election, to the Senate. Harper’s choice gave substance to his public pledge to name individuals who had been elected by the people of individual provinces. His choice was, however, made easy by the fact that he and the new senator were cut from the same political cloth. This appointment reduced the number of senators-in-waiting to three.

The next senate election was scheduled to be held by 2010 because the terms of the senators-in-waiting, who had been elected in 2004, were to expire at the end of the year. Rather than holding the senatorial elections in conjunction with the scheduled municipal elections in the spring of 2010, the provincial government, in an Order in Council, extended the terms of the three senators-nominee until December 31, 2013. This extension ensured that there would be senators-nominee in place when three of the six Albertan senators retired over the course of the next three years. The Premier Ed Stelmach, who was quoted in the Calgary Herald, argued that the decision not to hold elections would save the people of Alberta $5 million (Fekete 2010). The newspaper reported that Professor Peter McCormick claimed that the decision was made to shield the governing Progressive Conservatives from losing the election to the newly formed Wild Rose Alliance.

The move by the government prompted Lynk Byfield, who had placed fourth in the 2004 election, to resign as senator-in-waiting. He argued in his letter to the Premier, published in the Calgary Herald, that the extension of the term was “arbitrary and unnecessary.” He asserted that he no longer had the mandate to represent the people of Alberta in the Senate. Byfield also criticized Stelmach for having failed during the past six years, both in his capacity as the Premier and as Minister of Federal and Intergovernmental Affairs, to advance the cause of senate reform. Betty Unger, who had placed second in the election, expressed dissatisfaction with the decision of the government, stating (Fekete 2010) that “[w]e were elected for six-year terms. It should be respected as such—a six-year term.” She did not, however, offer her letter of resignation and was, as discussed earlier in the article, appointed by Harper in 2012. Cliff Breitkreuz, the third senator-in-waiting, sided with the government. He maintained, according to the Calgary Herald, that the cost of these elections was reason enough to extend the terms.

In 2011, Ed Stelmach announced that he would resign as Premier and as leader of the Progressive Conservative Party. All of the candidates, seeking to replace him, committed to holding a senatorial selection election as quickly as possible. Alison Redford, who subsequently won the leadership race, argued as reported in the Calgary Herald that “[w]e want them (Senate nominees) to be current. We don’t want to end up with a stale list.” The government announced in an Order in Council in March of 2012 that three senators-in-waiting would be chosen (Alberta 2012). The election was called for April 23, 2012, the date of the provincial general election.
Thirteen candidates participated in the election. Doug Black, Scott Tannas, and Mike Shaikh ran for the Progressive Conservative Party. Rob Gregory, Raymond Germain, and Vitor Marciano represented the Wild Rose Alliance. Elizabeth Johannson was represented the provincial Green Party. The remaining candidates—Len Bracko, David Fletcher, Ian Urquhart, Paul Frank, William Exelby, and Perry Chahal—ran as independents. The PC candidates placed first, second, and third with 16 percent, 13 percent, and 11.5 percent of the popular vote (Alberta. Elections Alberta 2012, 10). The three men running for the Wild Rose Alliance captured the next three spots. The level of support for each hovered around 10 percent. Voter turnout was significantly higher than in previous years. Almost 54 percent of Albertans cast ballots in the senatorial elections (Alberta. Elections Alberta 2012, 6). The level of participation was fractionally lower than that in the provincial general election. Roughly 17.5 percent of voters declined, rejected, or spoiled their ballots (Alberta. Elections Alberta 2012, 14).

Harper named Doug Black to the Senate in January 2013. Scott Tannas was appointed in March of that year. Once again, the decision of the Prime Minister to make use of the list drawn up by the province and presented to the Privy Council of Canada was made easy by the fact that the two men were Conservatives. Their appointments reduced the number of senators-in-waiting to one. Mike Shaikh, who placed third in the 2012 election, faces a long wait. Unless one of the six Albertan senators dies or retires early, he faces the prospect of never being appointed. The next vacancy will occur in 2018 when Betty Unger is scheduled to retire.

Reference re: senate reform

The need for a reference opinion by the Supreme Court on the matter of senate reform was prompted, in part, by an opinion of the Quebec Court of Appeal on the matter. The Quebec government had, pursuant to the provincial Court of Appeal Reference Act, referred three questions about the federal government’s proposed reforms to the province’s highest court. The provincial government argued that any reforms to the Upper House required broad-based support. The Court of Appeal held that Ottawa could not act unilaterally. The proposed reforms require the consent of seven provinces in which at least 50 percent of the Canadian population lives. While the federal government could have appealed the Quebec court’s ruling to the Supreme Court, it chose instead to present the judicial body with its own set of questions. This decision permitted Ottawa to frame the debate and set its parameters.

The need for a judicial advice from the Supreme Court was also rooted in the complexities surrounding amendments to the Canadian constitution. Part V of the Constitution Act, 1982 provides a set of formulae for making changes. The constitutional entrenchment of the amendment formulae occurred after the Court’s 1980 reference opinion on senate reform. There was uncertainty about whether Part V rendered the substance of the opinion moot. The determination about which specific formula to use in any given instance is dependent upon the substance of the proposed amendment. With respect to the Senate, Section 38 states that major changes must have broad provincial support. In addition to the approval of the House of Commons and the Senate, such alterations require the approval of the legislative assemblies of seven provinces in which at least 50 percent of the Canadian population lives. This section
codifies the “7/50 rule.” Monahan, Patrick, and Shaw (2013, 192) explain that the formula “protect[s] the provinces from having their rights or privileges negatively affected without their consent.” Cameron (1998, 324) argues that the provision “achieves a compromise between the demands of legitimacy and flexibility.” Section 42 of the Constitution Act, 1867 provides clarification about the application of Section 38 (Whyte 2009, 102). It, in particular, specifies the types of alterations to which the “7/50” rule applies. Included among them are changes to the powers of the Upper House and the method through which Senators are selected.

Prior to referring the matter to the Court, Harper and his government had spent seven years arguing that changes to term limits and to the manner in which senators were selected could be effected through the ordinary legislative process. Harper, while appearing before the Special Senate Committee on Senate Reform on September 7, 2006, asserted that the sort of “modest” changes that were being proposed—fixed term limits and the holding of non-binding elections—by the government were “achievable through the actions of Parliament (Canada 2006).” There was, in other words, no need for the constitution to be amended. There was no need to garner the support of the provinces. This assertion that the federal government could act unilaterally without provincial involvement or consent was reiterated and repeated with the introduction of each successive new bill. All of the bills, beginning in 2006, that were tabled by the governing party both in the House of Commons and the Senate failed to be enacted into law. The federal government also argued that in the event that the proposed changes to the Senate did require an amendment to the constitution, Sections 38 and 42 were not applicable. It argued that under Section 44 of the Constitution Act, 1982, Parliament may act unilaterally to make laws “in relation to the executive government of Canada or the Senate and the House of Commons.”

With respect to the use of consultative elections, the Attorney General of Canada made two arguments before the Supreme Court. He claimed, in the first instance, the Court explains at Paragraph 51, that they did “not constitute an amendment to the Constitution of Canada … [because neither] the text of the Constitution Act, 1867, nor the means of selecting Senators” was altered. The Prime Minister, the opinion sets out at Paragraph 62, would still “retain the ability to ignore the results of the consultative elections and to name whomever he or she wishes to the Senate.” He also maintained that, in the event that they were found to trigger the need for a constitutional amendment, Section 44 applied. The Court holds, at Paragraph 53, that the proposed changes to the manner in which senators are chosen do require a constitutional amendment. It states, at Paragraph 52, that elections would significantly modify “the Senate’s fundamental nature and role as a complementary legislative body of sober second thought …. Its determination rests on three points. The Court finds, at Paragraph 53, senatorial “elections would fundamentally alter the architecture of the Constitution.” Part V of the Constitution Act, 1982 expressly specifies which procedure is required for changes to the manner in which senators are appointed. Elections of this sort fall outside the parameters of Section 44 of the Constitution Act, 1867.

Both arguments advanced by the Attorney General are rejected by the Supreme Court. It finds without merit the claim by the federal government that it can act unilaterally. It holds, at Paragraph 48, that “[n]either level of government acting alone can alter the fundamental nature and role of the institutions provided for in the
Constitution. The Court states, at Paragraph 77, that the Senate is “a core component of the Canadian federal structure of government. As such, changes that affect its fundamental nature and role engage the interests of the stakeholders in our constitutional design—i.e., the federal government and the provinces—and cannot be achieved by Parliament acting alone.” It decrees, at Paragraph 67, that “the 7/50 procedure is the general rule for amendments to the Constitution of Canada.” Seven of 10 provinces, comprising at least 50 percent of the Canadian population, must agree to fundamental alterations to the architecture or structure of our constitution. Changes to the tenure of senators, according to and the adoption of consultative elections (Paragraph 82), necessitate constitutional amendments (Paragraph 60), and require strong provincial support (Paragraph 67).

The Supreme Court also holds that the unelected nature of the Senate is a fundamental feature of Parliament. It reflects the fact that Canada, according to the preamble of the Constitution Act, 1867, is to have a constitution “similar in Principle to that of the United Kingdom.” A key feature of the Westminster Parliament, the Court states in Paragraph 55, is an elected House of Commons and an unelected House of Lords. Quoting from its own 1980 opinion in Reference re Authority of Parliament in relation to the Upper House, the Court states, at Paragraph 57, that “[i]n 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.” By mandating that senators be appointed rather than elected (Paragraph 58), the constitution constrains the activities of the Senate to conducting legislative review and to shield their decision-making from “short-term political objectives.” The Court determines finally, at Paragraph 62, that “the purpose of the [government’s proposed] bills is clear: to bring about a Senate with a popular mandate. We cannot assume that future prime ministers will defeat this purpose by ignoring the results of costly and hard-fought consultative elections.” It holds, at Paragraph 60, that giving the Senate “democratic legitimacy [would permit it] to systematically block the House of Commons, contrary to its constitutional design.”

The reference opinion and the senatorial selection act

The reference opinion of the Supreme Court challenges the bases and goals of the provincial legislation. The Alberta government, when first introducing the bill, characterized it as a means to the ultimate end of a “Triple E” senate. The law, as discussed earlier in the article, was intended to be a stepping stone on the road to substantive reform of the Upper House and to the leveling of regional imbalances that are said to plague the country. The province maintained that changes to the manner in which senators are selected could be undertaken without having to reopen the constitution. This stance is revealed to be without merit by the Supreme Court. The judicial opinion expressly declares that our constitution precludes either the federal or a provincial government from unilaterally pursuing senate reform through the ordinary legislative process. Changes require amending the constitution in compliance with Part V of the Constitution Act, 1982. They require widespread support from the provinces and the federal government.
The reference opinion also undermines the provincial expectation that the law could change the unwritten constitutional convention governing senatorial appointments while leaving the text of Section 24 of the Constitution Act, 1867 intact. Alberta anticipated that its legislation would fetter the authority of the Prime Minister to name Senators. He would be obliged to advise the Governor General to appoint the individual or individuals chosen by the people of the province in senatorial elections. The Court holds, at Paragraph 62, that the nonbinding nature of consultative elections does not mitigate the fact that their purpose is to endow the Senate with a popular mandate. Such an endowment, which significantly alters the nature and role of the Upper House, can only be achieved through amendments being made to the Constitution.

Finally, the Court’s opinion negates the merit of the government’s efforts to evade potential obstacles posed by the constitution to its legislative goal by emphasizing the importance of democratizing the selection process and the Senate itself. The province links concerns about the legitimacy of the Upper House with the fact that senators are appointed by the Governor General on the advice of the Prime Minister rather than being elected by the people of the province. However admirable the goal of greater democracy in our political institutions might be, it cannot anoint changes that are effected outside the parameters of constitution with legitimacy. The Court’s opinion emphasizes the inescapable fact that any reforms to the Senate, including the manner in which its members are chosen, must be undertaken in compliance with the amendment formulae contained in Part V of the Constitution Act, 1982.

**Conclusion**

Twenty-five years after the enactment of the *Senatorial Selection Act* in Alberta, the Canadian senate has still not been reformed. Alberta’s quest for a “Triple-E Senate”—equal, elected, and effective—remains as elusive as ever. The province still only has six seats in the Upper Chamber. The small number of its senators remains at odds with the fact that the province has the fourth largest population in the country and the third highest gross domestic product rate in the country. The province still feels, to some extent, marginalized in the federal government’s decision making process. In January of 2012, the *Globe and Mail* reported that the province had reopened an office in Ottawa in order to ensure that its interests are given due consideration by the federal government when formulating public policy.

Over the course of 25 years, the province has held four senate elections at a cost of $10 million (Elections Alberta, 2012, 8). With the exception of the first one in 1989, the only individuals participating in the elections have been either independents or candidates for right-of-center political parties. The provincial Liberal party refused to participate in the last three elections. The provincial New Democratic Party has boycotted all of them. Ten senators-in-waiting or senator-nominees have been chosen by Albertans. Five of them have been named to the Upper House, four most recently by Harper. Since 1989, however, most of the individuals named by the Prime Minister of the day have not participated in the senatorial elections. This suggests that the conventions governing the naming of senators remain unchanged.

In the 25 years since the enactment of the provincial law, no other province has held a senatorial election. While British Columbia passed the *Senatorial Selection Act* in 1990,
it contained a sunset clause. The law provided for a senatorial election to be held at the same time as the next provincial election if there were a vacancy among the provincial seats in the Senate. Since none of British Columbia’s senators had retired or resigned by the time of the next provincial election, no selection election was held. The law, because of the sunset clause, died in 1995. In February of 2013, British Columbia again revisited the issue of elected senators. The provincial government introduced the Senate Nominee Election Act, whose purpose was to establish an electoral process through which provincial vacancies in the Senate could be filled. The bill only received first reading and was never enacted. In 2009, Saskatchewan passed the Senate Nominee Election Act, but never held an election. It was repealed in a unanimous vote by the legislative assembly just after the Senate suspended three of its members for alleged misspending and just before the Supreme Court of Canada heard Reference re Senate Reform in the autumn of 2013. Alberta’s great experiment in senatorial democracy has not, in other words, been emulated by other provinces.

Over the last 25 years, the province has reiterated again and again the need to elect senators in order to give democratic legitimacy to both senators and the Senate. The decision of the Supreme Court of Canada in Reference re Senate Reform would appear to be an insurmountable roadblock in the way of the province’s trailblazing efforts to effect change to the Upper House through the ordinary legislative process. Reform cannot be achieved without reopening the constitution. It cannot be achieved without garnering the substantive support of the federal government and a majority of provinces. It cannot be achieved without fostering the political willingness of federal and provincial politicians to reach a consensus about the nature of changes that should be made to the Upper House.

Notes

1. Reference re Senate Reform, [2014] S.C.C. 32, accessed January 4, 2016, http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13614/index.do. This is the second time that the Supreme Court has addressed the issue of senate reform. In 1978, the federal government proposed making significant changes to our Upper House of our Parliament in C-6 (3rd Sess., 30th Parl., 26-27 Elizabeth II, 1977-78, ss. 62-70.0). The bill would have replaced the Senate with an upper house to be called the House of the Federation. Half the members of the House of the Federation would have been chosen by the House of Commons while the remaining members would have been selected by the provincial legislatures. The federal government asked the Supreme Court of Canada to determine the scope of Parliament’s authority to abolish or alter the Senate. In 1980, the Supreme Court provided an opinion in Reference re Authority of Parliament in relation to the Upper House, Reference re Authority of Parliament in relation to the Upper House, [1980] 1 S.C.R. 54. It held, at pages 77–78, that “it is not open to Parliament to make alterations which would affect the fundamental features, or essential characteristics, given to the Senate as a means of ensuring regional and provincial representation in the federal legislative process.” It also stated that, at page 77, that “[t]o make the Senate a wholly or partially elected body would affect a fundamental feature of that body” and would result in “a radical change in the nature of one of the component parts of Parliament.”

refused to accept the legitimacy of the provincial process, appointed Elaine McCoy, Grant Mitchell, and Claudette Tardi in 2005.

3. In 1867, there were 180 seats in the House of Commons. Ontario had 82 seats. Quebec had 64 seats. New Brunswick and Nova Scotia had 15 and 19 seats, respectively.

4. The power of the Senate was restricted by the Constitution Act, 1982. It cannot veto a constitutional amendment. It can merely delay it for 180 days. If the institution has not approved the amendment after this period, the proposed changes are reintroduced in the House of Commons. The Senate is to be bypassed during this second process of ratification.

5. The second constitutional package negotiated by Prime Minister Mulroney and the provinces included senate reform. The agreement, drafted in 1992, embraced the notion of the “Triple E” Senate. The provinces were to each have six senators. The territories would have one.

6. The legislative assembly of Newfoundland originally ratified the Accord in April of 1987. A change in provincial government in 1990 resulted, however, in the ratification being rescinded in April of that year.

7. The piece of legislation has always included a sunset provision. The law was most recently amended in 2009 to reset the expiry date for December 31, 2016. Please see: Bill 55, Senatorial Amendment Section Act, 2nd session, 27th Legislature, Alberta, 2009 and Alberta, Lieutenant Governor in Council, Senatorial Selection, Act Election Act, Senate Nominee Amendment Regulation 129 April 0134, 2010.

8. The concerns about the party were well-founded. In March, 1989, Deborah Grey became the first member of the Reform Party to be elected to the House of Commons. In the 1993 federal election, the Reform Party elected 52 MPs. The caucus of the Progressive Conservative Party, which prior to the election had formed a majority government, was reduced to two.

9. The Charlottetown Accord, signed in 1992, included a provision for a “Triple E” Senate. Senators were to, at the discretion of the individual provinces, either be elected in general elections or by provincial legislative assemblies. Each province would have six senators and each territory would have one. There would, in addition, be seats for Aboriginal representatives. The powers of the powers of the Senate were to be reduced. The Accord was rejected by Canadians in two referendum held on October 26, 1992.

10. Betty Unger was appointed to the Senate in January 2012. The term of Cliff Breitkreuz ended in 2012 without his having been named to the Senate.

11. The questions included:

(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:

   (1) a fixed term of nine years for Senators, as set out in clause 5 of Bill C-7, the Senate Reform Act;

   (2) a fixed term of ten years or more for Senators;

   (3) a fixed term of eight years or less for Senators;

   (4) a fixed term of the life of two or three Parliaments for Senators;

   (5) a renewable term for Senators, as set out in clause 2 of Bill S-4, Constitution Act, 2006 (Senate tenure);

   (6) limits to the terms for Senators appointed after 14 October 2008, as set out in subclause 4(1) of Bill C-7, the Senate Reform Act; and

   (7) 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:
   
   (1) 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;
   
   (2) by amending or repealing some or all of the references to the Senate in the Constitution of Canada; or
   
   (3) 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?

12. Projet de loi fédéral relatif au Sénat (Re), 2013 QCCA 1807 (CanLII). The provincial government asked: (1) Is An Act respecting the election of senators and amending the Constitution Act, 1867 in respect of Senate terms limits as well as its Schedule given first reading on June 21, 2011 (Bill C-7) an amendment to the Constitution of Canada bearing on the office of the Governor General contemplated by Paragraph 41(a) of the Constitution Act, 1982 that cannot be adopted without the approval of the Senate, the House of Commons and the legislative assembly of each province?; (2) Is An Act respecting the election of senators and amending the Constitution Act, 1867 in respect of Senate terms limits as well as its Schedule given first reading on June 21 2011 (Bill C-7) an amendment to the Constitution of Canada bearing on the method of selecting Senators contemplated by Paragraph 42(1)(b) of the Constitution Act, 1982 that can be adopted only in conformity with subsection 38(1) of the Constitution Act, 1982, that is, with the approval of the Senate, the House of Commons and the legislative assemblies of at least two-thirds of the provinces that have in the aggregate at least 50 percent of the population of all of the provinces?; (3) Is An Act respecting the election of senators and amending the Constitution Act, 1867 in respect of Senate terms limits as well as its Schedule given first reading on June 21, 2011 (Bill C-7) an amendment to the Constitution of Canada bearing on the method of selecting Senators contemplated by Paragraph 42(1)(b) of the Constitution Act, 1982 that can be adopted only in conformity with subsection 38(1) of the Constitution Act, 1982, that is, with the approval of the Senate, the House of Commons and the legislative assemblies of at least two-thirds of the provinces that have in the aggregate at least 50 percent of the population of all of the provinces?

13. S-4 An Act to amend the Constitution Act, 1867 (Senate tenure); S-7 An Act to amend the Constitution Act, 1867 (Senate term limits); C-43 An Act to provide for consultations with electors on their preferences for appointments to the Senate; C-19 An Act to amend the Constitution Act, 1867 (Senate tenure); C-20 An Act to provide for consultations with electors
on their preferences for appointments to the Senate; C-30 An Act to amend the Parliament of Canada Act and to make consequential amendments to other Acts; C-10 An Act to amend the Constitution Act, 1867 (Senate term limits); C-7 An Act respecting the selection of senators and amending the Constitution Act, 1867 in respect of Senate term limits.

14. Peter Hogg, appearing before the Special Senate Committee on Senate Reform in 2006, stated Section 44 of the Constitution Act, 1982 was a confiscation of those “essential elements of the Senate that cannot be amended unilaterally.” He claimed that “since 1982, the matters listed in Section 42 are the fundamental or essential features that cannot be changed unilaterally.” Please see: Special Senate Committee on Senate Reform, Proceedings of the Special Senate Committee on Senate Reform, Issue 4, September 20 2006, 37.

15. The Court also finds, at Paragraph 11, that the unanimous consent of both houses of Parliament and all of the provinces is needed to abolish the Senate.

16. Included among the three was Pamela Wallin, who sat as a Senator for Saskatchewan. The remaining two were Patrick Brazeau of Quebec and Mike Duffy of Prince Edward Island.

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Notes on contributor

Dr. Kristin Hulme lectures on Canadian politics and government at the Royal Military College of Canada in Kingston, Ontario.

ORCID

Kristin Hulme http://orcid.org/0000-0002-0574-6499

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