

CONSTITUTIONAL WORKAROUNDS: SENATE REFORM AND OTHER EXAMPLES

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The process for amending Canada's constitution is complex and difficult. As a result, "back door" routes for realizing change of a constitutional nature have been adopted. These "workarounds" include "formula shopping," where amendment procedures requiring a lesser measure of provincial consent are adopted; ordinary legislation, where no provincial consent is sought at all; and hortatory declarations, where mere statements purport to define a government's position with respect to particular constitutional issues. Workarounds in areas such as Senate reform, fixed date election laws, secession and clarity acts, and regional vetoes, along with declarations dealing with special status for Quebec, the federal spending power, and prorogation of Parliament, will be examined. Key to the constitutional validity of these workarounds is whether they bind the actions of relevant political actors, as opposed to being merely advisory or consultative. At stake is the interplay between two fundamental constitutional values: flexibility, which permits the constitution to adapt to changing societal realities; and federalism, which requires a meaningful degree of provincial consent for significant constitutional change.

Il est difficile et complexe d'amender la constitution canadienne. C'est pourquoi, les modifications de nature constitutionnelle sont souvent effectuées par des moyens indirects. Ces "tactiques d'évitement" des difficultés constitutionnelles comprennent l'utilisation stratégique de procédures d'amendement qui requièrent un niveau d'appui provincial moindre; l'adoption de lois ordinaires, qui ne requièrent aucun appui provincial; et l'adoption par le Parlement de textes de nature déclaratoire, en vertu desquels le gouvernement tente de se positionner par rapport à un enjeu constitutionnel donné. Le présent article étudiera ces tactiques d'évitement dans le cadre d'enjeux tels que la réforme du

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Sénat, les lois sur les élections à date fixe, les lois sur la clarté référendaire et la sécession, et le droit de veto régional. Les déclarations concernant le statut particulier du Québec, le pouvoir fédéral de dépenser et la prorogation du Parlement seront examinées à la même occasion. La validité constitutionnelle de toutes ces tactiques d'évitement dépend de la qualification de leurs effets juridiques, à savoir si celles-ci imposent des obligations aux acteurs politiques concernés ou si elles sont plutôt de la nature d'un simple avis. L'interaction entre deux valeurs constitutionnelles fondamentales sous-tend cette question. Ces valeurs constitutionnelles sont la flexibilité, dont le rôle consiste à permettre à la constitution de suivre les évolutions sociales, et le fédéralisme, en vertu duquel un niveau d'appui important des provinces est nécessaire afin de procéder à des changements constitutionnels significatifs.

Any attempt to reform a complex constitution can only increase its complexity.

– Helmut Schmidt¹

1. Introduction

In 1982, Canada went from having no constitutional amending formula to having a cornucopia of formulas – five to be exact.² In one sense, it has made no difference. The ultimate approval of any significant constitutional amendment has remained with a body that is not democratically accountable to Canadians. When there was no formula, that body was the Parliament of a foreign power. Now, with too many formulas, that body, at least in all significant cases, is the Supreme Court of Canada. The proponents of an amendment will argue for the “easiest” formula, the one that requires the lowest threshold of consent. Opponents will argue for the formula requiring more consent. The Supreme Court will be called upon to choose the correct formula. Its choice will determine whether the amendment succeeds or fails.

¹ Cited in Fritz W Scharpf, “The Joint Decision Trap: Lessons from German Federalism and European Integration” (1988) 66:3 Public Administration 239 at 269.

² *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (UK), 1982, c 11 s 38 – the general amending or default formula requiring approval of the House, Senate and seven provincial legislatures with 50% of the population of all provinces; s 41 – the unanimity formula requiring approval of the House, Senate and all provincial legislatures used for matters of significant national importance; s 43 – used for matters that apply to one or more, but not all, of the provinces; s 44 – the federal Parliament alone formula used for matters that apply to the executive government of Canada, the House or the Senate, unless excepted by s 42; and s 45 – the provincial legislature alone formula used for amendments to provincial constitutions.

W H McConnell, having in mind the pre-1982 struggle to find a formula, referred to the amending process as the “Gordian Knot” of the Canadian constitution.³ That struggle continues, albeit in a different form. There is wide agreement, certainly following the failure of the Meech Lake (1987) and Charlottetown (1992) initiatives, and the introduction of popular referendum and veto legislation, that substantial constitutional amendment using the formal process is unlikely to succeed. John Whyte has commented that “few political realities are better understood than the virtual impossibility of constitutional reform, including reform that might be considered nothing more than constitutional modernization.”⁴ Some applaud this, pointing out that amendment should not be easy;⁵ others despair that excessive constitutional rigidity may frustrate attempts at updating the constitution to better reflect societal evolution.

Because of the complexity of the formal amending process, those seeking constitutional change have sought informal or “back-door” routes. David Smith refers to “non-constitutional means.” He points out that these routes are adopted to avoid using constitutionally entrenched formulas which require some measure of provincial approval and which, as a consequence, entail elaborate federal-provincial negotiations.⁶ These include section 38, the general amending formula, which requires resolutions of the House of Commons, Senate, and the legislative assemblies of at least two-thirds of the provinces with fifty percent of the population of all provinces, and section 41, the unanimity formula, which requires resolutions of the House of Commons, Senate, and all provincial legislatures.

³ W Howard McConnell, “Cutting the Gordian Knot: The Amending Process in Canada” (1981) 44:3 *Law & Contemp Probs* 195 at 195. See also David E Smith, “The Improvement of the Senate by Nonconstitutional Means” in Serge Joyal, ed, *Protecting Canadian Democracy: The Senate You Never Knew* (Montreal and Kingston: McGill-Queen’s University Press, 2003) 229 at 232.

⁴ John D Whyte, “Senate Reform: What Does the Constitution Say?” in Jennifer Smith, ed, *The Democratic Dilemma: Reforming the Canadian Senate* (Montreal and Kingston: McGill-Queen’s University Press, 2009) 97 at 98. There have been at least 28 major proposals for constitutional Senate reform since the early 1970s, all of which have failed. See Serge Joyal, “Introduction” in Serge Joyal, ed, *Protecting Canadian Democracy: The Senate You Never Knew* (Montreal and Kingston: McGill-Queen’s University Press, 2003) xvii at xix.

⁵ Don Desserud, “Whither 91.1? The Constitutionality of Bill C-19: An Act to Limit Senate Tenure” in Jennifer Smith, ed, *The Democratic Dilemma: Reforming the Canadian Senate* (Montreal and Kingston: McGill-Queen’s University Press, 2009) 63 at 63, 79.

⁶ Smith, *supra* note 3 at 232-33.

This paper will use the phrase “constitutional workaround” to refer to ways of achieving change of a constitutional nature that works around the complex requirements of the section 38 (general) and section 41 (unanimous) formal amending procedures. Workarounds are methods that avoid the need to obtain provincial consent in situations where such consent would not likely be forthcoming, in part because of the level of consent demanded by the constitution, in part because regional veto and referendum legislation makes obtaining such consent very difficult, and in part because log-rolling activity inevitably accompanies the federal-provincial negotiations necessary for gathering such consent.

Three workarounds will be examined: formula-shopping, where Parliament selects a constitutional amending formula that imposes no or weaker provincial consent requirements; ordinary legislation, where Parliament seeks change of a constitutional nature through a regular act of Parliament rather than through formal constitutional amendment; and declaratory statements, where the House of Commons, or government, seeks to achieve constitutional-like change by indicating how the executive branch is to exercise powers given to it under the constitution.

Specific examples of each workaround will be examined. In terms of formula-shopping, a constitutional amendment dealing with Senate term limits will be considered.⁷ In terms of ordinary legislation, the *Senatorial Selection Bill*,⁸ the *Fixed-Date Election Act*,⁹ the *Clarity Act*,¹⁰ and the regional veto statute¹¹ will be examined. In terms of declaratory statements, the analysis will focus on a variety of pronouncements including those relating to Quebec’s status as a distinct or unique society, those relating to the federal spending power, and those relating to House of Commons prorogation.

⁷ Bill C-10, *An Act to amend the Constitution Act, 1867 (Senate Term Limits)*, introduced into the Commons on March 29, 2010, died with the dissolution of the 40th Parliament on March 26, 2011.

⁸ Bill S-8, *An Act respecting the selection of senators (Senatorial Selection Act)*, introduced into the Senate on April 27, 2010, died with the dissolution of the 40th Parliament on March 26, 2011.

⁹ *An Act to amend the Canada Elections Act*, SC 2006, c 16. The Act does not have an official short title. It will be referred to as the “Fixed Date Election Act.”

¹⁰ *An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference*, SC 2000, c 26. Although the Act has no official short title, it is commonly referred to as the “Clarity Act.”

¹¹ *An Act respecting constitutional amendments*, SC 1996, c 1. The Act does not have an official short title but is commonly referred to as the “regional veto” statute. That terminology will be used throughout.

Two issues will be addressed when examining each example. First, how does the particular workaround work? Formula-shopping has as its objective change through formal constitutional amendment. It works around an amending formula requiring greater consent in favour of one with lower thresholds. Ordinary legislation and declaratory statements have as their objectives not actual constitutional change but change of a constitutional nature. These latter two workarounds work by restricting the scope of the discretion of those charged with operationalizing the constitution.

Second, is the use of the workaround itself constitutionally valid? It is possible to short-circuit this inquiry by insisting that all such workarounds are *prima facie* constitutionally invalid because they attempt to do indirectly what cannot be done directly. They seek a *de facto* constitutional change without following the formal constitutional process for achieving such a change.¹² Against this, it will be argued below that ordinary legislation or declaratory statements that seek constitutional-like change are constitutionally valid so long as they are non-binding on the political actors to whom they are addressed. That is to say, so long as the legislation or statements do not fetter the discretion granted by the constitution to those actors, but are merely advisory or consultative, they will not offend the constitution.

The argument over whether the proposed method of change is direct or indirect, binding or non-binding, merely begs the question. The real issue is whether, and in what context, the proposed change should be recognized as a valid constitutional safety valve. The answer to that question will depend on weighing competing fundamental constitutional values in the context at hand. On the one hand, workarounds, by reducing the level or type of consent necessary to achieve constitutional change, threaten democratic and federalist values. On the other hand, resort to workarounds, given the unattainable thresholds of consent required to achieve significant amendment, helps prevent the constitution from becoming ossified. Constitutions which cannot be updated will at some point cease to reflect evolving social values, will lose their relevance, and could disappear. Just as democracy and federalism are fundamental constitutional values, so too is constitutional flexibility. Constitutions are meant to last, and to last they must be capable of change. This is the

¹² See the citations at n 1 in Desserud, *supra* note 5 at 64. See also *Attorney-General for Ontario v Reciprocal Insurers*, [1924] AC 328; the testimony of Errol Mendes reported in Standing Senate Committee on Legal and Constitutional Affairs, *Thirteenth Report* (12 June 2007), online: Parliament of Canada <<http://www.parl.gc.ca/39/1/parlbus/commbus/senate/com-e/lega-e/rep-e/rep13jun07-e.htm>>.

justification for the “living tree” doctrine, and for the Supreme Court’s observation that “[t]he constitution is not a straightjacket.”¹³

This inquiry not only involves considering the rigidity of the existing amending formula, it also requires consideration of the impact of the workaround itself. Ironically, some workarounds designed to get around the rigidity of the formal amending process would, depending on how they are interpreted, make formal constitutional amendment more difficult, or would restrict the scope of discretion granted by the constitution to political actors.

If a court feels that the need for constitutional flexibility is paramount in the context under consideration, it will preserve the constitutional validity of the workaround at issue by giving it a non-binding interpretation. If, on the other hand, the court is concerned to maintain broader stakeholder consent in the circumstances, it will be more inclined to interpret the workaround as binding and so unconstitutional.

2. *The First Workaround: Formula Shopping – Senate Term Limits*

On 21 June 2011, following the 2 May 2011 general election that returned a majority Conservative government, Bill C-7, the *Senate Reform Act*, was given first reading in the House of Commons. Part 2 of that Bill, entitled “Senate Term Limits,” substantially repeats the provisions of Bill C-10¹⁴ which died on the order paper when the 40th Parliament was dissolved on 26 March 2011. Part 2 proposes to amend the constitution by replacing the current system of appointing senators for life, or until age 75, with a system that would limit senators to one, non-renewable, nine year term with mandatory retirement at age 75. Under the earlier Bill C-10 proposal, the term was eight years, one year less. The nine-year term will apply to all Senators appointed after 14 October 2008, the date of the fortieth Canadian general election. This retroactive feature reflects the promise obtained by the prime minister from senators whom he has appointed since 22 December 2008, to the effect that they would support senate term limits and other Senate reform legislation.¹⁵ The proposed *Senate Reform Act*, like the prime minister’s earlier senate reform attempts, is part of his plan to make the Senate more democratic, a plan which also includes both the

¹³ *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 150 [*Secession Reference*].

¹⁴ *Supra* note 7.

¹⁵ Canadian Broadcasting Corporation, “Wallin, Duffy among 18 named to fill Senate seats” (22 December 2008), online: CBC News <<http://www.cbc.ca/canada/story/2008/12/22/senate-harper.html>>.

term limits discussed here as well as changes to the senatorial selection procedure discussed in the next section.¹⁶

Part 2 of Bill C-7 is the prime minister's fifth attempt since coming into office on 6 February 2006 to pass a constitutional amendment limiting senators' terms.¹⁷ As mentioned, the only substantial difference between Part 2, and its predecessor, Bill C-10, is the extension of the proposed senatorial term limit by one year. Bill C-10 did amend previous term limit bills by proposing to make the senators' terms non-renewable, an attempt to meet objections that renewable terms would compromise the independence of senators, and by re-imposing the mandatory age 75 retirement date, an attempt to maintain the effectiveness of the Senate as a body of "sober second thought."

At the time when Bill C-10 was proposed, there was vigorous debate over the appropriate amending formula to be used to enact the legislation. The government favoured the formula contained in section 44 of the *Constitution Act, 1982*, a formula that avoided, or worked around, the need to obtain any provincial consent. Section 44 states: "Subject to ... [section] 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the ... Senate ..." Section 42 excludes four matters, "the powers of the Senate," "the method of selecting Senators," "the number of members by which a province is entitled to be represented in the Senate," and "the residence qualifications of Senators."¹⁸ Amendments on these four matters are governed by section 38, the constitution's general amending formula, which requires approval by resolution of the Senate, House of Commons, and the legislative assemblies of seven provinces representing fifty percent of the population of all provinces. The

¹⁶ Testimony of Prime Minister Steven Harper given on 7 September 2006 and reported in Special Senate Committee on Senate Reform, *Report on the subject-matter of Bill S-4, An Act to amend the Constitution Act, 1867 (Senate tenure)* (26 October 2006), online: Parliament of Canada <<http://www.parl.gc.ca/Content/SEN/Committee/391/refo/rep/rep01oct06-e.htm>>.

¹⁷ The first attempt, Bill S-4, was introduced into the Senate on 30 May 2006. It was allowed to die on 19 June 2007 when the Senate Standing Committee on Legal and Constitutional Affairs recommended that the Bill be referred to the Supreme Court of Canada for a ruling on the correct amending formula to be used for the Bill's enactment. The second attempt, Bill C-19, was introduced into the Commons on 13 November 2007. It died when the 39th Parliament was dissolved on 7 September 2008 ahead of the 14 October 2008 general election. The third attempt, Bill S-7, was introduced into the Senate on 28 November 2008 and died when the House was suddenly prorogued on 4 December 2008. The fourth attempt, Bill C-10, was given first reading in the 3rd Session of the 40th Parliament on 29 March 2010 and died when that Parliament was dissolved on 26 March 2011.

¹⁸ *Supra* note 2, s 42(1)(b), (c).

government's position was straightforward and textual: term limits were not in the section 42 list of Senate matters excluded from the purview of section 44. Therefore, the section 44 formula governed, enabling Parliament alone to pass an amendment establishing Senate term limits.¹⁹

Those arguing that the section 38 general amending formula applied did so on an historical basis.²⁰ In 1979, in *Re: Authority of Parliament in Relation to the Upper House*,²¹ the Supreme Court of Canada considered whether s. 91(1) of the *British North America Act* allowed Parliament to alter the tenure of senators. Section 91(1) permitted Parliament alone to amend the Constitution of Canada in certain circumstances. The Court held that amendments affecting the "fundamental features, or essential characteristics" of the Senate were not encompassed by section 91(1) and so could not be undertaken by Parliament alone without provincial involvement. It declined to express an opinion on the specific question of amending the tenure of senators beyond stating that "[a]t some point, a reduction of the term of office might impair the functioning of the Senate in providing what Sir John A Macdonald described as 'the sober second thought in legislation.'"²² The implication was that if the reduction in tenure affected a "fundamental characteristic or essential feature" of the Senate, it could not be enacted by Parliament acting alone, but would require some measure of provincial consent.

Those favouring the section 38 formula maintained that the *Upper House Reference* continued to be relevant despite the fact that section 91(1) of the *BNA Act*, the section in issue in the reference, had been repealed when the *Constitution Act, 1982*, with the amending formula in sections 42 and 44, was adopted. They submitted that both the new formula in sections 42 and 44, and the old section 91(1) formula, dealt with the exclusive power of Parliament to amend the constitution. Sections 42 and 44 were substituted for section 91(1), they argued, with no intention to expand Parliament's exclusive power to amend the constitution. Evidence from Parliamentary hearings during the 1982 patriation debate was cited in support of this position.²³ As a result, together with the four express Senate

¹⁹ Variations on this statutory interpretation approach were endorsed by Peter Hogg, Patrick Monahan, Stephen Scott, the Honourable G rard-A Beaudoin and G rard Tremblay; see Special Senate Committee on Senate Reform, *supra* note 16.

²⁰ Andrew Heard, Joseph Magnet and others favoured this approach; see Standing Senate Committee on Legal and Constitutional Affairs, *supra* note 12.

²¹ [1980] 1 SCR 54 at 78 [*Upper House Reference*].

²² *Ibid* at 76.

²³ John McEvoy, citing the Honourable Jake Epp, gave evidence to this effect; see Standing Senate Committee on Legal and Constitutional Affairs, *supra* note 12. Epp was a member of the 1981 Special Joint Committee that was set up to review early drafts of what would become the *Constitution Act, 1982*. Epp moved a motion in Committee to

exceptions contained in section 42, one had to read in a further implied exception to the effect that Parliament alone could not amend a “fundamental characteristic or essential feature” of the Senate. The implied exception, and the four express exceptions, would, according to section 42, then be subject to the section 38 general formula, one element of which was the consent of seven provinces containing fifty percent of the population.

Those rejecting this position replied that the amending formula in sections 42 and 44 was not a substitution for the old section 91(1) *BNA Act* formula but rather represented an entirely new departure.²⁴ The four exceptions contained in section 42 were, they maintained, a complete code which admitted no “reading in” of additional exceptions. They cited Supreme Court jurisprudence to suggest that the Court would not be bound by what was said during the 1982 parliamentary hearings.²⁵ They further argued that those who wrote sections 42 and 44 of the *Constitution Act, 1982* were well aware of the *Upper House Reference*. They chose not to use the words “fundamental characteristics and essential features,” preferring instead to specify areas of Senate reform which they felt were fundamental and should require a measure of provincial consent. Senate term limits were not one of those areas.

Even if they could have successfully established the continuing relevance of the *Upper House Reference*, those promoting the section 38 formula would also have had to establish that non-renewable, eight year term limits would, in fact, have changed a fundamental characteristic or essential feature of the Senate. Given that most Senate appointees would have been quick studies, and given that their terms would have been staggered by their differing dates of appointment, it seems unlikely that the proposed term limits would have impaired the Senate’s ability to effectively review legislation.

In addition to the historic argument relying on the *Upper House Reference*, those championing the section 38 formula made an alternate

have the Senate excluded from the s 44 Parliament only amending formula but was reassured by then Justice Minister Chrétien who advised that the only Senate amendments dealt with under the s 44 formula were “housekeeping” measures. See also *Desserud*, *supra* note 5 at 76.

²⁴ Hogg told the 2006 Special Senate Committee on Senate Reform that, in his opinion, the 1982 constitutional amendments “overtook the ruling in the *Upper House Reference*,” see Special Senate Committee on Senate Reform, *supra* note 16.

²⁵ *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at 508 where Lamer J, writing for the majority, stated that the Proceedings of the Special Joint Committee “should not be given too much weight” and referred to the “inherent unreliability” of statements given to the Committee by “prominent figures.”

textual argument. The section 42 exceptions to the “Parliament alone” formula, and specifically the words “the powers of the Senate and the method of selecting Senators,” could be read broadly to include senate term limits.²⁶ However, “powers” in the constitutional context normally refers to jurisdictional powers as opposed to institutional aptitude or to the prowess of an institution’s membership. The phrase “selection methods” normally deals with how office is obtained rather than the period for which office may be held.

There were, therefore, arguable points for both those who favoured the section 44 “Parliament only” workaround, and for those who preferred the more demanding section 38 provincial consent formula. If Part 2 of the current Bill C-7 is adopted by Parliament, these points may yet be tested in the Supreme Court. Should the Court uphold the section 44 workaround “shopped for” by the term limit proponents, its effect will be to make the constitution less rigid and more amendable. The workaround’s constitutional validity, however, will depend on weighing values. On the one hand, the Supreme Court will have to balance the desirability of opening a channel for limited Senate change in a context in which wider Senate reform has proven impossible owing to the log-rolling inherent in federal-provincial negotiations and the complexity of the formal amendment process. On the other hand, the Court will have to weigh the benefit of provincial consent for any change to an institution designed to represent provincial and regional interests within the central government. How that balance is to be struck will determine whether formula-shopping works with respect to amending Senate term limits.

3. *The Second Workaround: Ordinary Legislation – Senatorial Selection*

Section 24 of the *Constitution Act, 1867* states that, “The Governor General shall ... summon qualified Persons to the Senate. ...” By constitutional convention, the prime minister recommends appointments to the governor general who invariably accepts the recommendations.²⁷

²⁶ Desserud gave the following opinion to the Standing Committee on Legal and Constitutional Affairs: “I do not see how changing the tenure of senators to fixed eight-year terms can be seen as anything but a change in the powers of the Senate;” see Standing Senate Committee on Legal and Constitutional Affairs, *supra* note 12. In her evidence before the same Committee, Jennifer Smith is of a similar view: “I can imagine ... that an eight-year renewable term has enough of an impact on the functioning of the Senate that it gets to the power of the Senate ...”

²⁷ This is one of the Prime Minister’s “special prerogatives” codified by an Order-in-Council titled, “Memorandum regarding certain of the functions of the Prime Minister.” Minute of a Meeting of the Committee of the Privy Council, PC 3374, 25 October 1935.

Prime Minister Harper argues that this selection process robs the Senate of its legitimacy. In his opinion, “legitimacy cannot be conferred on a legislature without elections.”²⁸

As mentioned above, on 21 June 2011, Bill C-7, the *Senate Reform Act*, was given first reading in the House of Commons. As discussed, Part 2 of that bill proposes a constitutional amendment that would alter senate term limits. Part 1 of the bill, entitled “Senatorial Selection,” is considered in this section. It repeats the provisions of an earlier Bill, S-8, which died on the Order Paper on 26 March 2011 when the 40th Parliament was dissolved.²⁹ Part 1, and its schedule, sets out a template for use by provinces for the purpose of electing individuals whose names would then be forwarded to the prime minister who, in turn, would be obliged to consider those names when making recommendations for senate appointments to the governor general. The legislation is modelled after Alberta legislation already in force.³⁰

Part 1 of Bill C-7, like its predecessor, Bill S-8, is non-binding in two senses. First, no province is obliged to adopt the Senate election process. If it does not, Senate selection will proceed as at present on the basis of appointment following the prime minister’s recommendation to the governor general. Second, while the prime minister is obliged under the proposed legislation to consider the name of any individual designated in a provincial election, the prime minister is not obliged to recommend that name to the governor general for appointment to the Senate. Under the senatorial selection proposals, the holding of Senate elections is entirely optional, the elections themselves are entirely consultative, and the prime minister’s “special prerogative” to recommend to the governor general whomever he or she pleases remains unfettered.

Part 1 of Bill C-7, like Bill S-8, is an ordinary piece of legislation. It does not purport to amend the provisions of the constitution dealing with the selection of senators. In accordance with section 42(1)(b) of the

²⁸ Paul Wells, “Harper on Senate reform” *Maclean’s* (2 March 2009), online: *Macleans.ca* <<http://www2.macleans.ca/2009/03/02/harper-on-senate-reform/>>.

²⁹ Bill S-8 was the successor to Bill C-20 which was introduced into the Commons on 13 November 2007, and which died when Parliament was dissolved on 7 September 2008. The two bills differed in the form of consultative election which they proposed. Instead of provincially conducted elections modelled on the template set out in Bill S-8, Bill C-20 proposed a detailed federally regulated electoral process conducted by the Chief Electoral Officer for Canada. Bill C-20 was itself the successor to Bill C-43 introduced into the Commons on 13 December 2006. Bill C-43 died on the Order Paper when the 1st session of the 39th Parliament was prorogued on 14 September 2007.

³⁰ *Alberta Senatorial Selection Act*, RSA 2000, c S-5. The Act was adopted in 1987.

Constitution Act, 1982, such an amendment could only be made using the section 38(1) general amending procedure. The required consent of seven provinces with fifty percent of the population would not likely be forthcoming. Part 1, therefore, works around the need for provincial consent by attempting to alter the selection process through ordinary legislation. Is this workaround constitutionally valid?

At the time that Bill S-8 was being debated, proponents argued that if adopted, the law would be constitutionally valid because of its non-binding character. It did not displace the constitutional procedure for appointing senators. The prime minister's unqualified discretion to recommend whomever he pleased remained intact. The governor general's power to summon new senators was unaffected. Similar electoral schemes had proven that they could operate in a non-binding manner. Prime Minister Mulroney recommended the appointment of the winner of one Senate election in Alberta, Stan Waters, but ignored the results of Senate elections when recommending subsequent appointments. Prime Minister Martin refused to be bound by the Senate electoral results when he recommended appointments for three vacant Alberta senate seats.

Others maintained that Bill S-8 was a colourable attempt to amend one of the "fundamental features or essential characteristics" of the Senate without following the formal amending process. They dismissed the notion of a consultative referendum as a sham that would, *de facto*, produce an elected Senate. Andrew Heard maintained that "it would indeed be all but impossible for a government to ignore the clear wishes of the people in a nominee-election process ..."³¹ John Whyte pointed to an inherent contradiction in the government's position: "It cannot be the case that those seeking to justify an initiative to democratize the Senate can find constitutional justification for their reform through promising never to be bound by the democratic process that they so badly want and that they claim to be so uniquely legitimate."³² Senator Joyal argued that Bill S-8 was not a consultation at all but was rather an unconstitutional delegation of legislative powers to the provinces or even an usurpation by the provinces of federal powers.³³

³¹ Andrew Heard, "Constitutional Doubts about Bill C-20 and Senatorial Elections," in Jennifer Smith, ed, *The Democratic Dilemma: Reforming the Canadian Senate* (Montreal and Kingston: McGill-Queen's University Press, 2009) 81 at 94.

³² Whyte, *supra* note 4 at 105.

³³ Bea Vongdouangchanh, "Grit Sen. Joyal attacks latest Senate reform bill, calls it 'unconstitutional'" *The Hill Times* (25 October 2010), online: The Hill Times Online <<http://www.thehilltimes.ca/page/view/lobbying-10-25-2010>>.

Contrary to Heard's point, it is far from clear that future prime ministers would uniformly feel bound by the results of consultative referenda or that such referenda would inevitably result in an elected Senate. A prime minister who had a fresh mandate in a general election, but whose party found itself in opposition in the Senate, might well have passed over the winner of a Senate election who was from an opposition party. The democratic claim of the Senate election winner would be offset by the democratic mandate of the prime minister obtained in the recent general election. More justification could be found, if any were needed, by citing the qualities of the prime minister's unelected nominee.

If it is unconstitutional to place the names of "elected senators" in the pool of potential Senate nominees, then what other limitations does the constitution impose on that pool? To this point in time, the constitution has universally been understood to give the prime minister an unfettered discretion to recommend anyone of his own choosing for a Senate seat provided that the nominee meets the minimum qualifications set out in the constitution. The pool can include "bag men" who have financed the prime minister's campaigns, defeated candidates from the prime minister's party, ministers of the Crown who need to be gently moved aside, television celebrities or star athletes that have caught the prime minister's fancy, the prime minister's friends or, for that matter, anyone else who meets the minimal constitutional qualifications for appointment to the Senate. If these people are eligible by virtue of the discretion that constitutional convention gives the prime minister, how can it be that the constitution somehow excludes elected nominees from the pool of potential candidates? To put the matter another way, without the passage of any law, it is open to the prime minister, on his own initiative, to conduct a public opinion poll, or a focus group, or an informal survey of academics or legislators or business people, for the purpose of identifying potential senate nominees. How can it then be that the prime minister cannot also consult the general population under the auspices of an ordinary legislative enactment? Surely what is constitutionally permissible as an exercise of prime ministerial discretion does not become impermissible when authorized by ordinary legislation.

It is possible, although for the reasons given above not likely, that over a very long period of practice, a consistent usage would develop whereby prime ministers would feel bound to recommend elected nominees because of their democratic legitimacy. If such a convention did evolve, the Senate would be transformed into an elected body without formal constitutional amendment. The evolution of conventions, however, is a legitimate path to constitutional amendment. The fact that a non-binding change might one day evolve into a convention is no reason to say that the

non-binding change is void at the outset because of its potential to amend the constitution. If such were the case, we might still be waiting for a formal constitutional amendment to authorize the principles of responsible government.

If Bill S-8 had emerged from the minority Parliament into which it was introduced, its constitutionality would probably have been challenged in the Supreme Court of Canada. Proponents of the law would have stressed its consultative character; opponents would have argued that despite the language of the law it was sufficiently binding that it would have fundamentally altered the Senate. In deciding how the legislation should be characterized, the Court would have had to weigh the desirability of introducing a greater degree of constitutional flexibility through the use of the senatorial selection workaround against the desirability of maintaining the provincial consent requirements enshrined in the formal amending process. The high improbability of ever achieving Senate reform through formal constitutional channels would have been the strongest argument for accepting constitutional-like, informal Senate reform achieved by characterizing Bill S-8 as non-binding, consultative legislation. These arguments may yet be tested providing Bill S-8's materially identical successor, Part 1 of Bill C-7, is passed by the new majority Parliament.

4. *The Third Workaround: Fixed Date Elections*

Section 50 of the *Constitution Act, 1867* states, "Every House of Commons shall continue for Five Years from the Day of the Return of the Writs for choosing the House (subject to be sooner dissolved by the Governor General)..."³⁴ In accordance with the constitutional convention establishing responsible government, the governor general must exercise his or her discretion to dissolve Parliament only on the advice of a prime minister who has earlier demonstrated the confidence of the House.³⁵

³⁴ See also s 4(1) of the *Constitution Act, 1982*, *supra* note 2 which states, "No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs of a general election of its members."

³⁵ See "Memorandum regarding certain of the functions of the Prime Minister," *supra* note 27 which states that recommendations to the Crown concerning the convocation and dissolution of Parliament are the "special prerogatives" of the Prime Minister.

There are eight other jurisdictions in Canada with similar fixed date election laws similar to Canada's. Together with their dates of passage, they are: British Columbia (2001), Newfoundland and Labrador (2004), Ontario (2005), Northwest Territories (2006), New Brunswick (2007), Prince Edward Island (2008), Manitoba (2008) and Saskatchewan (2008).

In 2007, Parliament adopted the *Fixed Date Election Act*³⁶ which added section 56.1 to the *Canada Elections Act*.³⁷ Section 56.1 begins by stating that nothing that follows affects the powers of the governor general, including the power to dissolve Parliament at his or her discretion. It goes on to fix future election dates on the third Monday in October in the fourth year following the previous general election.

In September 2008, one year after the passage of the *Fixed Date Election Act*, and two years and eight months after the previous general election, Prime Minister Harper asked for, and was granted, dissolution of the 39th Parliament. He made his request after consultations with the three opposition leaders convinced him that the minority Parliament had, in his word, become “dysfunctional.” The 40th general election was set for 14 October 2008. Had the date prescribed by the *Fixed Date Election Act* been honoured, the election would not have taken place until October 2010.

Democracy Watch, a citizens’ advocacy organization, asked the Federal Court³⁸ for a declaration that the prime minister’s request for dissolution contravened the *Fixed Date Election Act*. Democracy Watch argued that the Act was binding. The Act stated in mandatory terms that each general election “must” be held on the prescribed fixed date. The government maintained that the Act was advisory only; “the purpose of section 56.1 [was] to create a ‘statutory expectation’ of a certain date for election, without making the expected election dates legally enforceable.”³⁹

Shore J held that the Act should be interpreted as non-binding for two reasons. First, in constitutional terms, he noted that if the Act were interpreted as fettering the scope of the prime minister’s discretion to recommend dissolution to the governor general, it would raise an issue as to whether the Act was an amendment to the office of the governor general. That in turn would call into question the Act’s constitutionality given that the Office of the Governor General can only be amended with the approval of both Houses of Parliament and the legislative assemblies of each province.⁴⁰ However, by giving the Act a non-binding, advisory interpretation, the powers of the prime minister, and so of the governor

³⁶ *Supra* note 9.

³⁷ SC 2000, c 9.

³⁸ *Conacher v Canada (Prime Minister) (FC)*, 2009 FC 920, [2010] 3 FCR 411 [Conacher].

³⁹ Respondents’ Memorandum of Fact and Law at para 38, cited in *Conacher*, *supra* note 38 at para 52.

⁴⁰ *Constitution Act, 1982*, *supra* note 2, s 41(a) (the unanimity formula).

general, would in no way be impaired and the Act's constitutionality would be preserved.

Second, in legislative terms, the Court noted that the Act made no provision for successful votes of non-confidence in the government. The Court concluded that "it would be simpler to interpret section 56.1 as not being binding on the prime minister than to interpret it as having two unwritten clauses, the first to bind the prime minister to the dates in subsection 56.1(2) and the other to exempt the prime minister when a vote of non-confidence, which section 56.1 neither defines nor mentions, occurs."⁴¹

The Federal Court of Appeal unanimously affirmed the lower court's decision.⁴² The appellate Court specifically recognized that the Act, by its own terms, in no way bound the governor general.⁴³ The Court added that, "the preservation of the Governor General's powers and discretions under subsection 56.1(1) arguably may also extend to the Prime Minister's advice-giving role."⁴⁴ It would take the "clearest of statutory wording," wording that the Act did not contain, before the Court would conclude that the Act prohibited the prime minister from advising an election because of dire need or an event of grave importance.⁴⁵ Leave to appeal to the Supreme Court of Canada was refused on 20 January 2011.

Parliament passed the *Fixed Date Election Act*, an ordinary statute, as a way of working around the need to amend the constitutional provision allowing the House of Commons to continue for five years subject only to the governor general's discretion to dissolve sooner. Its effect, if it had been interpreted as being binding, would have been to restrict the prime minister's discretion to recommend dissolution and, in that sense, would have made the operation of the constitution more rigid. In order to preserve the constitutionality of the Act, however, it was interpreted as being a non-binding expression of the will of Parliament.⁴⁶ As with other constitutional workarounds attempted by ordinary legislation, the constitutionality of the fixed date workaround hinged on it being read as advisory rather than as binding.

⁴¹ *Conacher*, *supra* note 38 at para 58.

⁴² *Conacher v Canada (Prime Minister)*, 2010 FCA 131, 320 DLR (4th) 530.

⁴³ *Ibid* at para 6.

⁴⁴ *Ibid* at para 5.

⁴⁵ *Ibid* at para 7.

⁴⁶ *Ibid* at para 6.

5. *The Fourth Workaround: Ordinary Legislation – Secession Acts*

During the 30 October 1995 Quebec referendum campaign, supporters of the federalist option expressed concern at the Chrétien government's seeming passivity throughout the campaign. They were also frustrated by the confusing nature of the referendum question, and the Parti Québécois' stance that a vote of fifty percent plus one would be sufficient justification for a unilateral declaration of independence.⁴⁷ They felt that the Quebec government had rigged the rules of the game in favour of secession, and that the federal government had not done enough to clarify what the consequences of a "Yes" vote would be.

Following the close referendum result,⁴⁸ in order to be more proactive, Ottawa asked the Supreme Court to rule on whether, under the Constitution of Canada, or international law, Quebec could "effect the secession of Quebec from Canada unilaterally?"⁴⁹ The Court held that secession could only be achieved through an amendment to the Canadian constitution. Citing the unwritten democratic and federal principles of the constitution, the Court held that where a referendum on a "clear question" resulted in a "clear majority" in favour of secession, there would be "a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire."⁵⁰ While there existed no unilateral right for Quebec to secede under either Canadian constitutional law, or under international law, a secession vote, under the appropriate circumstances, would trigger a constitutional "obligation to negotiate" a new arrangement.

The Court was frustratingly circumspect in detailing the circumstances that would give rise to the new obligation to negotiate, the content of the obligation, and the means of enforcing the obligation. In addition to stating that the ballot question, and the majority result, would have to be "clear,"⁵¹ the Court held that the negotiations would have to take into account a wide

⁴⁷ The ballot question read: "Do you agree that Québec should become sovereign after having made a formal offer to Canada for a new economic and political partnership within the scope of the bill respecting the future of Québec and of the agreement signed on June 12, 1995?"

⁴⁸ 50.56% - No (federalist); 49.44% - Yes (sovereignist). The results of the first referendum, which took place on 20 May 1980, and which asked voters if they favoured a sovereignty association arrangement, were 59.56% - No (federalist); 40.44% - Yes (sovereignist).

⁴⁹ *Secession Reference*, *supra* note 13.

⁵⁰ *Ibid* at para 88.

⁵¹ *Ibid* at para 92.

range of issues,⁵² would have to address the needs of other stakeholders,⁵³ and would have to be conducted in conformity with the unwritten principles of the constitution including federalism, democracy, constitutionalism and the rule of law, and respect for minorities.⁵⁴ Beyond that, the Court declined any supervisory role, saying that "... it will be for the political actors to determine what constitutes 'a clear majority on a clear question' ... in the event of demonstrated majority support for Quebec secession, the content and process of the negotiations will be for the political actors to settle."⁵⁵ The Court recognized that the negotiations might reach an impasse but added, "We need not speculate here as to what would then transpire."⁵⁶

The response to this judgment on the part of both Ottawa and Quebec was unilateral. Ottawa passed the *Clarity Act*.⁵⁷ Section 1 provided that the House of Commons would determine, prior to a referendum, whether the proposed question was clear. At the least, it had to elicit a "direct expression ... on whether the province should cease to be part of Canada." Section 2 stated that the House of Commons would decide, following any referendum, whether the result was clear. When considering the clarity of the question and the result, the legislation stipulated that the House "shall take into account the views of all political parties represented in the legislative assembly of the province whose government proposed the referendum on secession," as well as the views of others.⁵⁸ In the event that the Commons considered that either the question or the result was unclear, the legislation set out that the "Government of Canada shall not enter into negotiations on the terms on which a province might cease to be part of Canada..."⁵⁹

Quebec's approach mirrored that of Ottawa. Two days after the *Clarity Act* was introduced in the House of Commons, the Quebec government brought forward its own legislation setting out its own binding pre-conditions for post-referendum talks.⁶⁰ Quebec's law asserted the province's right to self-determination and stated, "No other parliament or government may ... impose constraint on the democratic will of the Québec people to determine its own future." The Quebec legislation defined a "clear" majority as fifty percent plus one votes in a referendum

⁵² *Ibid* at para 96.

⁵³ *Ibid* at para 151.

⁵⁴ *Ibid* at para 95.

⁵⁵ *Ibid* at para 153.

⁵⁶ *Ibid* at para 97.

⁵⁷ *Supra* note 10.

⁵⁸ *Ibid*, ss 1(5), 2(3).

⁵⁹ *Ibid*, ss 1(6), 2(4).

⁶⁰ *An Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec state*, SQ 2000, c 46. This Act has no official short title.

and laid down several other non-negotiable items including the territorial integrity of the province.

Both of these acts are workarounds that arguably add to the constitution's amending procedures without seeking to amend them formally, something which could only be done using the unanimity process. The *Clarity Act*, and the Quebec legislative response, are both designed to impose binding pre-conditions on the constitutional "obligation to negotiate" set out in the *Secession Reference*. These preconditions have the potential to make the constitution more rigid by barring governments, in certain circumstances, from entering into negotiations following a referendum. Can this rigidity be avoided by giving the preconditions an interpretation that both preserves their constitutionality and the constitution's capacity for post-referendum adaptation?⁶¹

If the House of Commons, or the Quebec legislature, acting unilaterally, can determine whether the clarity preconditions have been met, the possibility of a post-referendum stand-off becomes as real as the possibility of a post-referendum negotiation. Federalists, citing the *Clarity Act*, could foreclose negotiation claiming that, in the opinion of the Commons, the question, or the result, were not "clear." Likewise, the sovereigntists, citing the Quebec legislation, might refuse negotiation claiming that a fifty percent plus one vote was sufficiently clear to authorize self-determination. It is difficult to see how such claims, if made without consultation between governments, would meet the constitutional "obligation to negotiate" established by the *Secession Reference*.⁶²

It is possible, however, to give the preconditions a non-binding, flexible interpretation, and so preserve their constitutionality. There is nothing in either act that prevents the referendum question, and the interpretation of the results, from being negotiated. Indeed, in the case of the *Clarity Act*, the obligation on the House of Commons to "take into

⁶¹ Professor Monahan argues that the *Clarity Act* is constitutionally valid on either of two alternative grounds. First, he submits that s 44 of the *Constitution Act, 1982* permits the federal government alone to amend the Constitution in relation to the executive government of Canada. Second, he maintains that the *Clarity Act* is validly adopted pursuant to Parliament's peace, order and good government (POGG) powers found under s 91 of the *Constitution Act, 1867*. See Patrick J Monahan, *Constitutional Law*, 3d ed (Toronto: Irwin Law, 2006) at 225-28.

For the *Clarity Act* and the Quebec law to be constitutional, they would not only have to conform to the *Constitution Acts, 1867 and 1982*, they would also have to conform to the strictures laid down by the Court in the *Secession Reference*. In particular, they would could not impede the "obligation to negotiate" in appropriate circumstances.

⁶² *Supra* note 13 at para 88.

account the views of all political parties” in the Quebec Assembly can be read not simply as a requirement to “take note of” those views, but rather as a more robust requirement to engage in an open-minded and meaningful consultation on the referendum process. If agreement were reached as a result of such discussions, then both legislative bodies could affirm that the agreed upon referendum question, and rules for interpreting the results, were “clear.” In other words, while the preconditions might bind their respective governments, the legislation does not prevent the content of those preconditions from being negotiated.

This kind of contextual interpretation reflects the reality of the negotiation process. In complex negotiations, it is not uncommon for pre-bargaining to settle procedural matters such as the identity of the negotiating parties, the location of the negotiation, the agenda items (including whether purportedly “non-negotiable” items will be put on the table), the timetable, the rules for conducting the negotiation, and so on.⁶³ Nothing in the *Clarity Act*, or in the Quebec legislation, prevents bargaining over such procedural matters as the content of the referendum question and the rules for interpreting the referendum vote.

As with other workarounds, the constitutionality of preconditions depends on whether they are interpreted as binding constraints, or whether they are interpreted so as to preserve a window of discretion for the political actors to whom they are addressed. If the legislative preconditions for determining secession are binding in a way that prevents the political actors from negotiating all relevant matters, they will offend the “obligation to negotiate,” and be constitutionally invalid. If, however, the preconditions are sufficiently flexible to permit their content to be determined through mutual bargaining, they can meet the “obligation to negotiate” and be constitutionally valid.

A court might well be prepared to read into the *Clarity Act*, and the companion Quebec legislation, a window of discretion in which the political actors can work out all of the rules for dealing with a challenge to the existing constitutional order. After all, in the *Secession Reference*, the Court, beyond establishing the obligation to negotiate, was insistent that both the process, and the substance, of those talks was not justiciable but was, “for the political actors to settle.”⁶⁴

⁶³ The shape of the table was a major preliminary issue at the Paris Peace Talks convened to negotiate an end to the Vietnam War. See Wikipedia, *Paris Peace Accords*, online: Wikipedia, the free encyclopedia <http://en.wikipedia.org/wiki/Paris_Peace_Accords>.

⁶⁴ *Secession Reference*, *supra* note 13 at para 153. Note, however, Robert A Young, “A Most Politic Judgment” (1998) 10:1 Constitutional Forum constitutionnel 14

6. *The Fifth Workaround: Ordinary Legislation – Regional Vetoes*

When the amending formula was entrenched in the *Constitution Act, 1982*, it included no veto for Quebec, “something that in the past had always been recognized in practice.”⁶⁵ Quebec was angry both at losing the historic veto and at the way in which this happened. During the 1981-82 constitutional negotiations, Premier Levesque agreed to forego the veto in favour of what was known as the Vancouver formula. Constitutional amendments using that formula would have required the consent of seven provinces with fifty percent of the population. The formula treated all provinces equally in the sense that no province was given a veto over future constitutional amendments. The western provinces, in particular, found this attractive. Levesque initially supported this approach less out of conviction than out of a desire to hold together the “Gang of Eight” premiers who opposed Prime Minister Trudeau’s patriation initiative. His hope in backing the dissidents was to cause the constitutional negotiations to fail. This would have served as proof that federalism did not work and thus have paved the way for another secession referendum. When Trudeau eventually accepted a version of the Vancouver formula as the amending formula, seven of the eight premiers dropped their opposition to patriation. The constitution, absent any veto, was then amended with only Levesque in opposition. Attempts were made through the Meech Lake (1987) and the Charlottetown (1992) initiatives to accommodate Quebec’s demand for restoration of the veto. The failure of those initiatives, however, only heightened Quebec’s sense of grievance.

During the 1995 Quebec referendum campaign, Prime Minister Chrétien promised to address the veto issue. He could not do so by amending the constitution’s amending formula as that would have required unanimous provincial consent.⁶⁶ That would have been unlikely given support in the western provinces for the equality principle upon which the existing amending formula was based. Chrétien had no option, therefore, but to work around the formal amending process. He proposed ordinary legislation, the 1996 regional veto statute,⁶⁷ that would have the effect of sharing the House of Commons veto power under the section 38 general amending formula with Quebec and with the other regions of Canada. The Act stated that no minister of the Crown “shall” propose a House of

at 17 where the author observes: “In the course of an attempted secession, the Court might be the only body able to decide procedural matters such as who participates in negotiations ...”

⁶⁵ Peter W Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2010) ch 4 at 7.

⁶⁶ *Constitution Act, 1982*, *supra* note 2, s 41(e).

⁶⁷ *Supra* note 11.

Commons motion for a resolution to authorize a constitutional amendment using the section 38 amending formula unless the amendment enjoyed the support of Ontario, Quebec, British Columbia, two of the Atlantic provinces with fifty percent of the population of that region, and two of the prairie provinces with fifty percent of the population on the prairies.

The problem with this workaround is that it places an overlay on the section 38 general amending formula that makes it, for all practical purposes, unworkable. While the workaround avoids the need for a formal constitutional amendment to amend the amending formula, the impact of the workaround is to make the constitution more rigid by making it more difficult to amend in the future. This raises the question, therefore, of whether the workaround can be worked around for the sake of preserving some degree of constitutional flexibility. There are three possibilities.

First, if the regional veto statute is held to be binding, it is arguably unconstitutional and, as such, would have no effect on the section 38 amending formula. Generally, the constitution contemplates that Parliament “can make or unmake any law whatever,”⁶⁸ and that primary law-making authority can only be exercised by Parliament.⁶⁹ The regional veto statute impairs Parliament’s ability to pass “any law whatever,” and delegates part of Parliament’s primary law-making authority by requiring regional pre-approval of certain constitutional resolutions before they can be introduced into the House.

Specifically, section 38 of the *Constitution Act, 1982* states, “An amendment ... may be made by the Governor General ... where so authorized by resolutions of the ... House of Commons. ...” By preventing ministers from bringing such resolutions, the regional veto statute interferes with the constitutional authority of the House to consider, and with the constitutional discretion of the governor general to proclaim, such amendments. By imposing conditions on the operation of the section 38 general amending formula, and by attempting to modify the office of the governor general using ordinary legislation rather than the section 41 unanimity amending procedure, the regional veto statute becomes constitutionally suspect. If the Act is unconstitutional, the workaround

⁶⁸ The principle of parliamentary sovereignty was articulated by Arthur V Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (London: Macmillan, 1959) at 424. The principle is incorporated into Canadian law by virtue of the constitution’s preamble which states that the constitution is, “similar in principle to that of the United Kingdom.” It is qualified by the federal nature of the Canadian constitution and by the *Charter of Rights and Freedoms*.

⁶⁹ See *Re Initiative and Referendum Act* [1919] AC 935 and the discussion at Hogg, *supra* note 65 ch 14 at 10-16.

fails. Regional approval would not be a binding pre-condition to the operation of the general amending formula, leaving the constitution less rigid.

Second, if the regional veto statute is held to be non-binding, the constitutionality is not problematic and the operation of the section 38 amending formula is not made more rigid. If the Act is read as simply permissive, or consultative, it is neither an impediment to, nor delegation of, Parliament's law-making capacity. It would neither interfere with the ability of the House of Commons to consider amendments, nor with the discretion of the governor general to proclaim them. The issue is, therefore, whether the Act can be considered non-binding.

There are two senses, both debatable, in which it might be. There is always the possibility that Parliament could repeal the Act. That would enable ministers to introduce resolutions amending the constitution without obtaining the prior regional approval. Some argue, however, that Parliament does not have the power to revoke procedural or "manner and form" legislation such as the regional veto statute. Others maintain that Parliament has such a power so long as the legislation in question does not expressly forbid such revocation, so long as the legislation contains no "entrenching" clause. The regional veto statute does not contain an entrenching clause and so, presumably, could be revoked at any time that Parliament was so inclined.⁷⁰ It should also be said, however, that the option of repeal, if it exists, might be politically unattractive especially if attempted for the purpose of adopting a significant, but controversial, constitutional amendment.

In another sense, the Act might be interpreted as not fettering the power of Ministers to bring constitutional resolutions to the House of Commons. The Act could be considered advisory only if the following italicized words were read into its existing wording: "No Minister of the Crown shall propose a motion ... unless the amendment has first been *referred for consultation to, or consented to, by a majority of the provinces ...*" However, it might stretch the ordinary meaning of the language of the Act, language which uses the word "shall" in reference to obtaining the consent of the provinces, to read in words that turn the legislation from being directory into being consultative. Still, in the case of the *Fixed Date Election Act*, discussed above, the Court was able to work such magic to ensure that ordinary legislation would not fetter the exercise of constitutional discretion.

⁷⁰ On the issue of manner and form legislation see Hogg, *supra* note 65 ch 12.3(b).

Third, as a practical matter, the regional veto statute is not, by its own terms, very constraining. The most straightforward approach to working around the workaround might simply be to have a non-ministerial member of the government caucus introduce the House of Commons resolution to authorize the proposed constitutional amendment. The regional veto statute constrains only ministers. Non-ministers are not affected by the legislated need to obtain regional consent in addition to that constitutionally required by the general amending formula.

In summary, the regional veto workaround, despite appearing to make the constitution more rigid by placing a gloss on the general amending formula, may have little impact. If it is binding, it may well be unconstitutional and so of no effect. If it is non-binding, it will not change the threshold of provincial consent constitutionally required under the section 38 general amending formula. As a practical matter, a government can avoid the Act altogether, can work around the workaround, simply by repealing the legislation or by pressing one of its underutilized back benchers into service.

7. The Sixth Workaround: Declaratory Statements

Where formal constitutional change is virtually unachievable, declaratory statements, rather than advisory or consultative laws, can be employed to influence the way in which the constitution is operationalized. These statements, sometimes in the form of parliamentary motions, sometimes in the form of prime ministerial declarations, are expressions of will. They are often symbolic or advisory in nature, and are often used to send a message of reassurance to those seeking constitutional change where formal change is impossible. In that sense, they have about them the quality of a consolation prize. Perhaps for that reason, their effect is often negligible, or difficult to discern at best. Because these statements are political and not legal, are enforceable at the ballot box and not in the court room, they raise no issue of constitutional validity. However, executive actions taken pursuant to these statements must conform to the constitution.

On three occasions between 1995 and 2006, the House of Commons adopted motions dealing with Quebec's status within Canada. On 11 December 1995, Prime Minister Chrétien fulfilled a promise that he made during the second Quebec referendum by having the House of Commons adopt a motion to the effect that "the House recognize[s] that Quebec is a distinct society within Canada" and that "the House encourage[s] all components of the legislative and executive branches of government to

take note of this recognition and be guided in their conduct accordingly.”⁷¹ The motion defined “distinct society” as Quebec’s “French-speaking majority, unique culture and civil law tradition.”

The distinct society issue had been extensively mooted during the time of the Meech Lake (1987-90) and Charlottetown (1992) Accords. No consensus emerged on the meaning of the phrase. Peter Hogg considered it mainly “symbolic.”⁷² On the other hand, Quebec Premier Robert Bourassa insisted that the phrase would change the way the entire constitution, including the *Charter of Rights and Freedoms*, would be interpreted.⁷³ Later, in a 1996 speech, a former Chief Justice of Canada, Brian Dickson, pointed out that the courts already took “into account Quebec’s distinctive role in protecting and promoting its francophone character.”⁷⁴

On 14 September 1997, all Canadian premiers except Quebec Premier Lucien Bouchard met in Calgary. The meeting was meant as a goodwill gesture to Quebec following the close result in the 1995 Referendum. All of the premiers present signed a document entitled, “A Framework for Discussion on Canadian Unity.” The *Calgary Declaration*, as it came to be known, stated that all provinces had equality of status, that the Quebec legislature and government had a role to protect and develop “the unique character of Quebec society within Canada,” and that any new constitutional powers made available to one province would be made available to all. On 25 November 1997, the House of Commons passed a motion endorsing “the efforts of the premiers, the territorial leaders and grassroots Canadians to foster national unity ...” through the *Calgary Declaration* and the consultative meetings that followed it. In the nine months after the signing of the Declaration, all provincial legislatures except Quebec’s ratified it. Following that, the Declaration quickly faded from view.⁷⁵

⁷¹ See Brian O’Neal, “Distinct Society: Origins, Interpretations, Implications” (1995) Library of Parliament: Parliamentary Information and Research Service, online: Parliament of Canada <<http://www2.parl.gc.ca/content/lop/researchpublications/bp408-e.htm>>.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ See John Geddes, “Meech Lake Ten Years After” *Maclean’s* (19 June 2000), online: The Canadian Encyclopedia <<http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=M1ARTM0012191>>.

⁷⁵ Ted Glenn, “The Calgary Declaration” (1998) Ontario Legislative Library: Legislative Research Service, online: Ontario Legislative Library <<http://www.ontla.on.ca/library/repository/mon/1000/10273337.htm>>.

Late in 2006, the Bloc Québécois sought to have the House of Commons pass a motion recognizing Quebec as a “nation.” Before this initiative could come to a vote, Prime Minister Harper countered with a motion on 27 November 2006 to the effect that, “this House recognizes that the Québécois form a nation within a united Canada.”⁷⁶ The motion quickly passed by 266 votes to 16, with the Bloc voting in support. Various politicians subsequently debated the meaning of the word “Québécois” in the press. Some maintained that it included all people living in Quebec, some that it was limited to “pure laine” Quebecers. This motion, like the others on the status of Quebec, had no appreciable impact, constitutional or otherwise.

There have been several declaratory statements relating to Ottawa’s use of its spending power in areas of provincial jurisdiction. Although the *Constitution Act, 1867* is generally silent on the spending power, it is widely accepted and confirmed by long practice, that the federal government may spend its funds for any purpose that it chooses including on matters outside of its legislative competence.⁷⁷ Many provinces, especially Quebec, have considered federal government spending on education, health and welfare as an infringement on their areas of competence. After being re-elected in 1985, Premier Bourassa made limitation of the federal spending power one of his five conditions for Quebec-Canada reconciliation following that province’s refusal to ratify the *Constitution Act, 1982*. Both the Meech Lake and Charlottetown Accords attempted to do this by allowing any province to opt-out of any new shared-cost program, with federal compensation, provided that the province introduce a program similar to the national program. This attempt failed when the two accords were not ratified.

Following the 1995 referendum, Prime Minister Chrétien tried to respond to Quebec’s concern over the federal spending power by including the following declaratory statement in the 27 February 1996 Speech from the Throne:

The Government will not use its spending power to create new shared-cost programs in areas of exclusive provincial jurisdiction without the consent of a majority of the

⁷⁶ Parliament of Canada, “The Constitution Since Patriation: Chronology” PARLINFO, online: Parliament of Canada <<http://www2.parl.gc.ca/parlinfo/compilations/constitution/ConstitutionSincePatriation.aspx?Year=--+ALL+-->>. This chronology, which is an excellent research tool, lists events with constitutional significance that have occurred since 1982.

⁷⁷ Hogg, *supra* note 65 ch 6 at 17.

provinces. Any new program will be designed so that non-participating provinces will be compensated, provided they establish equivalent or comparable initiatives.⁷⁸

This statement was reflected in a declaration signed by Prime Minister Chrétien, and all of the premiers and territorial leaders except Premier Bouchard, on 4 February 1999. The Social Union Framework Agreement (SUFA) affirmed the right of all Canadians to social programs of comparable quality and to medicare based on comprehensiveness, universality, portability, public administration, and accessibility. It stated that the federal government would use conditional grants in a “cooperative manner,” and only after having consulted with the provinces and having obtained a majority consensus of provincial legislatures would new Canada-wide initiatives funded by Ottawa be introduced. The impact of SUFA was negligible.⁷⁹

The 3 March 2010 Speech from the Throne, opening the Third Session of the 40th Parliament, also contained a statement dealing with the federal spending power: “It [the Government of Canada] will also continue to respect provincial jurisdiction and to restrict the use of the federal spending power.”⁸⁰ Apart altogether from constitutional considerations, these statements by successive federal governments promising to restrict their use of the spending power have served federal interests in limiting expenditures in difficult economic times and, more recently, in forwarding policies aimed at reducing the size of government.

There are other examples of declaratory statements intended to influence the way in which the constitution is implemented. On 4 December 2008, Prime Minister Harper abruptly advised the governor general to prorogue the First Session of the 40th Canadian Parliament when it was only seventeen days old. The request, which was granted, was controversial.⁸¹ Harper claimed that the government needed the break to develop a new strategy to meet the growing world economic crisis; the opposition claimed that he merely wished to avoid a vote of confidence by

⁷⁸ Government of Canada, “Speech from the Throne to Open the Second Session of the Thirty-Fifth Parliament of Canada” (27 February 1996), online: Privy Council Office <<http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=archives/sft-ddt/1996-eng.htm>>.

⁷⁹ John Richards, “The Paradox of the Social Union Framework Agreement” (2002) 59 C.D. Howe Institute Backgrounder, online: cdhowe.org <http://www.cdhowe.org/pdf/backgrounder_59.pdf>.

⁸⁰ Government of Canada, “Speech from the Throne” (10 March 2010), online: Speech from the Throne <<http://www.speech.gc.ca/eng/media.asp?id=1388>>.

⁸¹ Robert E Hawkins, “The Fixed-Date Election Law: Constitutional Convention or Conventional Politics?” (2010) 19:1 Constitutional Forum constitutionnel 120.

a recently formed coalition that threatened his government. This incident, together with controversy surrounding Prime Minister Harper's decision to prorogue the House of Commons on 30 December 2009, led the New Democratic Party to propose a Commons resolution that was adopted by a vote of 139 to 135 on 17 March 2010. The motion read: "That, in the opinion of the House, the prime minister shall not advise the Governor General to prorogue any session of any Parliament for longer than seven calendar days without a specific resolution of this House of Commons to support such a prorogation."⁸² Such a declaratory motion, if legally binding, would, arguably, be an unconstitutional interference with the prime minister's prerogative to advise the governor general on prorogation. As the motion has no binding legal effect, however, it works around the need for any formal constitutional amendment.

Finally, Prime Minister Harper has made several declarations outlining what executive action he would take, pending passage of his Senate reform legislation, in recommending Senate appointments. After assuming office in January 2006, he made two such appointments, Michael Fortier on 6 February 2006, and Bert Brown on 10 July 2007. Fortier's appointment was made in order to give Quebec representation in the cabinet. Brown was successful in Senate nominee elections held in Alberta in 1998 and 2004. After making these two appointments, Harper stated that he would not fill any other vacant Senate seats with non-elected senators until term limit and senatorial selection bills were passed. He explained his refusal to make appointments on the ground that he hoped that this would encourage provinces to hold elections to designate Senate nominees.⁸³

John Whyte maintains that Harper's policy of not filling Senate vacancies violates a constitutional duty. He argues that the words "shall ... summon qualified persons to the Senate," found in section 24 of the *Constitution Act, 1867*, oblige the prime minister to present nominations to the governor general. "Whatever discretionary room may exist in this power, it does not extend to an exercise of that discretion that would destroy the element of governmental structure the preservation and functioning of which is the purpose behind the granting of the power."⁸⁴ He buttresses his argument by claiming that no government would be allowed to erode the judiciary by not filling judicial vacancies. In reply, one might observe, first, that Harper's studied inaction in not recommending Senate appointments never reached the point where the

⁸² Canadian Broadcasting Corporation, "Motion to limit PM's prorogation power passes" (17 March 2010), online: CBC News <<http://www.cbc.ca/politics/story/2010/03/17/layton-prorogue.html>>.

⁸³ *Supra* note 28.

⁸⁴ Whyte, *supra* note 4 at 108.

vacancies threatened to destroy the functioning of the upper house. Second, it is not clear that exerting pressure on the Senate by refusing to make appointments is analogous to exerting pressure on the judiciary by refusing to appoint judges. The Senate is a political body; the judiciary is not. The Senate is part of the legislative branch of government; the judiciary is an independent branch protected by the separation of powers doctrine.

Harper explained that he was obliged to abandon his practice of not filling Senate vacancies when he realized that he did not have the votes in the upper house to pass his Senate reform legislation. He also explained that, following the formation on 1 December 2008 of an opposition coalition capable of defeating the government, he did not want to give the coalition the chance to fill the vacancies should it come to power. On 22 December 2008, Harper recommended eighteen new Senators, the largest one-day set of Senate nominations in Canadian history. His office informed the press that all of the nominees had promised to support the government's Senate reform legislation, and to resign and run for their Senate seats if their designated provinces adopted Senate election legislation.⁸⁵ The same promises were given by later Harper nominees.⁸⁶ Harper's initial statement indicating his refusal to nominate new senators, and his subsequent statement that he would require all future nominees to promise support for Senate reform, are examples of legally non-binding declarations intended to bring about change of a constitutional nature without resort to the constitutional amending process.⁸⁷

8. Conclusion

Constitutional workarounds are useful safety valves. The near impossibility of making significant constitutional changes through formal

⁸⁵ Canadian Broadcasting Corporation, *supra* note 15.

⁸⁶ Gloria Galloway and Daniel Leblanc, "With Senate in his grip, PM drives crime agenda" *The Globe and Mail* (29 January 2010) online: The Globe and Mail <<http://www.theglobeandmail.com/news/politics/with-senate-in-his-grip-pm-drives-crime-agenda/article1450162/>>.

The Montreal Gazette. 21 December 2010. "Conservatives get majority in Senate." Accessed online at: <<http://www.montrealgazette.com/sports/Conservatives+majority+Senate/4006819/story.html>>

Jan 29, 2010 G&M; Dec 21, 2010 – Montreal Gazette.

⁸⁷ An anonymous review of this article made the interesting suggestion that quasi-constitutional legislation might be considered a seventh form of constitutional workaround. Such legislation contains an express primacy clause, or a primacy clause is implied, that gives the legislation precedence not only over earlier statutes but over subsequent statutes as well. Human rights codes are the most familiar examples.

amendment means that informal ways have to be found to ensure that the constitution continues to reflect the values of contemporary society. Workarounds, by offering an informal channel for constitutional-like change, are necessary to enable the constitution to adapt as society evolves.

To be constitutionally valid, workarounds in the form of ordinary legislation and declaratory statements must be non-binding. They must be consultative or advisory in nature so as not to fetter the discretionary powers that the constitution grants to public servants, and politicians, charged with operationalizing Canada's fundamental law. If they were binding in a way that did fetter constitutional powers, they would only be constitutionally valid if adopted in accordance with the constitutional amending formula.

When deciding whether to characterize a workaround as non-binding or binding, and so as constitutional or unconstitutional, a court will have to balance its concern to keep the constitution supple enough to accommodate modern realities with its concern to maintain the appropriate degree of stakeholder consent necessary to ensure buy-in for the proposed constitutional change. An interpretation that the workaround is non-binding enables constitutional-like change to take place without the need to resort to the formal amending process, with its rigid consent requirements. On the other hand, an interpretation that the workaround is binding ensures that the constitutional requirements of provincial consent are met, but makes passage of significant amendments virtually impossible.

As a practical matter, the workarounds discussed above must also be non-binding. Otherwise, they risk making the constitution more, not less, rigid. This would exacerbate the very problem that made workarounds necessary in the first place. The Senatorial Selection Bill, if interpreted as binding, would fetter the prime minister's discretion to nominate senators. The *Fixed Election Act*, had the Court interpreted it as binding, would have restricted the prime minister's and governor general's discretion with respect to dissolving Parliament and calling elections. The *Clarity Act*, if interpreted as imposing binding pre-conditions, would prevent the government from discharging its constitutional "obligation to negotiate" established by the *Secession Reference*. The regional veto statute, if binding, would place a gloss on the general amending formula that would, for all practical purposes, make it extremely difficult for ministers of the Crown to use that formula to propose constitutional change.

Workarounds offer the possibility for experimentation, and for the slow and careful evolution of constitutional conventions. A workaround

cannot produce constitutional change; it can only produce constitutional-like change. However, through time, if the use of a workaround creates a body of precedent, if political actors come to feel bound by those precedents, and if the original reason for the workaround proves that it responds to modern exigencies, a convention, and with it actual, binding constitutional change, may evolve.⁸⁸ That possibility, in a constitutional regime like Canada's, where the formal amending process is seriously blocked, offers one of the few opportunities for loosening the new Gordian knot.

⁸⁸ *Re Resolution to Amend the Constitution*, [1981] 1 SCR 753 at 888 (the Jennings test for establishing the existence of a constitutional convention).