Legislative Summary **LS-553E**

BILL C-43: SENATE APPOINTMENT CONSULTATIONS ACT

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LEGISLATIVE HISTORY OF BILL C-43

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
First Reading:	13 December 2006	First Reading:	
Second Reading:		Second Reading:	
Committee Report:		Committee Report:	
Report Stage:		Report Stage:	
Third Reading:		Third Reading:	

Royal Assent:

Statutes of Canada

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

Legislative history by Peter Niemczak

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INTRODUCTION

On 13 December 2006, the Honourable Rob Nicholson, the then Leader of the Government in the House of Commons and Minister for Democratic Reform, introduced Bill C-43, An Act to provide for consultations with electors on their preferences for appointments to the Senate (the Senate Appointment Consultations Act), in the House of Commons.

As its title suggests, the bill establishes a mechanism for consulting electors in a province with respect to their preferences for the appointment of senators to represent the province.

Bill C-43 is the second legislative initiative introduced by the government during the 39th Parliament with respect to the Senate. On 30 May 2006, the Honourable Marjory LeBreton, Leader of the Government in the Senate, introduced Bill S-4, An Act to Amend the Constitution Act, 1867 (Senate Tenure), in the Senate. This bill proposes that the term of new Senate appointees be eight years, which would be renewable. The subject matter of the bill was referred to a Special Senate Committee on Senate Reform on 28 June 2006. After hearing witnesses, the Committee tabled its report on Bill S-4 on 26 October 2006. The bill received second reading in the Senate on 20 February 2007 and was referred to the Standing Senate Committee on Legal and Constitutional Affairs.

On his appearance before the Special Committee on 7 September 2006, Prime Minister Stephen Harper stated: "As yet another step in fulfilling our commitment to make the Senate more effective and more democratic, the government, hopefully this fall, will introduce a bill in the House to create a process to choose elected senators."

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* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both Houses of Parliament, receive Royal Assent, and come into force.

The preamble of Bill C-43 expressly refers to the method of ascertaining the preferences of electors on appointments to the Senate as an undertaking pending the pursuit of a constitutional amendment under subsection 38(1) of the *Constitution Act, 1982* to provide for a means of direct election of senators.

Bill C-43 sets out the procedure for "electing" Senate nominees, and, as such, constitutes a mini *Canada Elections Act*. It includes, directly or by reference, several substantive provisions of the *Canada Elections Act*. Indeed, clause 2(2) provides that words and expressions used in Bill C-43 "have the same meaning as in the *Canada Elections Act* unless a contrary intention appears."

BACKGROUND

Members of the Senate are appointed (or "summoned") by the Governor General pursuant to section 24 of the *Constitution Act, 1867*.(1) In accordance with a constitutional convention, the Governor General's appointments to the Senate are made following a recommendation by the Prime Minister, which is his or her special prerogative.(2)

Section 23 of the *Constitution Act, 1867* provides for the qualifications of senators. A prospective senator must be a subject of the Queen, at least 30 years of age, and reside and possess at least $4,000 in real property in the province for which he or she is being appointed (except in Quebec, in which case a senator must reside or have his or her real property in the electoral division for which he or she is being appointed).

Since Confederation, the Senate and, more particularly, the method for selecting senators have been the object of numerous reform proposals. As early as 1874, the House of Commons debated a motion by David Mills, MP, that "our Constitution ought to be reformed … to confer upon each Province the power of selecting its own Senators."(3) At the outset of the first Interprovincial Conference in 1887, the premiers passed a resolution that half of the members of the Senate be appointed by the federal government and that the other half be appointed by the provincial governments.(4)

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(1) *Constitution Act, 1867* (U.K.), 30 and 31 Vict., c. 3.

(2) Privy Council Minute, P.C. 3374, 25 October 1935.

(3) In 1909, Senator Richard Scott moved that a proportion of senators (approximately two-thirds) be elected for seven-year terms.

(4) Leslie F. 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, p. 95.

After these early proposals, there was little interest in Senate reform until the end of the 1960s. In 1969, a federal government proposal at the First Ministers Conference echoed the 1887 resolution by suggesting that the Senate "could be partly selected by the federal government and partly selected by the provincial governments. Senators selected by the provinces could be nominated by the provincial governments, acting with or without the approval of their legislatures, depending on the provisions of each provincial constitution."(5) In the spirit of this proposal, the 1972 report of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada 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.(6)

In 1978, the Government of Canada's proposal *A Time for Action* called for a renewed Constitution, to include a House of the Federation that "would replace the Senate. It would provide a role for the provinces in the selection of its members."(7) Bill C-60 was tabled and received first reading in the House of Commons on 20 June 1978. It provided for half the senators of a province to be selected by the House of Commons following each general election and the other half to be selected by the legislative assembly of that province following each general election.(8) In 1979, however, the Supreme Court of Canada held that Parliament could not unilaterally alter the Senate if that would affect its fundamental features or essential characteristics, such as the method of selection of senators.(9) That same year, 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, on occasion, by the premier of a province.(10)

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(5) 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.

(6) *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.

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

(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, clause 63.

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

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

In 1982, the Constitution of Canada was patriated. It is now expressly provided by section 42(1)(*b*) of the *Constitution Act, 1982* that an amendment to the method of selecting senators must be agreed on by the Senate, the House of Commons and at least two-thirds of the provinces that have at least 50% of the population of all provinces.

In 1984, the Special Joint Committee on Senate Reform recommended that senators be directly elected.(11) The Royal Commission on the Economic Union and Development Prospects for Canada recommended similarly in 1985 that senators be elected and that elections for the House of Commons and the Senate take place at the same time.(12)

In 1987, the first ministers reached an agreement about constitutional reform, known as the Meech Lake Accord. Under this agreement, once a vacancy occurred in the Senate, the provincial government to which the vacancy related could submit a list of names of persons who could be summoned to the Senate. The Meech Lake Accord also provided that the above procedure for appointment to the Senate was to apply pending approval by the provincial legislatures of the constitutional agreement.(13) Although not provided for in the agreement, on 16 October 1989, Alberta held an election under its recently enacted *Senatorial Selection Act*.(14) Reform Party candidate Stan Waters was elected. He was nominated to the Senate on 11 June 1990. On 23 June 1990, however, the Meech Lake Accord expired without the approval of Manitoba and Newfoundland.

The 1992 Charlottetown Accord provided that the Constitution be amended in order to provide that senators be elected by the population or by members of provincial or territorial legislatures. The Accord stipulated that each province would have six senators, with one senator for each territory. The Accord also provided for representation of Aboriginal peoples in the Senate, in addition to provincial and territorial representation. The Charlottetown Accord was defeated in a nation-wide referendum held on 26 October 1992.

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(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) 1987 Constitutional Agreement, Schedule: Constitutional Amendment 1987, section 2, which would have amended the *Constitution Act, 1867*.

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

On 19 October 1998, Albertans elected Bert Brown and Ted Morton as senators-in-waiting in an election conducted in conjunction with the Alberta municipal elections. On 22 November 2004, they elected Cliff Breitkreuz, Link Byfield and Betty Unger, and re-elected Bert Brown, as senators-in-waiting in conjunction with the provincial general election. None of these "elected" senators was subsequently appointed to the Senate by the Governor General.

In 1990, British Columbia enacted the *Senatorial Selection Act*,(15) which mirrors its Alberta counterpart; no elections, however, were held under its authority. This Act contained a sunset clause and has since lapsed. In addition, various federal and provincial private Members' bills have proposed advisory elections for appointments to the Senate, but none have been enacted.(16)

SENATE APPOINTMENT CONSULTATIONS ACT

A. Part 1 – Administration (Clauses 3-11)

Part 1 of Bill C-43 sets out the powers and authorities involved in the administration of the new "consultation" process. The Chief Electoral Officer is to exercise general direction and supervision over the conduct of consultations, and he or she has the power to perform the duties necessary for the administration of the bill (clause 3).

Clause 4 gives the Chief Electoral Officer power to adapt the bill in emergencies and unusual and unforeseen circumstances. (This is similar to section 17 of the *Canada Elections Act*.) The Chief Electoral Officer may also implement public education and information programs to make the consultation process better known to the public (clause 5, which is similar to section 18 of the *Canada Elections Act*).

The Chief Electoral Officer appoints consultation officers and staff necessary for the purposes of the bill (clause 6). Consultation officers play a role that seems similar to the role of returning officers under the *Canada Elections Act*. The bill provides few particulars in relation to the mandate of these consultation officers, nor does it deal with possible overlap or duplication between them and returning officers. They are to perform their functions in

(15) *Senatorial Selection Act*, S.B.C. 1990, c. 70.

(16) 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; 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.

accordance with directions issued by the Chief Electoral Officer for the holding of a consultation (clause 6(3)). Clause 50(2) provides that the Chief Electoral Officer or a consultation officer can decide every question raised by an objection to a ballot.

Clause 9 provides that sections 540, 543, and 546 to 549 of the *Canada Elections Act* apply to a consultation, with any necessary adaptations. These provisions deal with the following issues:

- retention of election documents by the Chief Electoral Officer (section 540);
- payment of claims that relate to the conduct of an election (section 543);
- taxation of accounts that relate to the conduct of an election (section 546);
- forms and manner of notices to the Chief Electoral Officer (section 547);
- removal of notice of election (section 548); and
- oaths and affidavits (section 549).

Clause 11 provides that the funds necessary for the application of the Act shall be paid out of the unappropriated moneys forming part of the Consolidated Revenue Fund.

B. Part 2 – Conduct of a Consultation (Clauses 12-17)

Bill C-43 provides that the Governor General may order that the consultation of the electors of a province take place in conjunction with either a general election of Members of the House of Commons or a general election of members of the provincial legislature (clauses 12(1) and 13(1)). The bill does not provide for the holding of a consultation in conjunction with a territorial general election. Nor does it permit a consultation to take place at a different time than at a federal or provincial general election.

An order that a consultation be held specifies, for each province, the number of places in the Senate in respect of which electors are to be consulted (clauses 12(2)(*a*) and 13(4)(*a*)). The government has stated that "the order may specify that the number of places subject to the consultation is greater than or lesser than the number of existing vacancies."(17)

Polling day for the consultation is either on the same day for voting in the federal general election or on the same day for voting in the provincial general election (clauses 2 "polling day," 12(2)(*c*) and 13(4)(*c*)) unless, in any electoral district, the writ is withdrawn or the

(17) Leader of the Government in the House of Commons and Minister for Democratic Reform, *Backgrounder: Senate Appointment Consultations Act*, 2006.

election is postponed under sections 59[18] or 77[19] of the *Canada Elections Act*. In these cases, the consultation in that electoral district is then postponed to the day of the postponed election (clause 14).

When the consultation is carried out in conjunction with a provincial general election, the Chief Electoral Officer may enter into an agreement with any person or body responsible for the conduct of elections in a province and has the power to adapt any provisions of the bill in order to facilitate this process (clause 13(2)).

If a consultation is to be conducted in conjunction with a provincial general election, a notice of the order must be published in the *Canada Gazette* at least six months before the order authorizing the consultation (clause 13(3)).

Once an order related to a consultation is made, the Chief Electoral Officer shall send to each returning officer in the province concerned a notice of consultation providing for information on nominations, the polling day and the consultation process. Such notices shall be distributed and posted in conformity with the Chief Electoral Officer's directives (clause 15).

If, on the 23rd day before polling day, the number of nominees confirmed by the Chief Electoral Officer is less than or equal to the number of places in the Senate in respect of which electors are to be consulted, the consultation will not be held (clause 16). If the number of nominees in a province is greater than the number of places in the Senate in respect of which electors are to be consulted, the Chief Electoral Officer takes the steps that are necessary to conduct a consultation. Information relating to nominees is then sent to returning officers and shall be posted in their offices (clause 17).

C. Part 3 – Nominees (Clauses 18-43)

Clause 18 of Bill C-43 provides that, with certain exceptions (outlined below), any citizen of Canada who is at least 30 years old may be a nominee in a consultation. The age requirement reflects one of the qualifications for senators prescribed in section 23 of the

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(18) *Canada Elections Act*, subsection 59(1): "The Governor in Council may order the withdrawal of a writ for any electoral district for which the Chief Electoral Officer certifies that by reason of a flood, fire or other disaster it is impracticable to carry out the provisions of this Act."

(19) *Canada Elections Act*, subsection 77(1): "If a candidate endorsed by a registered party dies after 2:00 p.m. on the 5th day before the closing day for nominations and before the close of polling stations on polling day, the election is postponed and the returning officer shall, after communicating with the Chief Electoral Officer, fix the 2nd Monday after the death as the closing day for nominations in that electoral district."

Constitution Act, 1867. However, while the Constitution prescribes that an individual has to be 30 years old or older on the date of his or her nomination, the bill seems to add the requirement that a nominee shall have attained the age of 30 by the date of the consultation. This requirement may exclude from the consultation process prospective nominees who will attain the age of 30 years between the consultation and the date of the nomination and who otherwise fulfil all of the qualifications provided for by the Constitution. There also seems to be a difference between clause 18 of the Act, which prescribes that a nominee must be a Canadian citizen, and section 23 of the *Constitution Act, 1867*, which requires that senators be subjects of the Queen. The other qualifications prescribed in section 23 of the *Constitution Act, 1867* are not set out in Bill C-43.

The Chief Electoral Officer, the Assistant Chief Electoral Officer, consultation officers, election officers and nominees in consultations being held in other provinces cannot be nominees in a consultation (clause 18). There seems to be no prohibition on an individual's being a nominee for a place in the Senate and, at the same time, a candidate for election to the House of Commons or to a provincial legislature.

The nomination paper of a prospective nominee must include, among other things, the names, addresses and witnessed signatures of at least 100 electors resident in the province where the consultation is to be conducted (clause 19(1)(*e*)). A deposit of $1,000 must also be filed with the Chief Electoral Officer (clause 21(1)(*b*)).

A political party may endorse as many nominees in a consultation in a province as there are places in the Senate in respect of which electors are to be consulted (clause 20(1)). In this case, a written statement that a nominee is endorsed by the party, signed by the party leader, must be filed with the Chief Electoral Officer (clause 21(1)(*d*)).

Nomination papers must be filed with the Chief Electoral Officer before 2:00 p.m. on the 25th day before the polling day ("closing day") (clauses 22 and 23).

Clauses 29 to 33 provide for the rights of the nominees. Nominees who are employed in federally regulated workplaces (those subject to Part III of the *Canada Labour Code*) have the right to a leave of absence to seek nomination and to be nominees during the consultation period (clause 29). (This is similar to section 80 of the *Canada Elections Act*.) Nominees have the right of access to apartment buildings, condominium buildings, other multiple residence buildings, gated communities and to public places (clause 30). (This is similar to section 81 of the *Canada Elections Act*.) Nominees also have the right to receive a copy of the lists of electors for the electoral districts in the province for which the electors are to

be consulted (clause 31). The Chief Electoral Officer will create a compilation of the information concerning nominees (an "elector information guide") and distribute it to the households in the province concerned (clause 33).

A prospective nominee must appoint an official agent and an auditor before the close of nominations (clauses 34 to 38).

Clauses 39 to 43 prescribe prohibitions relating to:

- ineligible nominees (clause 39);
- ineligible official agents and auditors (clause 40);
- publishing false statements with the intention of affecting the results of a consultation (clause 41);
- publishing a false statement of the withdrawal of a nominee (clause 42); and
- contributions, the provisions of goods and services, and electoral expenses for the purpose of a campaign other than the campaign of a nominee (clause 43).

Those clauses reflect the substance, with the necessary adaptations, of the prohibitions contained in sections 89 to 92 of the *Canada Elections Act*.

D. Part 4 – Voting (Clauses 44-47)

Bill C-43 includes by reference the qualifications and entitlements for electors to vote that are provided for in the *Canada Elections Act* (clause 44). Qualified electors are Canadian citizens who are 18 years of age or older on polling day (*Canada Elections Act*, section 3). The following persons are not entitled to vote in a consultation: the Chief Electoral Officer, the Assistant Chief Electoral Officer, and every person who is imprisoned in a correctional institution and serving a sentence of two years or more (*Canada Elections Act*, section 4). This latter provision, however, was struck down by the Supreme Court of Canada in 2002 with respect to prisoners.[20]

Since the entitlement to vote differs in some cases between federal and provincial elections (e.g., regarding the minimum number of months specified for the residence requirement), an elector might have the right to vote only in the consultation and not in the general election when a consultation is being conducted in conjunction with a provincial general election.

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(20) See *Sauvé* v. *Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519.

The electors vote at the same polling station as for the election of Members of Parliament or members of a provincial legislature (clause 44).

Part 9 with respect to "Voting," Part 10 with respect to "Advance Polling" and Part 11 with respect to "Special Voting Rules" of the *Canada Elections Act* apply to voting in a consultation with any adaptations that may be required (clause 46). However, instead of marking the ballot in the circular space opposite the name of the nominee of his or her choice, the elector shall indicate his or her preferences – first choice, second choice, third choice, etc. – by entering 1, 2, 3, etc., in the circular space opposite the names of the nominees. An elector shall not indicate more preferences than there are places in the Senate in respect of which there is a consultation (sections 46 and 47(3)).

The Chief Electoral Officer is to publish in the *Canada Gazette* the form of the ballot to be used for voting in a consultation (clause 47(1)).

E. Part 5 – Counting of Votes (Clauses 48-58)

Part 5 of Bill C-43 sets out the rules for counting votes pursuant to the single transferable vote system. This system takes into account the first and subsequent preferences indicated by electors on their ballots.

Clauses 48 to 50 prescribe general provisions with regard to:

- the examination of ballot boxes (clause 48);
- the rejection of ballots (clause 49); and
- objections to ballots (clause 50).

The Chief Electoral Officer establishes a list of selected nominees for each province in which a consultation is held (clause 51). There shall be as many successive counts of the votes as are necessary to equal the number of places for which the consultation is being conducted (clauses 51(2) and 55).

On the first count of the votes, only the first preferences expressed by voters are taken into consideration. Votes cast for a nominee who has withdrawn or for a person other than a nominee are void (clauses 26(2) and 28). Ballots that indicate no first preference shall also be rejected (clause 49(1)(*c*)). If an elector indicates the same preference twice or if he or she omits to indicate one preference, that preference and any subsequent preferences on the ballot are not considered (clause 49(2)).

The name of a nominee shall appear on the list of selected nominees if on the first count of the votes and taking into account only the electors' first preferences, the nominee has obtained a number of votes at least equal to the quota set in clause 52(2) (clause 53(1)(*a*)). This quota shall be determined by the following formula:

> A / (B + 1) + 1:
>
> A is the total number of first preference votes obtained by all nominees; and
>
> B is the number of places in the Senate in respect of which electors have been consulted.

For example, if there are 1,000,000 valid ballots in a province for a consultation and four seats in the Senate to be filled, all nominees who obtained 200,001 first preference votes or more have their names on the list of selected nominees. If four nominees obtain more than 200,001 votes, their names will all appear on the list of selected nominees and there will be no second count of the votes.

On the second count, the votes obtained by selected nominees in excess of the quota are distributed to the next available preferences. A nominee is the next available preference of an elector if he or she comes next in that elector's order of preference (clause 52(1)). Before the distribution of the votes, the number of next available preferences must be multiplied by the "transfer factor," which is the number of votes of a selected nominee in excess of the quota divided by the total number of votes obtained by the selected nominee. For example, if the quota is 200,000 votes and nominee A gets 300,000 votes, the transfer factor will be one third (100,000 / 300,000). Hence, if nominee B was the next available preference for 150,000 voters who indicated nominee A as their first preference, nominee C was the next available preference for 100,000 voters who indicated nominee A as their first preference, and nominee D was the next available preference for 50,000 voters who indicated nominee A as their first preference: nominee B will get 50,000 votes; nominee C, 33,333; and nominee D 16,666 votes; in addition to the number of votes they already had on the first count.

On subsequent counts, all nominees who obtain the quota by adding to the electors' first preferences the transferred votes are added to the list of selected nominees (clause 53(1)(*b*)). The remaining nominees are also added to the list of selected nominees if their number equals the number of places in the Senate for which a consultation has been conducted (clauses 51(2) and 55).

On any count, if no nominee obtains a number of votes at least equal to the quota, the nominee who obtains the least number of votes is eliminated (clause 54(1)). His or her votes are then distributed to the next available preferences (clause 54(2)). If more than one nominee gets the smallest number of votes, the nominee who obtained the fewest votes in the preceding count is eliminated (clause 54(4)). The bill provides no mechanism to break such a deadlock on the first count, but presumably all nominees who obtained the smallest number of votes will be eliminated.

Clauses 53(4) and 56 deal with the order of distribution of votes in excess of the quota in cases where more than one nominee receives more than the quota.

The Chief Electoral Officer shall establish a system of electronic data entry and processing for the purposes of counting votes (clause 10(1)).

Clause 57 provides that the Chief Electoral Officer shall transmit the list of selected nominees to each of the nominees in the province. He or she shall also submit to the Prime Minister and publish in the *Canada Gazette* a report setting out, among other things, the results of the consultation (clause 58).

F. Part 6 – Communications (Clauses 59-71)

Part 6 of Bill C-43 deals with advertising and surveys. It incorporates within the consultation process the relevant provisions of Part 16 of the *Canada Elections Act* (sections 319 to 348). Clause 59 of the bill defines “advertising” and “survey” in the same way those two words are defined in the *Canada Elections Act* but with the necessary adaptations.

Clauses 60 to 65 repeat the substance of sections 320 to 325 of the *Canada Elections Act* on advertising, relating in particular to:

- advertising that must contain a message stating that its transmission was authorized by the official agent of a nominee (clause 60, see section 320 of the *Canada Elections Act*);
- using a means of transmission of the Government of Canada (clause 61, see section 321 of the *Canada Elections Act*);
- advertising posters in apartment buildings and condominium units (clause 62, see section 322 of the *Canada Elections Act*);
- the advertising blackout period (clauses 63 and 64, see sections 323 and 324 of the *Canada Elections Act*); and
- prevention or impairment of transmission of an advertising message (clause 65, see section 325 of the *Canada Elections Act*).

Clause 66 of the bill provides that no electoral district association of a registered party shall incur advertising expenses that promote or oppose a nominee during a consultation period.

Clauses 67 to 69 of the bill re-state the substance of sections 326 to 328 of the *Canada Elections Act* concerning opinion surveys, relating in particular to:

- transmission of survey results (clause 67, see section 326 of the *Canada Elections Act*);
- surveys not based on recognized methods (clause 68, see section 327 of the *Canada Elections Act*); and
- transmission and causing transmission of survey results during the blackout period (clause 69, see section 328 of the *Canada Elections Act*).

Clauses 70 and 71 replicate the substance of sections 330 and 331 of the *Canada Elections Act* prohibiting broadcasting outside Canada with the intent to influence voters and prohibiting interference by foreigners.

G. Part 7 – Third Party Advertising (Clauses 72-85)

Part 7 of Bill C-43 deals with third party advertising in relation to consultations. This part of the bill introduces within the consultation process the relevant provisions of Part 17 of the *Canada Elections Act* (sections 349 to 362).

The definition of third party in Bill C-43 encompasses, however, more entities than it does in the *Canada Elections Act*. Indeed, an eligible party and a registered party can register as a third party under the bill (clause 72). As mentioned earlier, electoral district associations of registered parties may not incur advertising expenses during a consultation period (clause 66).

Clause 73 provides for spending limits on advertising expenses in respect of one or more nominees in a province. This spending limit is the greater of $5,000 or the amount obtained by multiplying $150,000 by the total number of electors in the province and dividing by the total number of electors in Canada (section 73(1)). Each territory has a spending limit for advertising expenses of $3,000 (clause 73(2)).

Clause 74 repeats the substance of section 351 of the *Canada Elections Act* by prohibiting a third party from circumventing, or attempting to circumvent, a spending limit on advertising expenses by splitting itself into more parties or acting in collusion with another third party.

Clause 75 sets out the information that has to be included in a third party's advertising message. The message must include the name of one or more nominees and the province in which they are nominees. The message must also identify the third party and indicate that it has authorized the message. This section is different than its counterpart in the *Canada Elections Act* (section 352), since clause 75 requires that one or more nominees be named in an advertising message while there is no similar requirement in section 352 of the *Canada Elections Act*.

Clauses 76 to 85 repeats the substance of sections 353 to 362 of the *Canada Elections Act* governing third parties:

- clause 76 repeats the substance of section 353 of the *Canada Elections Act*, which deals with the application for registration of a third party;
- clause 77 contains the substance of section 354 of the *Canada Elections Act*, which deals with the appointment of the financial agent for a third party;
- clause 78 re-states the substance of section 355 of the *Canada Elections Act*, which deals with the appointment of the auditor for a third party;
- clause 79 repeats the substance of section 356 of the *Canada Elections Act*, which deals with the establishment of a registry of third parties by the Chief Electoral Officer;
- clause 80 contains the substance of section 357 of the *Canada Elections Act*, which deals with contributions to and expenses incurred on behalf of third parties that must be authorized by the third party's financial agent;
- clause 81 repeats the substance of section 358 of the *Canada Elections Act*, which deals with prohibitions on the use of foreign contributions;
- clause 82 contains the substance of section 359 of the *Canada Elections Act*, which deals with the advertising report that every third party is required to file;
- clause 83 re-states the substance of section 360 of the *Canada Elections Act*, which deals with the third party's auditor's report on the advertising report;
- clause 84 contains the substance of section 361 of the *Canada Elections Act*, which deals with the Chief Electoral Officer's right to correct an immaterial error in an advertising report filed by a third party; and
- clause 85 repeats the substance of section 362 of the *Canada Elections Act*, which deals with the publication, by the Chief Electoral Officer, of information relating to third parties and of their advertising reports.

H. Part 8 – Financial Administration (Clauses 86-96)

The provisions of Part 8 of Bill C-43 dealing with financial administration are similar to those contained in the *Canada Elections Act*, except that under Bill C-43 contributions are made exclusively to the nominee while the *Canada Elections Act* stipulates rules for contributions to registered parties, registered associations, candidates, leadership contestants or nomination contestants:

- clause 86 repeats, with the necessary adaptations, the substance of section 404 of the *Canada Elections Act* with regard to ineligible contributors;

- clause 87(1) contains the substance, with the necessary adaptations, of section 404.2(1) of the *Canada Elections Act* in respect of a nominee's own funds used in his or her campaign – those funds are considered to be a contribution;

- clause 87(2) departs from its counterpart in the *Canada Elections Act*. Under Bill C-43, a provision of goods or services to a nominee is permitted and is not considered a contribution if it is from a registered party or from a registered association of a party. The goods or services may include professional services, shared office accommodation and lists of members or contributors but shall not include goods and services for which advertising expenses are incurred;

- clause 87(3) repeats the substance, with the necessary adaptations, of section 404.2(3) of the *Canada Elections Act* in respect of paid leave of absence not being considered to be a contribution from the employer for the purposes of the bill;

- clause 88 comprises the substance, with the necessary adaptations, of section 404.4 of the *Canada Elections Act* in respect of the issuance of receipts for contributions over $20 and in respect of record keeping for contributions of $20 or less;

- clause 89 repeats the substance, with the necessary adaptations, of section 405 of the *Canada Elections Act* in respect of contribution limits and a nominee's contributions to his or her own campaign. No individual may contribute more than $1,000 per nominee;

- clause 90 reflects the substance, with the necessary adaptations, of section 405.2 of the *Canada Elections Act* in respect of circumventing contribution limits, concealing the source of a contribution, accepting excessive contributions, and entering into agreements for the provision of goods or services contingent on a contribution;

- clause 91 contains the substance, with the necessary adaptations, of section 405.21 of the *Canada Elections Act* in respect of prohibiting certain illegal contributions;

- clause 92 repeats the substance, with the necessary adaptations, of section 405.3 of the *Canada Elections Act* in respect of prohibiting indirect contributions;

- clause 93 reflects the substance, with the necessary adaptations, of section 405.31 of the *Canada Elections Act* limiting cash contributions to $20;

- clause 94 contains the substance, with the necessary adaptations, of section 405.4 of the *Canada Elections Act* in respect of the return of a contribution:
  - in excess of $1,000 (clause 89(1), section 405(1) of the *Canada Elections Act*), or
  - resulting from a prohibited agreement (clause 90(4), section 405.2(4) of the *Canada Elections Act*), or
  - made indirectly (clause 92, section 405.3 of the *Canada Elections Act*);

  clause 94 does not, however, provide for the return of a cash contribution in excess of $20; the *Canada Elections Act*, as amended by the *Federal Accountability Act*,[21] stipulates such a return;

- clause 95 provides that sections 406 to 412 of the *Canada Elections Act*, which deal with electoral expenses, apply to nominees in a consultation, with any adaptation that may be necessary; and

- clause 96 provides that sections 436 to 438, 444 to 463, 468, 471 to 475 (except paragraph 473(2)(*a*)) and 477 and subsection 478(2) of the *Canada Elections Act*, which deal with financial administration of candidates, apply to nominees in a consultation, with any adaptation that may be necessary.

Bill C-43 does not provide for a direct consultation expenses limit, although individual contributions may not exceed $1,000 per nominee. The government explains that "because of the level of the contribution limit and the costs associated for a province-wide campaign, no spending limit is provided for in the bill."[22]

I. Part 9 – Enforcement (Clauses 97-110)

Part 9 of Bill C-43 deals with its enforcement. It mirrors in large part the enforcement provisions of the *Canada Elections Act*, concerning matters such as:

- obstructing or delaying the consultation process (clause 97, see section 480(1) of the *Canada Elections Act*);

- offer and acceptance of bribes (clause 98, see section 481 of the *Canada Elections Act*);

(21) *Federal Accountability Act*, S.C. 2006, c. 9.

(22) Leader of the Government in the House of Commons and Minister for Democratic Reform, *Backgrounder: Senate Appointment Consultations Act*, 2006.

- intimidation, duress, pretence and contrivance (clause 99, see section 482 of the *Canada Elections Act*);

- offences relating to the removal of posted election documents, the compelling or inducing of a false oath and the signing of a document that limits freedom of action in Parliament (clause 100(4), see section 499 of the *Canada Elections Act*);

- offences relating to: voting when not qualified or entitled; inducing a person not qualified or entitled to vote, to vote; and voting more than once (clause 102, see section 483 of the *Canada Elections Act*);

- offences relating to communications (clause 104, see section 495 of the *Canada Elections Act*);

- offences relating to third parties (clause 105, see section 496 of the *Canada Elections Act*);

- offences relating to financial administration (clause 106, see section 497 of the *Canada Elections Act*); and

- punishment (clause 107, see section 500 of the *Canada Elections Act*).

Clauses 100(1), 100(2) and 100(3) provide for offences for consultation officers for contravention of the bill.

Clause 103 includes by reference the offences established by sections 489, 490 and 491 of the *Canada Elections Act* for contravention of Part 9, "Voting," Part 10, "Advance Polling," and Part 11, "Special Voting Rules," of the *Canada Elections Act* (see clause 46).

Clause 108 contains, with the necessary adaptations, the substance of section 501 of the *Canada Elections Act*, which provides for additional penalties for a person who has been convicted of an offence. Clause 109 specifies that an offence under Part 9 of the bill does not include any punishment provided by sections 501 or 502 (illegal and corrupt practices) of the *Canada Elections Act*.

Clause 110 of the bill includes by reference sections 504 (case of judicial proceedings or a compliance agreement involving an eligible party, a registered party, a deregistered political party or an electoral district association), 505 (prosecution of third parties), 508 (evidence emanating from a returning officer) and 510 to 521 (Commissioner of Canada Elections) of the *Canada Elections Act*.

J. Part 10 – Transitional Provisions, Consequential Amendments, Coordinating Amendments and Coming Into Force (Clauses 111-126)

In case there is an order for consultation while the provisions of Bill C-43 that provide for the single transferable vote system have not yet come into force, the bill provides for a provisional plurality-at-large voting system. Under this interim voting system, all nominees will campaign against each other for the number of places in the Senate in respect of which electors are to be consulted. The electors will vote for the nominee or nominees of their choice but without expressing preferences among the nominees. The nominees with the most votes will win the nomination. Electors will have a number of votes equal to the number of places in the Senate for which a consultation is being conducted, but they may vote only once for a nominee.

Bill C-43 makes consequential amendments to the *Canada Elections Act* (clauses 113 to 121) in respect of restrictions and prohibitions relating to the use of the Register of Electors (clauses 113, 114 and 118) and in respect of restrictions respecting the appointment of official agents and auditors (clauses 115 to 117), the appointment of third party financial agents and auditors (clauses 119 and 120), and prohibited agreements for the payment of goods or services to a registered party that includes a term that a contribution be made to a nominee (clause 121).

The bill also makes consequential amendments to the *Income Tax Act* (clauses 122 to 123) in order to permit contributors to obtain tax credits for monetary contributions and to require authorized agents who receive monetary contributions under Bill C-43 to keep a record of them.

Bill C-43 comes into force six months after it receives Royal Assent, except Part 2 and clauses 51 to 58, 112, 124 and 125 (clause 126(1)).

Part 2, which contains the provisions regarding the conduct of a consultation, comes into force one year after the bill receives Royal Assent, or on an earlier day (but at least six months after Royal Assent) on which the Chief Electoral Officer publishes a notice in the *Canada Gazette* to the effect that the necessary preparations have been made.

Clauses 51 to 58, which relate to the list of selected nominees and consultation reports, come into force two years after the bill receives Royal Assent, or on an earlier day (but at least six months after Royal Assent) on which the Chief Electoral Officer publishes a notice in the *Canada Gazette* to the effect that the necessary preparations have been made.

If Part 2 comes into force before clauses 51 to 58, the transitional provisions referred to above apply to a consultation.

COMMENTARY

At present, members of the Senate are appointed by the Governor General on the recommendation of the Prime Minister. Section 42(1)(*a*) of the *Constitution Act, 1982* provides that an amendment to the Constitution of Canada in respect of the method of selecting senators may be made only in accordance with the general procedure for amending the Constitution – that is, by a proclamation issued by the Governor General and authorized by resolutions of the Senate, the House of Commons, and the legislative assemblies of at least two-thirds of the provinces that have at least 50% of the population of all the provinces. The premise of Bill C-43 is that it does not, as such, amend the method of selecting senators and therefore does not require a constitutional amendment. Instead, it establishes a list of selected nominees that reflects electors' preferences. As its preamble states, the bill creates a "method for ascertaining the preferences of electors in a province on appointments to the Senate within the existing process of summoning senators." In future years, it may be that an informal practice of appointing senators from the 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.(23)

As may be expected, there is a range of views on this proposal. Many expert commentators expressed their views on the constitutionality of elections for senators during their testimony before the Special Senate Committee on Senate Reform in 2006, thus commenting on the general proposal before the bill was tabled. For instance, constitutional scholar Peter W. Hogg stated that:

> If the second step legislation dealing with the elections legally fetters the Prime Minister's discretion by requiring him to select the elected person, then I think we would have crossed the path and made a change to section 29, and that would be unconstitutional as a piece of legislation. If the legislation does not fetter the Prime Minister's discretion at all but simply provides a pool of people from which he can select, it is probably all right.(24)

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(23) See David C. Docherty, "The Canadian Senate: Chamber of Sober Reflection or Loony Cousin Best Not Talked About," *Journal of Legislative Studies*, Vol. 8, 2002: "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).

(24) Senate of Canada, *Proceedings of the Special Senate Committee on Senate Reform*, 20 September 2006, p. 41.

Professor Patrick Monahan repeated the substance of what he had written in a textbook on constitutional law, that "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.'"[25]

Mr. Benoît Pelletier, Minister responsible for Canadian Intergovernmental Affairs for the Government of Quebec, cautioned the senators in his testimony that any changes to the fundamental characteristics of the Senate, such as the method of nomination for senators, should be made through the multilateral constitutional process rather than by the Parliament of Canada alone. Mr. Pelletier did not comment on the constitutionality of any hypothetical proposals that would involve advisory elections.[26]

In its report, the Special Committee echoed its witnesses' concerns and stated that the development of any consultative or advisory elections must be carefully considered with a view to their constitutionality.

The Special Senate Committee on Senate Reform also stated that any means chosen to achieve a more democratic Senate should not disturb one of the main characteristics of the Senate – the representation of various segments of the Canadian population; rather, that characteristic should be enhanced. The Committee also noted the impact that advisory elections could have on the relatively minor role that partisanship plays in the Senate's deliberations. The Committee expressed the view that an electoral system enabling voters to assign preferences to individual candidates across party lines, although it would not eliminate parties or partisanship, would focus attention on the merits of individuals as well as political parties, and might thus be more appropriate for the distinctive culture of the Senate.

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(25) Patrick J. Monahan, *Constitutional Law*, 2nd edition, Irwin Law, Toronto, 2002, p. 488. See Senate of Canada, *Proceedings of the Special Senate Committee on Senate Reform*, 21 September 2006, pp. 12-13.

(26) Senate of Canada, *Proceedings of the Special Senate Committee on Senate Reform*, 21 September 2006, pp. 86-92.