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LEGISLATIVE SUMMARY

Bill C-7:

An Act respecting the selection of senators and amending the Constitution Act, 1867 in respect of Senate term limits

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Legislative Summary of Bill C-7

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Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

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LEGISLATIVE SUMMARY OF BILL C-7: AN ACT RESPECTING THE SELECTION OF SENATORS AND AMENDING THE CONSTITUTION ACT, 1867 IN RESPECT OF SENATE TERM LIMITS

1 BACKGROUND

Bill C-7, An Act respecting the selection of Senators and amending the Constitution Act, 1867 in respect of Senate term limits, was introduced in the House of Commons on 21 June 2011 by the Minister of State (Democratic Reform), the Honourable Tim Uppal.

The bill is divided into two parts:

- Part 1 prescribes a selection process that a province or territory may choose to adopt to enable voters in that province or territory to vote for the individuals who would be considered by the prime minister in making his recommendations to the Governor General for appointment to the Senate; and
- Part 2 amends the *Constitution Act, 1867* to limit the term of senators appointed to the Senate after 14 October 2008 to one non-renewable nine-year term.

The bill contains proposals that may not require constitutional amendments, in the case of the selection process for senators, or may not require provincial concurrence for constitutional amendments, in the case of Senate term limits.

Bill C-7 was first introduced in the House of Commons in March and April 2010 during the 3rd Session of the 40th Parliament as Bill C-10 and Bill S-8. Bill C-10, An Act to amend the Constitution Act, 1867 (Senate term limits) was introduced on 29 March 2010. Bill S-8, An Act respecting the selection of senators, was introduced on 27 April 2010. Both bills died on the *Order Paper* on 26 March 2011 with the dissolution of the 40th Parliament. Part 2 of Bill C-7 is largely a copy of Bill C-10, with the important difference being that the Senate term limit has been increased slightly from eight years to nine years. Bill S-8, meanwhile, set out a senatorial selection process that is identical to the process now found in Part 1 of Bill C-7.

In his historic appearance before the Special Senate Committee on Senate Reform in September 2006, the only appearance before a Senate committee by a prime minister, Prime Minister Stephen Harper spoke of a step-by-step process for reform of the Senate that involved legislation for shortened senatorial terms, to be followed by legislation to establish an advisory, or consultative, election process for senators on a national level.[1] He also expressed a desire to initiate a process for constitutional reform leading to an elected Senate "in the near future."[2]

1.1 SENATORIAL SELECTION

Part 1 of Bill C-7 proposes to establish a framework for the selection of Senate nominees within a province or territory for consideration by the prime minister in

recommending persons to be summoned to the Senate by the Governor General. The bill sets out, in effect, a model statute that prescribes an electoral process, which provinces and territories may choose to adopt. This legislative model would allow voters to select candidates wishing to be considered for appointment to the Senate.

Under the bill, a province or territory that enacts electoral legislation that is substantially in accordance with the framework may select its senatorial nominees and submit those nominees to the prime minister, who would be obligated to consider them in making his or her recommendations to the Governor General for appointment to the Senate. The selection process would be conducted entirely by the province or territory and overseen by its electoral officials.

It should be noted that the bill imposes no obligation on provinces or territories to establish a selection process for Senate nominees modelled on the framework as set out in the schedule. It provides provinces and territories with an opportunity to propose qualified individuals to the prime minister, who must consider – but is not bound to accept – the names of the persons proposed. The bill effectively sets out an optional alternative to the current selection process. If a particular province or territory chooses to take no action, the current process – whereby the prime minister alone selects Senate nominees – would continue.

1.1.1 Previous Bills Proposing Reforms to the Selection Process

The government has made three attempts to enact legislation proposing to establish a process allowing the voters of a province or a territory to select senatorial nominees.

On 27 April 2010, the Honourable Gerald J. Comeau (deputy leader of the Government in the Senate) introduced Bill S-8, An Act respecting the selection of senators. Its short title is the *Senatorial Selection Act*. As noted earlier, Bill S-8 died on the *Order Paper* with the dissolution of the 40th Parliament in March 2011.

Bill C-20, An Act to provide for consultations with electors on their preferences for appointments to the Senate (the Senate Appointment Consultations Act), proposed a federally regulated electoral process to be conducted by the Chief Electoral Officer of Canada. The bill was introduced on 13 November 2007 and was referred to the House of Commons Legislative Committee on Bill C-20. The Committee held a total of 10 meetings in studying the bill, which then died on the *Order Paper* with the dissolution of the 39th Parliament on 7 September 2008. The bill included directly, or by reference, several substantive provisions of the *Canada Elections Act*. In addition, it contained special rules for financing of campaigns by candidates wishing to become senatorial nominees. The bill also proposed a preferential voting system for senatorial selection.[3]

Bill C-20 had previously been introduced as Bill C-43 in the 1st Session of the 39th Parliament. That bill was awaiting second reading when it died on the *Order Paper* with the prorogation of Parliament on 14 September 2007.

1.1.2 Proposals for Reforming Senatorial Selection

Since Confederation, proposals to reform the Senate, including proposals to change the senatorial selection process, have been put forward at various points in time. Some of the major proposals are discussed as follows.[4]

During the first Interprovincial Conference of 1887, provincial premiers passed a resolution proposing that half the members of the Senate be appointed by the federal government and the other half by provincial governments.[5]

Interest in Senate reform abated until the end of the 1960s. At the Constitutional Conference of 1969, the federal government proposed that senators be selected in part by the federal government and in part by provincial governments, similar to the proposal made at the 1887 Interprovincial Conference. The provinces could choose the method of selection of senators, whether by nomination of the provincial governments or with the approval of their legislatures.[6] A similar proposal was made by the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada. In its 1972 report, the committee recommended that senators continue to be nominated by the federal government but that half of them be appointed from a panel of nominees submitted by the provincial and territorial governments.[7]

In 1978, the Government of Canada's proposal *A Time for Action* called for a renewed Constitution, which would include a House of the Federation that would replace the Senate. The proposal provided for half the senators of a province to be selected by the House of Commons following each federal general election and the other half to be selected by the legislative assembly of that province following each provincial general election, with the senators representing a territory to be selected by the Governor in Council.[8] Bill C-60 was intended to give effect to the proposal. It was tabled and received first reading in the House of Commons on 20 June 1978.[9]

In 1979, the Pépin–Robarts Task Force on Canadian Unity recommended the abolition of the Senate and the establishment of the Council of the Federation, to be composed of provincial delegations led by a person of ministerial rank or by the premier of a province.[10]

In 1984, the Special Joint Committee of the Senate and House of Commons on Senate Reform (Molgat–Cosgrove Committee) recommended that senators be directly elected.[11] The Royal Commission on the Economic Union and Development Prospects for Canada recommended that senators be elected in elections held simultaneously with elections to the House of Commons.[12]

A committee of the Alberta legislature, the Alberta Select Committee, in 1985 proposed that senators be chosen by Alberta voters in an election held simultaneously with elections to the provincial legislature.[13]

In 1987, provincial and federal first ministers reached an agreement on constitutional reform that would have had implications for the method of selecting senators. Under

the *Meech Lake Accord*, once a vacancy occurred in the Senate, the provincial government of the province in which the vacancy existed could submit a list of nominees for potential appointment to the Senate. This process was to apply pending approval of the constitutional agreement by the provincial legislatures.[14] On 23 June 1990, however, the *Meech Lake Accord* expired when the legislatures of Manitoba and Newfoundland failed to ratify the Accord.

The 1992 *Charlottetown Accord* proposed that the Constitution be amended in order to provide that senators be elected by voters in each province or territory, or by members of provincial or territorial legislatures. Under the terms of the Accord, each province would have six senators, and each territory one senator, with provision being made for the representation of Aboriginal peoples in the Senate. The *Charlottetown Accord* was defeated in a nationwide referendum held on 26 October 1992.

The Special Joint Committee of the Senate and House of Commons on a Renewed Canada (Beaudoin–Dobbie Committee) in its 1992 report recommended the direct election of senators under a proportional representation system.

1.1.2.1 Provincial Legislation Affecting the Selection of Senators

Several provinces have already enacted legislation to enable voters to select nominees for appointment to the Senate, or have studied the option.

Alberta enacted the *Senatorial Selection Act* in 1989.[15] Soon after its coming into force, an election was held and Reform Party candidate Stan Waters was selected as the Alberta nominee for appointment to the Senate. He was appointed to the Senate on 11 June 1990.

Several more Senate nominee elections have been held. On 19 October 1998, Albertans selected Bert Brown and Ted Morton as Senate nominees in an election conducted in conjunction with Alberta municipal elections. On 22 November 2004, Albertans elected Cliff Breitkreuz, Link Byfield and Betty Unger, and re-elected Bert Brown, as Senate nominees in conjunction with the provincial general election. Mr. Brown was appointed to the Senate on 10 July 2007.

In 1990, British Columbia enacted the *Senatorial Selection Act*,[16] which mirrors its Alberta counterpart; no elections, however, were held under its authority. This Act contained a sunset clause that has since lapsed. However, it has been reported in recent media accounts that the British Columbia government is contemplating reviving the legislation.

In 2009, Saskatchewan passed the *Senate Nominee Election Act*,[17] modelled on the Alberta *Senatorial Selection Act*. It received Royal Assent but has not been proclaimed in force.

In Manitoba, the Special Committee on Senate Reform released a report in November 2009 that proposed an electoral process for selecting Senate nominees, to be administered by Elections Canada and to be paid for by the federal

government. It further proposed that the province's allotment of six Senate seats be allocated by region (three in Winnipeg, one in the North, two in the South).[18]

In addition, various federal and provincial private members' bills have proposed advisory elections for appointments to the Senate, but none have been enacted.[19]

1.2 Senate Term Limits

1.2.1 Prior Versions of Bills on Senate Tenure

Four previous bills proposing to limit a senator's term of office have been introduced since the 39th Parliament. In addition, in most of the proposals to reform the Senate (see section 1.1), term limits were included.

Bill C-10, An Act to amend the Constitution Act, 1867 (Senate term limits) was introduced in the House of Commons on 29 March 2010. It proposed to limit the tenure of senators appointed after 14 October 2008 to one non-renewable eight-year term. The bill extended the existing retirement age of 75 for current senators to all senators, regardless of when they were appointed. It further allowed a senator who was subject to the eight-year term to return to the Senate to complete an interrupted term.

Bill C-10 reintroduced, without modification, Bill S-7, An Act to amend the Constitution Act, 1867 (Senate term limits). Bill S-7 was introduced in the Senate on 28 May 2009, but died on the *Order Paper* when Parliament was prorogued on 30 December 2009. The bill did not proceed past second reading.

Bill S-7 reintroduced, with important modifications, the provisions set out in Bill C-19, An Act to amend the Constitution Act, 1867 (Senate tenure), introduced in the House of Commons on 13 November 2007. Bill C-19 died on the *Order Paper* when Parliament was dissolved on 7 September 2008.

There were two important differences between Bill C-10 (and its predecessor, Bill S-7) and Bill C-19:

- Bill C-10 imposed a universal retirement age of 75 years regardless of the date of appointment. Bill C-19 did not require senators appointed after the coming into force of the bill to retire at age 75; and
- Senators appointed after 14 October 2008, but before the coming into force of Bill C-10, were subject to the eight-year term limit. The term, however, was to begin on the date the bill came into force.

Bill C-19 was itself a reintroduction, with one important modification, of Bill S-4, An Act to amend the Constitution Act, 1867 (Senate tenure), introduced in the Senate on 30 May 2006 by Senator Gerald J. Comeau. Bill S-4 did not expressly foreclose the possibility of renewable eight-year terms, whereas Bill C-19 provided for an eight-year non-renewable term.

1.2.2 Senate Committee Studies on Senate Tenure

In recent years, Senate tenure has been studied by two Senate committees in particular: the Special Senate Committee on Senate Reform, in 2006, and the Standing Senate Committee on Legal and Constitutional Affairs, in 2007. The Special Senate Committee on Senate Reform was established by the Senate on 21 June 2006. The Special Committee conducted a comprehensive review of the subject matter of Bill S-4, and also studied a motion that the *Constitution Act, 1867* be amended to alter the formulae for western representation in the Senate.[20] The Standing Committee, meanwhile, reviewed Bill S-4 after it was introduced in the Senate. The reports prepared by both committees are commented upon later in this paper (see "Commentary," sections 3.2.3 and 3.2.4).

1.2.3 Proposals for Reforming Senate Tenure

There has been only one reform affecting Senate tenure since 1867. In 1965, the *British North America Act* was amended to establish a retirement age of 75 for senators. Prior to this amendment, senators served for life.[21] The amendment to the *British North America Act* was made by Parliament using its exclusive power under section 91(1) to amend the Constitution of Canada.

Since the imposition of a mandatory retirement age of 75 in 1965, a number of proposals have been made to further reduce Senate terms, many of which have emanated from the Senate itself.[22] In 1972, the Special Joint Committee on the Constitution of Canada (the Molgat-McGuigan Committee) recommended a mandatory retirement age of 70 years. In 1980, the Standing Senate Committee on Legal and Constitutional Affairs recommended a 10-year term renewable for a 5-year term. The Special Joint Committee of the Senate and the House of Commons on Senate Reform (the Molgat–Cosgrove Committee), in its 1984 report, recommended the election of senators to serve a non-renewable term of nine years, with one third of senators being elected every three years. Finally, the Special Joint Committee of the Senate and the House of Commons on a Renewed Canada (the Beaudoin–Dobbie Committee) called for the direct election of senators by proportional representation. Under the Beaudoin–Dobbie proposals, senators would serve non-renewable terms of six years.

The Government of Canada has also made recommendations for reforms to the Senate over the years, some of which would have affected Senate tenure. One notable effort was Bill C-60, introduced in 1978, which proposed a variable Senate term to coincide with the life of a Parliament or a provincial legislature. The proposal would have seen 50% of the Senate appointed by the House of Commons and the other 50% appointed by provincial legislatures or the Governor in Council in the case of senators representing a territory. The terms would have varied, depending on the life of the governments in the various jurisdictions.[23]

The Supreme Court of Canada also had occasion to consider Senate reform in response to a referral for a reference opinion by the Government of Canada in respect of a series of proposals for Senate reform. In the Upper House Reference,[24] a judgment delivered in 1980, the Court articulated a number of guiding

principles for the process of amending the Constitution in respect of the Senate. Although decided under the *British North America Act* and prior to the enactment of the current amending procedures in the *Constitution Act, 1982*, the judgment, for some scholars, continues to have relevance. At the time it was decided, the case established the proposition that amendments affecting the essential characteristics or fundamental features of the Senate could not be undertaken by Parliament acting alone. Provincial involvement would be necessary.

Some, however, argue that the principles in the Upper House Reference have been overtaken by the subsequent enactment of the amending procedures in the *Constitution Act, 1982* or were incorporated into the new procedures. Others maintain that the principles are still relevant where any fundamental alterations to the Senate are being contemplated, notwithstanding the text of the new amending procedures. These issues are discussed later in this paper.

2 DESCRIPTION AND ANALYSIS

2.1 SENATORIAL SELECTION

Part 1 of Bill C-7 consists of two clauses. The schedule to the bill sets out the legislative framework for the selection of senators that provinces or territories must "substantially" adopt in order for Senate nominees selected in the province or territory to be considered by the prime minister in making his recommendations to the Governor General. Several of the preambular clauses in the bill are relevant to the senatorial selection process.

2.1.1 THE PREAMBLE

The preamble (the third, fourth and fifth recitals) reflects generally the government's desire to have Senate nominees selected on the basis of a democratic process within the province or territory that a senator is to represent. The preamble also draws upon the history of efforts to reform the method of selecting senators. It cites an agreement by First Ministers in 1987, presumably the *Meech Lake Accord*, that provides that, as an interim measure until Senate reform is achieved, any nominees for appointment to the Senate should be chosen from among individuals whose names have been submitted by the government of the province the prospective senator is to represent.[25]

2.1.2 THE BASIS FOR THE SELECTION OF SENATE NOMINEES (CLAUSES 2 AND 3)

Clause 2 of the bill proposes that the basis for the selection of nominees by voters of a province or territory for consideration by the prime minister shall be the framework legislation contained in the schedule to the bill.

Clause 3 states that if a province or territory enacts legislation that is "substantially in accordance" with the framework legislation set out in the schedule, the prime minister "must consider" the names of the individuals selected by that province or territory in recommending Senate nominees to the Governor General.

2.1.3 The Framework Electoral Process (Schedule to the Bill)

The schedule to the bill sets out the model legislation that provinces and territories must enact in substantially similar terms in order for their Senate nominees to be considered by the prime minister. The schedule is modelled largely on Alberta's *Senatorial Selection Act*. Part 1 of the schedule sets out the general framework to govern the selection process, including the requirement that the selection of nominees shall be on the basis of an election to be held in conjunction with a provincial or territorial general election, or a municipal election, or on another date to be determined by an order in council. Other basic requirements include that the election for Senate nominees is to be conducted by the province's or territory's electoral officials in accordance with legislation enacted as prescribed in the schedule to the bill and in accordance with the electoral laws of the province or territory, so long as they are not in conflict with the senatorial selection legislation.

2.1.3.1 Senate Appointees Should Be Chosen From a List of Provincial or Territorial Nominees (Section 1)

The schedule restates the object of the proposed legislation: that senators who are to be appointed to represent a province or territory should be chosen from a list of nominees submitted by the government of that province or territory. The choice of the non-directive word "should" appears to be designed to respect the principle that the prime minister retains his or her discretion to recommend Senate appointees of his or her own choosing.

2.1.3.2 Timing of Election (Sections 2 and 5)

The list of nominees for a province or territory is to be determined by an election held at the same time as a provincial or territorial general election, or a municipal election, or an election on a date determined by order in council (section 2). The election for Senate nominees may be commenced at any time by order in council (section 5).

2.1.3.3 Determining the Number of Nominees to Be Elected (Section 5)

As noted earlier, the number of persons that are to be elected as Senate nominees is to be determined by order in council (paragraph 5(1)(*c*)). It is not indicated in the model legislation how this number is to be determined, particularly whether the number is to correspond to the number of vacancies in the Senate for a particular province or territory or whether there may be a number of senators-in-waiting should a vacancy in the Senate occur at some later date.[26]

2.1.3.4 Political Affiliation (Section 3)

Candidates for selection as Senate nominees may be nominated by a registered political party in the province or territory or they may be independent candidates.

2.1.3.5 Election to Be Conducted by Provincial or Territorial Election Officials (Sections 7 and 31)

If the Senate nominee election is held at the same time as a provincial or territorial general election, it is to be conducted and overseen by provincial or territorial election officials (section 7) in accordance with the senatorial selection legislation enacted by the province or territory. A province's or territory's own election legislation will also apply, with any necessary modifications, to a Senate nominee election, provided the legislation does not conflict with the senatorial selection legislation (section 31).

If the Senate nominee election is to be held at the same time as a municipal election, the rules that govern municipal elections will apply and municipal election officials will oversee the process. (See section 2.1.3.11 of this paper, "Special Rules for Municipally Conducted Elections [Sections 38–50].")

2.1.3.6 Campaign Financing (Section 27)

The model legislation contemplates that candidates will incur expenses and receive contributions to finance their campaigns. The campaign funding rules of the province or territory would apply to campaign financing by candidates.

2.1.3.7 Eligibility for Candidacy in a Senatorial Nominee Election (Sections 8, 9, 11, 12 and 14)

Persons wishing to be candidates in a Senate nominee election must satisfy a number of eligibility requirements. Notably, they must:

- be qualified to be a senator under section 23 of the *Constitution Act, 1867* (age, citizenship, property, residency);
- not be a member of the Senate or the House of Commons or of a provincial or territorial legislature;
- not run in a provincial or territorial general election or municipal election held in conjunction with a Senate nominee election;
- be a resident of the province or territory for at least six months preceding the senatorial nominee election; and
- not be prohibited from being a candidate for election to the provincial or territorial legislative assembly by virtue of any law of the province or territory.

A number of other requirements include:

- the filing of nomination papers signed by at least 100 electors in a province or 50 electors in a territory (section 9);
- the appointment of an official agent (section 11); and
- a deposit of $4,000, refundable if the candidate is elected or receives at least half the number of votes received by the candidate elected with the lowest number of votes (sections 12 and 14).

2.1.3.8 The Holding of an Election (Sections 15 and 16)

An election is to be held if the number of candidates for election as Senate nominees exceeds the number of persons to be elected as nominees. If the number of candidates is less than or equal to the number of persons to be elected, the candidates are to be declared elected by the province's or territory's chief electoral officer.

2.1.3.9 The Voting Process (Sections 22 and 35)

Voters are entitled to vote for as many candidates as there are nominees to be elected. Thus, if the order in council establishes that there are four persons to be elected, voters can vote for no more than four candidates (paragraph 35(1)(*a*) and subsection 35(2)).

Candidates are declared elected on the basis of a simple plurality. If only one Senate nominee is to be elected, as determined by order in council, the candidate with the largest number of votes is declared elected (section 22(2)). If the order in council stipulates that more than one nominee is to be elected, the candidate with the highest number of votes is declared elected, followed by the candidate with the next highest number and so on, until candidates are elected to fill the required number of nominee places (section 22(3)).

2.1.3.10 Duration of Nominations (Section 4)

The model legislation anticipates that successful candidates in the nominee election process may not immediately be referred to the prime minister by the Lieutenant Governor in Council or Commissioner in Council, given that there may not be a vacancy in the Senate. Moreover, the prime minister may delay making his or her choice as to whom to recommend for appointment to the Senate, or may ultimately recommend someone of his or her own choosing. The model legislation, therefore, provides that nominees will remain nominees until the earliest of the following occurrences:

- they are appointed to the Senate;
- they resign as a Senate nominee;
- the sixth anniversary of the person's selection as a nominee takes place; or
- they become subject to disqualification as a senator in accordance with subsections 31(2) to (4) of the *Constitution Act, 1867* by:
    - taking an oath or making a declaration of allegiance to a foreign power;
    - becoming bankrupt or insolvent; or
    - being convicted of treason or an indictable offence ("felony" or "infamous crime").

Senate nominees must also continue to satisfy the eligibility requirements to be a candidate for election under section 8 of the schedule (see section 2.1.3.7 of this

paper, “Eligibility for Candidacy in a Senatorial Nominee Election [Sections 8, 9, 11, 12 and 14]”).

2.1.3.11 Special Rules for Municipally Conducted Elections (Sections 38–50)

If the order in council under section 5 of the framework legislation directs that a Senate nominee election is to be held at the same time as a municipal election, the laws governing municipal elections in the province or territory apply with the necessary modifications, and provided those laws do not conflict with the Senate nominee election legislation (section 39).

Municipal councils would be responsible for conducting the election of Senate nominees in the municipalities in which the elections are held (section 40). Election officials who oversee the conduct of municipal elections would be the election officials responsible for the conduct of Senate nominee elections (section 42).

In all other respects, the provisions of the framework legislation that govern elections held in conjunction with provincial or territorial elections apply to elections held at the same time as municipal elections.

2.2 Senate Term Limits

2.2.1 Nine-Year Non-Renewable Terms (Clause 5)

Bill C-7 proposes to amend section 29 of the *Constitution Act, 1867*. That section currently provides that a senator may serve in the Senate until age 75 (section 29(2)).[27]

Clause 5 in Bill C-7 responds to some of the issues raised in the course of the review of Bill S-4 in the Senate. It expressly forecloses the possibility that the nine-year term could be renewed. Clause 5 amends section 29 so that it will state:

> 29. (1) Subject to sections 29A to 31, a person who is summoned to the Senate after the coming into force of the *Constitution Act, 2011 (Senate term limits)* shall hold a place in that House for one term of nine years.
>
> (2) Subject to sections 29A to 31, a person referred to in subsection (1) whose term is interrupted may be summoned again to fill the remainder of the term.

The amended subsection 29(1) specifically addresses the concern raised by some members of the Standing Senate Committee on Legal and Constitutional Affairs in their study of Bill S-4 that renewable terms could undermine the independence of the Senate (see section 3, “Commentary,” for a broader discussion of this issue).

Bill S-4, as originally presented, was silent on the question of whether the eight-year terms were renewable. In his appearance before the Special Senate Committee on Senate Reform, the prime minister indicated that the silence could be construed as

allowing for the possibility of renewal. He further noted that his position on renewability would be compatible with, and reflect his desire for, an elected Senate. The prime minister indicated, however, that if the committee was strongly opposed to the idea of renewable terms, this could be accommodated by means of an amendment to the bill.[28] During debates on Bill S-7 at second reading in the Senate, Senator Marjory LeBreton (Leader of the Government and Minister of State [Seniors]), indicated that the government was addressing the concerns about the effect of renewable terms on the independence of senators, and thus, Bill S-7 made clear that the eight-year term is not renewable.[29]

2.2.2 Senators Appointed After 14 October 2008 Subject to Nine-Year Terms (Clause 4(1))

Clause 4(1) of Bill C-7 proposes to include among the senators who will be subject to the nine-year term limit those senators appointed after 14 October 2008, regardless of when Bill C-7 comes into force.[30] This proposed amendment likely reflects a commitment made by the prime minister when he recommended 18 senators for appointment to the upper chamber, following the 40th general election. As part of the recommendation, new appointees would be subject to a term limit should legislation to reduce Senate terms come into force.

For this group of senators, the term will begin not on the date they were summoned, but on the coming into force of the bill. During second reading debates in the Senate on 9 June 2009,[31] concern was expressed that this provision might operate retroactively in an unlawful manner.[32]

2.2.3 Interruption of the Nine-Year Term (Clauses 4(2) and 5)

Bill C-7 makes an accommodation to enable senators who are subject to the nine-year term limit to complete their nine-year terms following an interruption of their term (Clause 2(2) and Clause 3, new subsection 29(2) of the *Constitution Act, 1867*). This amendment appears to be intended to clarify that senators who are unable to complete their nine-year term because of disqualification, illness, retirement or family obligations, for example, may be summoned again and permitted to complete the remaining portion of the term. This provision applies only to senators appointed after the coming into force of Bill C-7.

2.2.4 A Uniform Retirement Age of 75 (Clause 5)

Clause 5 proposes to add section 29A to the *Constitution Act, 1867*, which will establish a retirement age of 75 for all senators, regardless of the date they were summoned to the Senate. In debates on Bill S-7 at second reading in the Senate, Senator LeBreton indicated that this provision responded to the concerns expressed by the Standing Senate Committee on Legal and Constitutional Affairs during its review of Bill S-4 that senators subject to an eight-year term could sit beyond age 75.[33] In its report to the Senate, the committee took issue with this provision, noting that the absence of a retirement age for some senators could affect the nature and quality of the Senate's work and would run counter to one of the aims of the

government, which is to encourage renewal and a diversity of ideas (for a discussion of this issue, see “Commentary,” section 3 of this paper).

2.2.5 The Preamble

The various preambular recitals in the bill are worth mentioning, as they provide important indications of the government’s broader intentions to bring democratic reform to the Senate. The first recital pronounces on the need for the Senate, along with all of Canada’s representative institutions, to evolve in accordance with modern democratic principles. The second recital states that the government will explore additional measures to ensure that Canadian democratic values are reflected in the Senate. The sixth recital speaks more directly to Senate tenure, asserting that tenure should be “consistent with modern democratic principles.”

The seventh recital serves as a reminder that Parliament amended the Constitution in 1965 to limit Senate terms to age 75. The eighth recital asserts Parliament’s exclusive authority, without the need for provincial involvement, as set out in section 44 of the *Constitution Act, 1982*, to amend the Constitution of Canada in relation to the Senate (section 3 of this paper, “Commentary,” features a discussion on the amending process). The final recital serves as a general acknowledgment that the essential characteristics of the Senate as a “chamber of independent, sober second thought” are not to be disturbed (this point is also explored in section 3, “Commentary.”).

Preambles in legislation or other enactments are generally considered to act only as aids to the interpretation of the substantive provisions of legislation. They are not viewed as having independent force of law.[34]

3 COMMENTARY

3.1 Senatorial Selection

3.1.1 Constitutional Issues

3.1.1.1 The Governor General’s Power to Summon and the Prime Minister’s Prerogative to Recommend

Sections 24, 26 and 32 of the *Constitution Act, 1867* empower the Governor General to summon qualified individuals to serve in the Senate. The Governor General is the sole individual on whom the authority to summon has been conferred by the Constitution of Canada.[35]

The Governor General, however, exercises his or her appointment powers on the advice and recommendation of the prime minister. The power of the prime minister to provide advice and recommendations to the Governor General with respect to Senate appointments is not mentioned in the *Constitution Act, 1867*. Instead, it arises from constitutional convention.[36] Since 1897, this power to recommend has been formalized by an order in council, the most recent version of which was promulgated

in 1935. It is entitled “Memorandum regarding certain of the functions of the Prime Minister” and states that the recommendation of senators is one of the special prerogatives of the prime minister.

Only on rare occasions has a Governor General refused the advice of a prime minister on appointments to the Senate.[37] This fact highlights the strong constitutional character of the prime minister’s power to recommend and advise – a power that, as a matter of convention and practice, is rarely challenged by the Governor General.

3.1.1.2 Is a Constitutional Amendment Necessary?

The government has expressed the view that the premise of former Bill S-8 – and hence of Bill C-7 – is that it does not, as such, alter the method of selecting senators and therefore does not require a constitutional amendment.[38] Instead, it establishes a list of selected nominees that reflects electors’ preferences. The bill creates a process to enable electors of a province or territory to express a preference as to who should represent them in the Senate. Constitutional law specialist Professor Patrick Monahan, who is Vice-President Academic and Provost of York University, believes that non-binding elections for the nomination of senators would not need a constitutional amendment: “It should be noted that certain changes are possible in federal institutions without formal constitutional amendment, such as the appointment of senators on the basis of non-binding ‘elections.’”[39]

It has been suggested by some, however, that even this “advisory” or “consultative” election process may constitute an alteration to the method of selection of senators. If so, an amendment to the *Constitution Act, 1867* would be required. Constitutional amendments to change the method of selection of senators would require the concurrence of at least seven provinces representing at least 50% of all the provinces, in accordance with sections 42(1)(*b*) and 38 of the *Constitution Act, 1982*.[40] A more in-depth discussion of the amending process under the Constitution is provided in section 3.2.8 of this paper, “Which Amending Formula?.”

3.1.1.3 Other Constitutional Questions

Other constitutional issues that have been raised include whether the senatorial selection proposal in the bill constitutes an improper delegation of federal legislative power to provincial legislatures and whether the provinces are competent to enact legislation – the required senatorial selection legislation – in an area of federal legislative competence. On the latter point, it is suggested that legislation in relation to the Senate can only be enacted by Parliament. Any provincial statute would be *ultra vires* (beyond the legislative authority of) the province.[41]

3.1.1.3.1 Provincial Legislative Competence to Enact Senatorial Selection Legislation

Provincial involvement in the process of selecting senators is an area of law that has largely been untested in the courts. It is a highly uncertain area. Even though Alberta’s *Senatorial Selection Act* was enacted over 20 years ago, the

constitutionality of this law has never been tested in the courts. The general question of provincial legislative competence in respect of federal institutions has had only limited treatment in the courts. It has been considered in the context of provincial legislation placing limits on the right of civil servants to participate in the federal political process. In *Ontario (Attorney General)* v. *OPSEU*, [1987] 2 S.C.R. 2, the Supreme Court of Canada upheld the constitutionality of the provisions of the *Public Service Act*, R.S.O. 1970 that prohibited civil servants from being candidates in a federal or provincial election and from engaging in other political activities such as fundraising for a political party, unless leave to do so had been granted by the province.

The majority of the Court decided the case on the basis that the legislation was in effect a valid amendment to the Constitution of the province of Ontario, something that a province is permitted to do under section 45 of the *Constitution Act, 1982* (previously, section 92(1) of the *British North America Act*). The Court determined that the legislation could not be considered under other heads of provincial legislative power, particularly section 92(13) (the labour law jurisdiction under the "property and civil rights power"), and section 92(4) (the tenure and appointment of provincial officers). The following passage from the judgment of the majority summarizes the Court's conclusion:[42]

> … an enactment can generally be considered an amendment of the constitution of a province when it bears on the operation of an organ of the government of the province, provided it is not otherwise entrenched as being indivisibly related to the implementation of the federal principle or to a fundamental term or condition of the union, and provided of course it is not explicitly or implicitly excepted from the amending power bestowed upon the province by s. 92(1) [now section 45 of the *Constitution Act, 1982*], such as the office of the Lieutenant-Governor and, presumably and *a fortiori*, the office of the Queen who is represented by the Lieutenant-Governor.

Thus, the Court's holding suggests that the arguments concerning the head of power under which one would place provincial legislation dealing with senatorial nominees could centre on section 45 of the *Constitution Act, 1982*, a provincial head of legislative power. This, of course, only provides a possible context for the discussion of whether senatorial nomination legislation could find a home or be anchored in a provincial head of power.

Another suggestion as to the focus of debate would be whether the legislation could be seen as addressing matters of a purely local nature in section 92(16) of the *Constitution Act, 1867*. The Court in the OPSEU case suggested that section 92(13) dealing with property and civil rights would not be an appropriate head of power for electoral matters and matters pertaining to the organs of government, since these rights have been defined by the courts as relating to private laws that govern the relationship between individual and individual rather than the relationship between the individual and government.[43] They are not "civil rights" as one might understand the term in the context of Charter or human rights.

3.1.1.3.2 Does the Legislation Improperly Delegate Law-Making Power to the Provinces?

The issue of improper delegation of legislative authority has been considered by the courts on various occasions. Delegations of law-making power from Parliament to a provincial legislature or vice versa have been determined to be unconstitutional. An early leading case on this point is *Attorney General of Nova Scotia* v. *Attorney General of Canada*, [1950] 4 D.L.R. 369, a judgment of the Supreme Court of Canada. The Supreme Court of Canada has, however, upheld delegations that may be characterized as administrative delegations by which Parliament delegates to an administrative body, including the Cabinet of a province, authority to administer federal legislation, where the administrative body also administers related provincial legislation. This is the model established for many types of agricultural marketing schemes that regulate both intra-provincial and extra-provincial marketing of farm products.[44]

As an alternative to delegation, some statutes simply incorporate the legislation of other jurisdictions by reference to that legislation. This has been held to be constitutionally permissible in some contexts, including the context of spousal support orders.[45]

In the criminal law context, section 207 of the *Criminal Code* effectively allows the provinces to legislate in the area of gaming, an area that comes within the criminal law jurisdiction of Parliament, at least for the purpose of licensing gaming establishments. The provision authorizes the issuing of gaming licences by the Lieutenant Governor in Council on terms that it may establish. The Supreme Court of Canada held that the provincial legislation had been validly incorporated into the *Criminal Code* by making specific reference to it. The Court emphasized that this was not a delegation of law-making power to a province, particularly since the provincial legislation was in an area of federal law-making power that Parliament had kept open.[46]

3.1.1.4 The Supreme Court of Canada's Views on Fundamental Constitutional Reform of the Senate

The Supreme Court of Canada has considered some of the constitutional issues surrounding fundamental Senate reform in a 1980 judgment.[47] A series of questions was put to the Court on a reference from the Government of Canada, including whether the Parliament of Canada could unilaterally abolish the Senate, and whether the Parliament of Canada could enact legislation altering the method by which senators are chosen.[48] The government proposed a number of options for the selection of senators, including:

- selection by provincial legislatures;
- selection by the House of Commons;
- selection by the Lieutenant Governors in Council of the provinces; or
- direct election.

In respect of the question dealing with selection of senators, the Court relied on the preamble to the *Constitution Act, 1867*, which provides that Canada shall have a "Constitution similar in principle to that of the United Kingdom," where the House of Lords is not elected. The Court viewed direct elections as altering a fundamental character of the Senate, and, therefore, contrary to the Constitution.[49] It held that the Senate was intended to be a "thoroughly independent body which could canvass dispassionately the measures of the House of Commons."[50] Parts of the judgment bear quoting at length:[51]

> The substitution of a system of election for a system of appointment would involve a radical change in the nature of one of the component parts of Parliament. As already noted, the preamble to the Act referred to "a constitution similar in principle to that of the United Kingdom," where the Upper House is not elected. In creating the Senate in the manner provided in the Act, it is clear that the intention was to make the Senate a thoroughly independent body which could canvass dispassionately the measures of the House of Commons. This was accomplished by providing for the appointment of members of the Senate with tenure for life. To make the Senate a wholly or partially elected body would affect a fundamental feature of that body. We would answer this sub-question in the negative …
>
> [I]t 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. The character of the Senate was determined by the British Parliament in response to the proposals submitted by the three provinces in order to meet the requirement of the proposed federal system. It was that Senate, created by the Act, to which a legislative role was given by s. 91. In our opinion, its fundamental character cannot be altered by unilateral action by the Parliament of Canada …

In effect, the Court held that the Parliament of Canada could not enact legislation to provide for the "direct" election of senators. However, it declined to answer the question of what alternatives to direct election might be permissible under the Constitution of Canada, given that the Court felt it lacked a proper factual context in which to answer that question.

Assuming that the Upper House Reference still has relevance today, given that the case was decided under the pre-1982 *British North America Act* (now the *Constitution Act, 1867*) and amending process then in force, the only parts of the judgment relating to the Senate "non-election" selection process that potentially have some meaning are the comments on the basic principles that should guide Parliament in undertaking Senate reform. The basic principle enunciated by the Court is that alterations to the Senate cannot "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."

Scholars differ on the extent to which the Upper House Reference may have value as a source of interpretation of the constitutional provisions relating to the Senate, particularly the provisions regarding the amending process for alterations to the Senate and whether the principles articulated by the Court continue to be authoritative. These differing views are discussed in more detail in section 3.2.2 of

this paper, “The Upper House Reference and the Essential Characteristics of the Senate.”

3.1.1.5 Some Scholarly Views on the Constitutional Implications of Part 1 of Bill C-7

It has been suggested that in future years, an informal practice of appointing senators from a list of selected nominees will transform itself into a constitutional convention that would “constrain” the prime minister in making his or her choice for Senate appointments.[52]

Other academics, such as Associate Professor Andrew Heard of Simon Fraser University, consider the impact of the Upper House Reference and the current amending procedures in the Constitution in the context of Bill C-20, the Senate Appointment Consultations Act. In a recent article, Heard canvasses the views of various scholars and commentators on these issues.[53] He also discusses the extent to which the discretion of the prime minister to recommend Senate nominees to the Governor General, and the Governor General’s discretion to make those appointments, may be affected by a reformed selection process. Although his commentary focuses on Bill C-20,[54] with its federally imposed selection process, some of his more general concerns about modifying the process of selecting senators – including the potential impacts on the discretion or prerogatives of the prime minister and the Governor General, and whether the constitutional amendment process may be engaged – bear consideration in the context of Bill C-7.

3.2 Senate Term Limits

3.2.1 Parliament’s Exclusive Authority to Amend the Constitution of Canada in Relation to the Senate

The central constitutional question that preoccupied both the Special Senate Committee on Senate Reform and the Standing Senate Committee on Legal and Constitutional Affairs was whether amendments to the *Constitution Act, 1867* affecting Senate tenure could be achieved by Parliament without the involvement of the provinces. Parliament’s exclusive authority to amend the Constitution of Canada is found in section 44 of the *Constitution Act, 1982*. That section provides that Parliament has exclusive authority, subject to sections 41 and 42 of the Act, to amend the Constitution of Canada in relation to the executive government of Canada, the Senate and the House of Commons. Section 41 lists the matters that require unanimity among Parliament and all the provincial legislatures. Paragraphs 42(1)(*b*) and (*c*) specifically outline four exceptions to Parliament’s exclusive power to amend the Constitution in relation to the Senate. These paragraphs provide that the concurrence of at least seven provinces representing at least 50% of the population of all the provinces (the “7/50” process)[55] is required where Parliament proposes to alter:

- the method of selection of senators;
- the powers of the Senate;

- the distribution of Senate seats; or
- the residence qualifications of senators.

Senate tenure is not one of the listed exceptions in paragraphs 42(1)(*b*) and (*c*). On a textual reading of the provision, therefore, Parliament's authority to change senatorial terms would not appear to require provincial involvement. On this reading, section 44 of the 1982 Act grants Parliament a general amending power in respect of the Senate. From this general power, the four listed matters in paragraphs 42(1)(*b*) and (*c*) are subtracted. One need, therefore, look no further than the text of the *Constitution Act, 1982*.

Section 44 of the *Constitution Act, 1982* replaced section 91(1) of the *British North America Act*, which granted broad authority to Parliament to exclusively amend the Constitution of Canada subject to five major exceptions.[56] Parliament invoked this provision in 1965 to eliminate life terms for senators and impose a mandatory retirement age of 75. Under section 91(1), no provincial concurrence was required for this amendment.

During the proceedings of the Special Senate Committee on Senate Reform, most of the expert witnesses in the field of constitutional law favoured this textual interpretation of Parliament's exclusive amending power. Other witnesses, however, raised concerns about adopting a strict textual analysis of the amending process in sections 44 and 42. It was maintained by some witnesses that these provisions needed to be read in light of the 1980 judgment of the Supreme Court of Canada in the Upper House Reference case.

3.2.2 The Upper House Reference and the Essential Characteristics of the Senate

The Upper House Reference is significant for the view expressed by the Supreme Court of Canada that alterations to the Senate that 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" could not be made by Parliament alone.[57]

The decision was rendered in response to a reference from the federal government for an opinion on whether Parliament could unilaterally amend the Constitution to:

- abolish the Senate;
- alter the method of appointment of senators;
- require the direct election of senators;
- change the provincial distribution of Senate seats;
- limit Senate tenure; and
- change the qualification of senators.

In respect to abolishing the Senate, the Court held that Parliament could not act unilaterally. As for the remaining questions, all grouped under "Question 2," the Court made the following broad observation: [58]

> Dealing generally with Question 2, it is our opinion that while s. 91(1) would permit some changes to be made by Parliament in respect of the Senate as now constituted, 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. The character of the Senate was determined by the British Parliament in response to the proposals submitted by the three provinces in order to meet the requirement of the proposed federal system. It was that Senate, created by the Act, to which a legislative role was given by s. 91. In our opinion, its fundamental character cannot be altered by unilateral action by the Parliament of Canada and s. 91(1) does not give that power.

The Court held that Parliament could not amend the Constitution unilaterally to change the provincial allocation of Senate seats, nor could it require the direct election of senators. On the remaining questions (tenure, qualifications of senators, appointment process), the Court declined to provide an answer as the Court felt it lacked a factual context (in the case of an alternative method of appointment), or it lacked a sufficiently detailed proposal from the government (senate tenure and qualifications of senators).

Although the Court declined to answer the reference question on Senate tenure, because the government failed to specify a term, it did comment that, at some point, a reduction in the term of office might impair the function of the Senate as a body of sober second thought.

It may be noted that the Supreme Court of Canada invoked the preamble to the *British North America Act* in articulating the principle that changes affecting the fundamental features or essential characteristics of the Senate would require provincial concurrence. As noted earlier in section 3.1.1.4, "The Supreme Court of Canada's Views on Fundamental Constitutional Reform of the Senate," the preamble, now found in the *Constitution Act, 1867*, provides that Canada shall have a constitution similar in principle to that of the United Kingdom. From this it was inferred that Canada should have an unelected upper chamber appointed for life. The Court also commented that the unilateral amendment by Parliament to the *British North America Act*, which imposed a retirement age of 75, met the test of constitutionality as it did not change the essential character of the Senate.

There are differing views of the significance and continuing relevance of the Upper House Reference. Scholars such as P. W. Hogg maintain that whatever principles may be derived from the decision, these have been overtaken by the amending formulae that came into effect with the patriation of the Constitution of Canada in 1982.[59] Sections 41, 42 and 44 of the *Constitution Act, 1982* may be viewed, therefore, as providing something in the nature of a code for determining what constitutional amendments affecting the Senate may be made by Parliament acting alone.

Others take the view that section 42 may be seen as an attempt to articulate and codify the essential characteristics of the Senate described by the Court in the Upper House Reference.[60] Still another view holds that, while the essential characteristics of the Senate are now "for the most part" incorporated into the amending process in the *Constitution Act, 1982*, an interpretation of those provisions would be incomplete without considering the principles in the Upper House Reference. According to this view, an attempt by Parliament to act alone to limit Senate terms to an extreme level such as one year, for example, or to propose other radical alterations to the Senate, would not likely be permitted, despite the text of the *Constitution Act, 1982*.[61] Resorting to the complex amending formula in section 38(1) would be required in those cases.

3.2.3 The Conclusions of the Special Senate Committee on Senate Reform Regarding Bill S-4

On 28 June 2006, after debate on the motion by Senator LeBreton for second reading of Bill S-4, Senator Joan Fraser moved that the subject matter of the bill be referred to the Special Senate Committee on Senate Reform.[62]

The Special Committee hearings into the subject matter of the bill began on 6 September 2006 and concluded on 21 September 2006. The committee heard from witnesses on the institutional and constitutional implications of reducing Senate tenure to eight years and considered a number of related matters, including the implications and desirability of advisory or consultative elections for senators and the potential effect of renewable terms.

The Senate also referred to the Special Committee a motion by Senator Lowell Murray, seconded by Senator Jack Austin, that the *Constitution Act, 1867* be amended to alter the formulae for western representation in the Senate. In particular, the motion called for an amendment to recognize British Columbia and the Prairie provinces as separate regions for purposes of Senate representation. The motion sought to alter the distribution of Senate seats in the western provinces as follows: British Columbia – 12 senators (up from 6); Alberta – 10 senators (from 6); Saskatchewan – 7 senators (from 6); and Manitoba – 7 senators (from 6). The revised distribution would result in a total of 117 Senate seats, rather than the current 105.[63]

The committee tabled its *Report on the subject-matter of Bill S-4, An Act to amend the Constitution Act, 1867 (Senate tenure)* in the Senate on 26 October 2006.[64] The report on the Murray–Austin motion was tabled on the same day.

The majority of the members of the Special Committee concluded that the evidence of the scholars and other witnesses who appeared before it supported the government's position that it could proceed to amend the *Constitution Act, 1867*, acting under the authority of section 44 of the *Constitution Act, 1982*, without resorting to the complex amending formula in section 38(1) of the Act. Most of the committee members also indicated that, given that the committee was studying only the subject matter of the bill, there would not be any need to refer the bill for a reference opinion from the Supreme Court of Canada, as was suggested by some

witnesses. In the majority view, the Constitution of Canada was sufficiently clear that a reference to the Court was not necessary.

The majority of the members of the Special Committee also endorsed the underlying principle of the bill that a defined limit on Senate terms would improve the Senate as an institution. Although the Special Committee heard from various witnesses on the effect and desirability of renewable terms, it came to no conclusions on the issue.

3.2.4 The Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs on Bill S-4

On 30 May 2006, Bill S-4 was given first reading in the Senate. After second reading, it was referred to the Standing Senate Committee on Legal and Constitutional Affairs on 20 February 2007. The committee conducted hearings on the bill from 21 March 2007 to 6 June 2007. The bill was reported back to the Senate with amendments, a recommendation and observations on 12 June 2007.[65] The report was adopted by the Senate on 19 June 2007. Following the recommendation in the report that the bill "not be proceeded with at third reading until such time as the Supreme Court of Canada has ruled with respect to its constitutionality," and given the adoption of the report by the Senate, the bill did not proceed to third reading.

It should be noted that the report was a majority report that was entirely written by the Opposition. In addition, concern was expressed about whether the committee could proceed as it did, reporting the bill back with amendments, observations and a recommendation that the bill not proceed further. It was noted by Senator Donald Oliver, chair of the Standing Senate Committee on Legal and Constitutional Affairs, in remarks made during his report to the Senate, that the committee's recommendation appeared to have no precedent in the Senate's rules. The rules provide that a committee is empowered to report a bill with or without amendments, or it can recommend that a bill not proceed. According to Senator Oliver, there seemed to be no precedent for recommending that a bill not proceed further pending some other event, such as a reference opinion from the Supreme Court of Canada.[66]

In its report to the Senate, the majority of the members of the Standing Committee also considered the potential impact of Bill C-43, An Act to provide for consultations with electors on their preferences for appointments to the Senate (the Senate Appointment Consultations Act), on the constitutional issues raised by Bill S-4.[67]

3.2.5 Eight-Year Terms Not Constitutional?

The majority of the members of the Standing Committee considered the eight-year term appointment prescribed in the bill to be inadequate to preserve the essential characteristics and fundamental features of the Senate and recommended a 15-year non-renewable term in its report on the bill. The majority drew a number of conclusions as to the characteristics of the Senate that must be preserved in order for a reduction in Senate tenure to meet the constitutional requirements established in the Upper House Reference. Three characteristics were considered critical:[68]

- independence;

- a capacity to provide sober second thought; and
- the means to ensure provincial and regional representation.

The eight-year term, the Standing Committee concluded, would not meet the Supreme Court of Canada's test for constitutionality, as elaborated in the Upper House Reference.

Most committee members concluded that a longer term would be necessary to protect the role envisaged for the Senate, as articulated by the Supreme Court of Canada, as a chamber of sober second thought and one ensuring regional and provincial representation. The majority of the committee looked favourably on the proposals for reform of the House of Lords in the United Kingdom, particularly the 15-year non-renewable term.[69]

Another concern was that an eight-year term would allow a two-term prime minister to appoint every senator, effectively threatening the Senate's independence. The nine-year term proposed in Bill C-7 may address part of this concern.

3.2.6 Non-Renewable Appointments

A second concern expressed in the report was the renewability of the eight-year term. The majority of committee members noted that renewable terms would be compatible with an elected Senate but that no constitutional amendment had been proposed by the government for an elected Senate. In the absence of an elected Senate to complement the renewable terms, there were concerns that the bill could undermine the independence with which senators have traditionally approached their work.[70] Renewable terms would interfere with this tradition by making senators who wished to have their appointments renewed susceptible to influence from the prime minister. A non-renewable nine-year term, as proposed in Bill C-7, addresses part of this concern.

3.2.7 Age Limit of 75

With respect to the retirement age, the majority of the committee's members noted that Bill S-4 would result in a situation whereby currently serving senators would be required to retire at age 75, while those appointed after the coming into force of Bill S-4 could serve beyond the age of 75. This, it was feared, would have an effect on the nature and quality of the work of the Senate. It would also run counter to the government's stated aim of renewal and diversity of ideas and perspectives in the Senate.[71] The majority noted that, in the absence of an imposed retirement age, newly appointed senators could conceivably serve for life, thus frustrating the policy behind the decision to eliminate life terms in 1965. It was also pointed out that removing the age limit might be appropriate for an elected Senate, but that there were no proposals to amend the *Constitution Act, 1867* to effect such a change.

Bill C-7 addresses these concerns by proposing a universal retirement age of 75.

3.2.8 Which Amending Formula?

In its report, the majority of the members of the committee raised a number of questions about the amending process proposed by the government to effect the amendment to the *Constitution Act, 1867* that would set a fixed term for senators. The critical question that the committee posed in its report was whether the Upper House Reference continues as good law, or whether it has been superseded by the enactment of an amending formula in section 44 of the *Constitution Act, 1982*. Does section 44 give Parliament new amending powers, or was it intended to reproduce the powers in section 91(1) of the *British North America Act*, the provision in effect at the time the Upper House Reference was decided? The majority of the committee members accepted that the Upper House Reference continued to stand as good law and that section 44 of the *Constitution Act, 1982* does not grant Parliament an exclusive amending power that is greater than the power it had under section 91(1) of the pre-1982 *British North America Act*. In other words, its view is that section 44 of the 1982 Act has the same narrow scope as section 91(1) of the *British North America Act*.[72]

The committee rejected the government's position that the alterations that would affect the fundamental features or essential characteristics of the Senate, as expressed by the Supreme Court of Canada, have all been codified in section 42, and that the requirements necessitating the use of the general amending formula (the "7/50" formula in section 38 of the 1982 Act) have been enumerated in section 42.[73] Most committee members also questioned whether section 42 of the 1982 Act can be considered as an exhaustive list of matters that requires Parliament to seek provincial concurrence under the "7/50" formula.[74]

With respect to the impact of Bill C-43, the majority of the committee felt that Bill S-4 and its constitutional implications needed to be considered together with the government's proposals in Bill C-43 for a new selection process for the appointment of senators. According to the majority of the committee, a court, reviewing the constitutionality of Bill S-4 and the possibility of its falling within the scope of section 44, could not ignore the related measures for Senate reform, which could affect regional representation, tenure, method of selection and provincial representation. In the view of the majority, the package of measures could be perceived as altering the fundamental features or essential characteristics of the Senate.[75]

It is noteworthy that various provinces indicated that they could not support Bill S-4 and the government's proposal to proceed unilaterally to amend the *Constitution Act, 1867*. Provinces and territories that were opposed to Parliament acting unilaterally to reduce Senate tenure included Quebec, Ontario, New Brunswick, Newfoundland and Labrador, and Nunavut. These jurisdictions were concerned about the effect on the structure of the Senate and the implications for preserving its role as a body protecting regional and provincial interests.

3.2.9 Arguments For and Against Reduced Senate Terms

3.2.9.1 Arguments in Favour of Term Limits

- Most upper houses in Western democracies are subject to term limits and members of those chambers are required to seek periodic voter support for further terms. Moreover, the standard length of tenure in upper chambers in Western democracies is more in line with the proposed nine-year term in Bill C-7. A nine-year term would qualify among the longest term in second chambers with limited terms, comparable to the maximum term in the French Senate, nine years.
- A nine-year term would enable a senator to gain the experience necessary to fulfill his or her role in legislative review and policy investigation while ensuring a renewal of ideas and perspectives on a regular basis.
- A nine-year term is consistent with the range of proposals put forward in some of the leading studies on Senate reform, including those by the Molgat–Cosgrove Committee (a term of nine years) and the Canada West Foundation and the Alberta Select Committee (terms equivalent to the life of two legislatures).
- Based on the reports, proposals and recommendations prepared by various governmental and non-governmental bodies over the past 30 years, it would appear that a large number of Canadians support term limits.

3.2.9.2 Arguments Against Term Limits

- Under shortened term limits, the Senate's function as a "house of sober second thought," and its capacity to conduct careful legislative reviews and in-depth studies, drawing upon its institutional memory, would be impeded by the greater turnover of senators. Lengthy and secure tenure is one of the sources of the Senate's institutional strength.
- Term limits could enhance the prime ministerial power of appointment, eroding the independence of the Senate and its sober second thought function as well as its historical role of protecting regional and provincial interests. As previously noted, prime ministers with a majority government lasting two or more terms could conceivably fill all or most Senate seats by the time they left office, effectively controlling the Senate. This would also exacerbate political partisanship in the Senate, further eroding the Senate's capacity for independent and thorough legislative review and regional and provincial representation.
- The Senate is a unique institution which the framers of the Constitution of Canada conceived as a counterbalance to the elected and partisan House of Commons. It was intended that senators be appointed to serve long terms as a means of instilling independence in senators to enable them to carefully and effectively review legislative proposals, free from political partisanship. Term limits would cause the Senate to depart from its historical, constitutional and political origins and undermine Canada's unique system of governance.

NOTES

1. An advisory election process would preserve the prime minister's power, which arises by constitutional convention, to recommend individuals to be summoned to the Senate by the Governor General. The advisory election process would provide the prime minister with a pool of candidates from which to choose for recommendation.

2. Senate, Special Committee on Senate Reform, *Proceedings*, 1st Session, 39th Parliament, 7 September 2006, p. 2:9.

3. See Michel Bédard, *Legislative Summary of Bill C-20: Senate Appointment Consultations Act*, Publication no. LS-588E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 13 December 2007.

4. This is a non-exhaustive list of the proposals that have been made over the last century and a half. For a discussion of the major contemporary proposals, see Jack Stilborn, *Senate Reform Proposals in Comparative Perspective*, Publication no. BP-316E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, November 1992.

5. F. Leslie Seidle, "Senate Reform and the Constitutional Agenda: Conundrum or Solution?," in *Canadian Constitutionalism: 1791–1991*, ed. Janet Ajzenstat, Canadian Study of Parliament Group, Ottawa, 1991, pp. 94–95.

6. Government of Canada, *The Constitution and the People of Canada: An Approach to the Objectives of Confederation, the Rights of People and the Institutions of Government*, Queen's Printer, Ottawa, 1969, p. 30.

7. *Final Report of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada*, Queen's Printer, Ottawa, 1972, p. 33.

8. Bill C-60, An Act to amend the Constitution of Canada with respect to matters coming within the legislative authority of the Parliament of Canada, and to approve and authorize the taking of measures necessary for the amendment of the Constitution with respect to certain matters, 3rd Session, 30th Parliament, clause 63.

9. Government of Canada, *A Time for Action: Highlights of the Federal Government's Proposals for the Renewal of the Canadian Federation*, Minister of Supply and Services Canada, Ottawa, 1978, pp. 10–11.

10. Task Force on Canadian Unity, *A Future Together: Observations and Recommendations*, Minister of Supply and Services Canada, Ottawa, 1979, p. 97.

11. Special Joint Committee on Senate Reform, 2nd Session, 32nd Parliament, *Report of the Special Joint Committee of the Senate and of the House of Commons on Senate Reform*, Queen's Printer, Ottawa, 1984, p. 21.

12. Royal Commission on the Economic Union and Development Prospects for Canada, *Report of the Royal Commission on the Economic Union and Development Prospects for Canada*, Vol. 3, Minister of Supply and Services, Ottawa, 1985, p. 389.

13. Alberta Special Select Committee on Upper House Reform, *Strengthening Canada: Reform of Canada's Senate*, Edmonton, March 1985.

14. *1987 Constitutional Agreement*, "Schedule: Constitutional Amendment 1987," s. 2, which would have amended the *Constitution Act, 1867*.

15. *Senatorial Selection Act*, S.A. 1989, c. S-115, now R.S.A. 2000, c. S-5.

16. *Senatorial Selection Act*, S.B.C. 1990, c. 70.

17. *Senate Nominee Election Act*, 2009, c. S-46.003 [Saskatchewan statute].

18. Legislative Assembly of Manitoba, *Report of the Special Committee on Senate Reform*, 9 November 2009.

19. See, for example, Bill C-264, An Act to allow the electors of a province to express an opinion on who should be summoned to the Senate to represent the province, which was introduced and received first reading in the House of Commons on 16 April 1996; Bill C-382, An Act to allow the electors of a province to express an opinion on who should be summoned to the Senate to represent the province (the Senate Representation Act), introduced on 19 March 1998; and Bill 64, An Act to provide for the election in Ontario of nominees for appointment to the Senate of Canada, which was tabled and received first reading in the Ontario Legislative Assembly on 16 February 2006.

20. Senate, *Journals*, 1st Session, 39th Parliament, 21 June 2006.

21. *Constitution Act, 1965*, S.C. 1965, c. 4, in force on 1 June 1965.

22. Senate, Special Committee on Senate Reform, *Report on the subject-matter of Bill S-4, An Act to amend the Constitution Act, 1867 (Senate tenure)*, 1st Session, 39th Parliament, October 2006, pp. 3–5. For a more detailed discussion of the various proposals for Senate reform, see also Jack Stilborn, *Senate Reform Proposals in Comparative Perspective*, Publication no. BP-316E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, November 1992.

23. Bill C-60, The Constitutional Amendment Act, 1978.

24. *Re: Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54 (1979) [Upper House Reference].

25. This preambular recital appears in almost identical form in Alberta's *Senatorial Selection Act*. The Alberta legislation expressly refers to the *Meech Lake Accord*. (It may be noted that the Accord and the Alberta legislation refer only to nominees from a province, not from a territory.)

26. It may be noted that there is no regulation-making power conferred on the Lieutenant Governors in Council or Commissioners in Council for determining how the number of nominees is to be decided. Consequently, the model legislation allows considerable discretion to those dignitaries in determining the number of nominees to be elected.

27. Senators appointed to the Senate for life prior to the coming into force of section 29(2) continued to serve for life (see s. 29(1)).

28. Senate, Special Committee on Senate Reform, *Proceedings*, 1st Session, 39th Parliament, 7 September 2006, p. 2:12.

29. Senate, *Debates*, 2nd Session, 40th Parliament, 9 June 2009, p. 1039.

30. Clause 2 will be a separate enactment, within the *Constitution Act, 2009 (Senate term limits)*, that will not amend the *Constitution Act, 1867*.

31. Senate (9 June 2009), p. 1041.

32. According to R. Sullivan in *Sullivan on the Construction of Statutes*, 5th ed., LexisNexis Canada Inc., Markham, Ont., 2008, p. 669, a retroactive application of legislation is one that changes the past legal effect of a past situation. A retrospective application is one that changes the future legal effects of a past situation. An immediate application changes the future legal effects of an ongoing situation. Retroactive legislation may be permissible, provided certain rights under the *Canadian Charter of Rights and Freedoms* are not violated, and provided there is a clear intention in legislation that it should apply retroactively. With respect to Charter rights, sections 11(*g*) and (*i*) forbid the retroactive application of new offences, while section 7 would likely prohibit the retroactive deprivation of life, liberty and security of the person (see p. 665).

33. Senate (9 June 2009), p. 1039.

34. Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3rd ed., Carswell, Toronto, 2000, pp. 57–60. Professor Côté notes that some authorities also suggest that a preamble should be used only to resolve some ambiguity or lack of clarity in the substantive provisions of an enactment.

35. It should be noted, however, that under section 26, the provision allowing for the appointment of four or eight additional persons to serve as senators, the Governor General acts on the direction of the Queen, who in turn is guided by a recommendation from the Governor General to appoint additional senators.

36. Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics*, Oxford University Press, Toronto, 1991, p. 18.

37. In the few cases where a Governor General has refused the advice of a prime minister, it has generally been because to accept the advice would have violated the Constitution of Canada. In 1896, for instance, after the defeat of the Conservative government, Conservative Prime Minister Tupper advised the Governor General, Lord Aberdeen, to appoint a number of senators. Lord Aberdeen refused, and instead invited Liberal leader Laurier, whose party had won a majority in the election, and who could therefore command majority support in the House, to form the government. Lord Aberdeen's refusal to accede to Prime Minister Tupper's request has been defended by constitutional scholars as consistent with constitutional convention. Tupper lacked the support of the House, and it was considered improper of him to have attempted to strengthen his party's support in the Senate after having been defeated at the polls. See Peter Hogg, *Constitutional Law of Canada*, 3rd ed., Looseleaf, Carswell, Toronto, 1997, pp. 9-26.2 to 9-27.

38. See, for example, the government's backgrounder on Bill S-8, An Act respecting the selection of senators (3rd Session, 40th Parliament), "Harper Government Drives Senate Reform Agenda," 27 April 2010. See also the backgrounder on Bill C-20, The Senate Appointment Consultations Act (2nd Session, 39th Parliament), "The Federal Government Introduces Legislation to Create a Democratic, Accountable Senate," 13 November 2007.

39. Patrick Monahan, *Constitutional Law*, 2nd ed., Irwin Law, Toronto, 2002, p. 488.

40. See Senate, *Debates*, 3rd Session, 40th Parliament, Vol. 147, Issue 57, 20 October 2010 (Honourable Serge Joyal).

41. Ibid.

42. *Ontario (Attorney General)* v. *OPSEU*, [1987] 2 S.C.R. 2, para. 90. The Court made other noteworthy comments concerning a provincial legislation in respect of responsible government. These amendments could be construed as constitutional in nature.

43. Ibid., para. 72.

44. This kind of delegation was considered in a leading case on this issue, *Prince Edward Island Potato Marketing Board* v. *Willis*, [1952] 2 S.C.R. 392.

45. *A.G. Ont.* v. *Scott*, [1956] S.C.R. 137. The legislation provided that a spouse resident in Ontario was entitled to raise any defence provided by United Kingdom (U.K.) legislation in any proceedings to enforce a maintenance order brought by a U.K.-resident spouse. The legislation effectively incorporated or adopted the laws of the U.K.

46. *R.* v. *Furtney*, [1991] 3 S.C.R. 89. It should also be noted that the Court found that regulation of gaming establishments was an area that had "dual aspects," with some aspects being clearly under provincial jurisdiction, as well as being subject to the rule of federal paramountcy developed by the courts in Canada, under which any conflict in an area of dual aspect is to be decided in favour of federal jurisdiction.

47. Upper House Reference.

48. The other reference questions were whether Parliament could unilaterally change the provincial and territorial distribution of Senate seats, alter Senate tenure, and change the qualifications for sitting in the Senate.

49. Upper House Reference, para. 49.

50. Ibid., para. 48.

51. Ibid., paras. 48–49.

52. See David C. Docherty, "The Canadian Senate: Chamber of Sober Reflection or Loony Cousin Best Not Talked About," *Journal of Legislative Studies*, Vol. 8, No. 3, Fall 2002, pp. 27–48: "Should a Prime Minister choose to follow this method, an informal practice might soon take the form of convention. This is perhaps the greatest opportunity for movement on Senate selection, if only because it could avoid constitutional discussions" (p. 45).

53. Andrew Heard, *Constitutional Doubts About Bill C-20 and Senatorial Elections*, Working Paper 2008-17, Institute of Intergovernmental Relations, School of Policy Studies, Queen's University, Kingston, 2008, p. 12.

54. The important difference between Bill C-20 and Bill C-7 is that the former effectively imposed a selection process on the provinces, while Bill C-7 provides the provinces and territories with an optional alternative to the current selection process.

55. The "7/50" amending process is set out in section 38(1) of the *Constitution Act, 1982*.

56. These five exceptions included amendments that would affect provincial legislative powers; schools; the use of the French and English languages; the requirement that there be a session of Parliament at least once each year; and the requirement that the House of Commons should continue for no more than five years, or longer in times of war, invasion, or insurrection.

57. Upper House Reference, para. 49, p. 56.

58. Ibid.

59. Senate, Special Committee on Senate Reform, Proceedings, 1st Session, 39th Parliament, 20 September 2006, pp. 4:36–4:37 (Peter Hogg).

60. Monahan (2002), p. 68.

61. Senate, Special Committee on Senate Reform, *Proceedings*, 1st Session, 39th Parliament, 7 September 2006, pp. 2:28–2:29 (Warren Newman, General Counsel, Constitutional and Administrative Law Section, Department of Justice Canada).

62. Senate, *Journals*, 1st Session, 39th Parliament, 28 June 2006.

63. Senate, Special Committee on Senate Reform, *Report on the motion to amend the Constitution of Canada (western regional representation in the Senate)*, 1st Session, 39th Parliament, October 2006.

64. Senate, *Report on the subject-matter of Bill S-4* (October 2006).

65. Senate, Standing Committee on Legal and Constitutional Affairs, *Thirteenth Report*, 1st Session, 39th Parliament, 12 June 2007.

66. Rule 100 of the *Rules of the Senate of Canada* states: "When a committee to which a bill has been referred considers that the bill should not be proceeded with further in the Senate, it shall so report to the Senate, stating its reasons. If the motion for the adoption of the report is carried, the bill shall not reappear on the *Order Paper*." See Senate, *Debates*, 1st Session, 39th Parliament, 14 June 2007, and Rule 100, *Rules of the Senate of Canada*.

67. Bill C-43 was reintroduced in the House of Commons as Bill C-20, An Act to provide for consultations with electors on their preferences for appointments to the Senate (short title: Senate Appointment Consultations Act). It received first reading on 13 November 2007, and was referred to the House of Commons Legislative Committee on Bill C-20 before second reading. The committee held hearings on the bill. With the dissolution of Parliament on 7 September 2008, the bill died on the *Order Paper*. For a description and discussion of this bill, see Michel Bédard, *Legislative Summary of Bill C-43: Senate Appointment Consultations Act*, Publication no. LS-553E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 23 April 2007.

68. Senate (12 June 2007), p. 4.

69. Ibid., p. 6.

70. Ibid., p. 7. The majority of the members of the committee pointed to some empirical work done by Professor Andrew Heard in support of the traditional view of the Senate as a body that fosters more independent voting than the House of Commons.

71. Ibid., p. 10.

72. Ibid., p. 14.

73. Ibid.

74. It was argued by one witness, for example, that if section 42 of the *Constitution Act, 1982*, could be considered to provide an exhaustive list of matters over which Parliament lacks exclusive authority to amend the Constitution, then some very fundamental elements of the Constitution not included in that list, such as the requirement that there must be a federal election at least every five years, could be altered by Parliament without provincial concurrence. This kind of amendment, on a textual interpretation of the Constitution, would be an amendment in relation to the House of Commons, and thus not be precluded by section 42. This was described as an absurd result, since it could in theory allow a government to continue for 10 or even 20 years without an election. Other elements of the Constitution and additional constitutional principles would need to be introduced into sections 42 and 44 to prevent such unilateral action. (See Senate [12 June 2007], pp. 17–18, referring to the evidence of Professor Andrew Heard).

75. Senate (12 June 2007), pp. 16–17, referring to the evidence of Professor Joseph Magnet and Roger Gibbins, President and Chief Executive Officer, Canada West Foundation. Other witnesses expressed concern that Bill S-4 could affect the powers of the Senate, and thus bring it into conflict with section 42 of the *Constitution Act, 1982*. See pp. 20–21, referring to the evidence of Professor Don Desserud; and p. 23, referring to the evidence of Professor Jennifer Smith.