Legislative Summary **LS-580E**

BILL C-19: AN ACT TO AMEND THE CONSTITUTION ACT, 1867 (SENATE TENURE)

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Law and Government Division

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LEGISLATIVE HISTORY OF BILL C-19

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
First Reading:	13 November 2007	First Reading:	
Second Reading:		Second Reading:	
Committee Report:		Committee Report:	
Report Stage:		Report Stage:	
Third Reading:		Third Reading:	

Royal Assent:

Statutes of Canada

This bill did not become law before the 39th Parliament ended on 7 September 2008.

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 Michel Bédard

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BILL C-19: AN ACT TO AMEND THE CONSTITUTION ACT, 1867* (SENATE TENURE)

BACKGROUND

Bill C-19, An Act to Amend the Constitution Act, 1867 (Senate tenure) was introduced in the House of Commons on 13 November 2007 by the Leader of the Government, the Honourable Peter Van Loan, PC, MP. It limits the tenure of senators appointed after the bill becomes law to one non-renewable eight-year term. At the same time it preserves the existing retirement age of 75 for current senators. It further allows a senator whose term has been interrupted to return to the Senate and complete his or her term.

The bill re-introduces, with two important modifications, 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 expressly provides for an eight-year non-renewable term. In addition, Bill C-19 contains a provision to permit a Senate term to be completed after an interruption. When Bill S-4 was introduced it was described by the Prime Minister as a first step toward broader Senate reform.

On 21 June 2006, the Senate established a Special Senate Committee on Senate Reform to undertake a comprehensive review of the subject-matter of Bill S-4 and any other related matter referred to it by the Senate.(1) On 28 June 2006, after debate on the motion by Senator Marjory LeBreton, PC, for second reading of the bill, it was moved by Senator Joan Fraser that the subject-matter of the bill be referred to the Special Committee.(2)

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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.

(1) *Journals of the Senate*, 1st Session, 39th Parliament, Issue 26, 21 June 2006.

(2) Ibid., Issue 29, 28 June 2006.

The Special Committee hearings on 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.

In addition to the subject-matter of Bill S-4, the Senate also referred a motion by Senator Lowell Murray, PC, seconded by Senator Jack Austin, PC, 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 would 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.(3)

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.(4) The report on the Murray–Austin motion was tabled on the same day.

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.(5) The report was adopted by the Senate on 19 June 2007. Following the recommendation in the report that the bill "should not proceed to third reading until such time" as the Supreme Court of Canada has ruled on its constitutionality, and given the adoption of the report by the Senate, the bill will not proceed to third reading. It should be noted that the report was a majority report prepared by the Opposition.

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(3) Senate of Canada, Special Senate 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, http://www.parl.gc.ca/39/1/parlbus/commbus/senate/Com-e/refo-e/rep-e/rep02oct06-e.htm.

(4) Special Senate Committee on Senate Reform, *Report on The subject-matter of Bill S-4, An Act to amend the Constitution Act, 1867 (Senate tenure)*, 1st Session, 39th Parliament, October 2006 (hereinafter, *The subject-matter of Bill S-4*), http://www.parl.gc.ca/39/1/parlbus/commbus/senate/com-e/refo-e/rep-e/rep01oct06-e.htm.

(5) Senate of Canada, Standing Senate Committee on Legal and Constitutional Affairs, 39th Parliament, 1st Session, Thirteenth report, 12 June 2007, http://www.parl.gc.ca/39/1/parlbus/commbus/senate/com-e/lega-e/rep-e/rep13jun07-e.htm. (hereinafter, Thirteenth report.)

There has been only one reform affecting Senate tenure since 1867. In 1965 the *British North America Act* (the BNA Act) was amended to establish a retirement age of 75 for senators. Prior to this amendment senators served for life.(6) The amendment to the BNA 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.(7) 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 five-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. The terms would have varied, depending on the life of the governments in the various jurisdictions.(8)

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*,(9) a judgment delivered in 1980, the Court articulated a number of guiding principles for the process of amending the Constitution

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(6) *Constitution Act, 1965*, S.C. 1965, c. 4, in force on 1 June 1965.

(7) *The subject-matter of Bill S-4*, 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*, BP-316E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, November 1992.

(8) Bill C-60, The Constitutional Amendment Act, 1978.

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

in respect of the Senate. Although decided under the BNA Act and prior to the enactment of the current amending procedures in the *Constitution Act, 1982*, the judgment 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 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 summary.

DESCRIPTION AND ANALYSIS

A. Eight-Year Non-Renewable Terms (Clause 2)

Bill C-19 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)).[10]

Clause 2 in Bill C-19 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 eight-year term could be renewed. Clause 2 amends section 29 so that it will state:

> 29. (1) Subject to sections 30 and 31, a person summoned to the Senate shall hold a place in that House for one term of eight years.
>
> (2) If that term is interrupted, that person may be summoned again for the remaining portion of the term.
>
> (3) Notwithstanding subsection (1) but subject to sections 30 and 31, a person holding a place in the Senate on the coming into force of the *Constitution Act, 2007 (Senate tenure)* continues to hold a place in that House until attaining the age of seventy-five years.

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

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 the Commentary section 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, 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.(11)

B. Interruption of an Eight-Year Term

The other important change in Bill C-19 from Bill S-4 is a provision to permit a senator whose eight-year term is interrupted to complete the term (new subsection 29(2)). This amendment appears to be intended to clarify that senators who are unable to complete their eight-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-19.

C. Newly-Appointed Senators to Serve Beyond Age 75

The proposed amendment to subsection 29(3) of the *Constitution Act, 1867*, preserves the retirement age of 75 for existing senators. Since this provision is directed at currently serving senators, the Prime Minister would presumably be free to appoint new senators to serve for eight-year terms even if this term extended beyond age 75. In its report to the Senate, the Standing Senate Committee on Legal and Constitutional Affairs 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 (see the Commentary section for a discussion of this issue).

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(11) Senate of Canada, *Proceedings of the Special Senate Committee on Senate Reform*, 1st Session, 39th Parliament, 7 September 2006, p. 2:12.

D. Amendments to Bill S-4 in the Senate

Following the proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Bill S-4 was reported back to the Senate with a number of significant amendments. The amended bill proposed:

- a non-renewable term of 15 years; and
- a mandatory retirement age of 75 years for all senators, including those appointed after the coming into force of the bill.

E. The Preambles

The various preamble clauses 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 preamble clause 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 clause states that the government will explore additional measures to ensure that Canadian democratic values are reflected in the Senate. The third clause speaks more directly to Senate tenure, asserting that tenure should be "consistent with the principles of modern democracy."

The fourth clause serves as a reminder that Parliament amended the Constitution in 1965 to limit Senate terms to age 75. The next clause asserts Parliament's exclusive authority, without the need for provincial involvement, in section 44 of the *Constitution Act, 1982* to amend the Constitution of Canada in relation to the Senate (see below, in the "Commentary" section, the discussion on the amending process). The final clause 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 will be explored later, in the "Commentary" section).

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.(12) The preambles in Bill S-4 serve to provide an important context to a broader government program of democratic reform for the Senate, of which Senate tenure is but a first step.

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(12) 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.

In his historic appearance before the Special Senate Committee, the Prime Minister indicated that Bill S-4 was part of a step-by-step process for reform of the Senate that would be followed by legislation in the fall of 2006 to establish an advisory, or consultative, election process for senators on a national level.(13) He also expressed his intention to initiate a process for constitutional reform leading to an elected Senate "in the near future."(14)

COMMENTARY

A. 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 and the Standing Senate Committee on Legal and Constitutional Affairs was whether the amendment to the *Constitution Act, 1867* 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)(15) 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.

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(13) An advisory election process would preserve the Prime Minister's power that arises by constitutional convention to recommend individuals to be summoned to the Senate by the Governor General. The advisory election process would simply provide the Prime Minister with a pool of candidates from which to choose for recommendation to the Governor General.

(14) Senate of Canada, *Proceedings of the Special Senate Committee on Senate Reform*, 1st Session, 39th Parliament, 7 September 2006, p. 2:9.

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

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 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.(16) 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 Special Committee's proceedings, 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.

B. 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.(17) Although the Court declined to answer the reference question submitted by the Government of Canada 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.

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(16) These five exceptions included amendments that would affect: provincial legislative powers; schools; the use of the French and English languages; the requirement that there shall 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.

(17) *Upper House Reference*, para. 49.

There are differing views of the significance and continuing relevance of the *Upper House Reference*. Scholars such as Professor 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.(18) 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*.(19) 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*. On 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, notwithstanding the text of the *Constitution Act, 1982*.(20) Resort to the complex amending formula in section 38(1) would be required in those cases.

C. The Special Committee's Conclusions on Bill S-4

The majority 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. The majority of the Committee also indicated that, given that it 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.

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(18) Senate of Canada, *Proceedings of the Special Senate Committee on Senate Reform*, 1st Session, 39th Parliament, 20 September 2006, pp. 4:36-4:37, evidence of P. W. Hogg.

(19) P. Monahan, *Constitutional Law*, 2nd ed., Irwin Law, Toronto, 2002, p. 68.

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

The majority 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.

D. Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs

The Standing Senate Committee on Legal and Constitutional Affairs met six times between 21 March and 6 June 2007 to hear from witnesses and deliberate on the bill. The Committee reported the bill back to the Senate on 12 June 2007 with amendments, observations and a recommendation that the bill not proceed to third reading until the Supreme Court of Canada has ruled on its constitutionality.(21) As noted earlier, the report reflected the views of the majority and was, in fact, written by the Opposition. The decision to report the bill back with amendments, observations and a recommendation were made on division.

In its report to the Senate, the Standing Committee noted at the outset that after the Special Senate Committee submitted its report, the government 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).(22) This was noted to be a significant development that caused some senators and a number of constitutional scholars who appeared before the Special Senate Committee to reconsider their earlier positions and their analyses on Bill S-4, especially with respect to the bill's constitutionality.

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(21) It was noted by Senator Donald Oliver, QC, Chair of the Standing Senate Committee, in remarks made during his report to the Senate, that the Committee's recommendation would appear 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 be proceeded with further. According to Senator Oliver, there appears 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. 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 *Debates of the Senate (Hansard)*, 1st Session, 39th Parliament, Vol. 143, Issue 108, 14 June 2007, and Rule 100, *Rules of the Senate of Canada*.

(22) For a description and discussion of this bill see Michel Bédard, *Bill C-43: Senate Appointment Consultations Act*, LS-553E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 23 April 2007, http://www.parl.gc.ca/LEGISINFO/index.asp?Language=E&query=4899&Session=14&List=ls.

Bill C-43 has been 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.

1. Eight-Year Terms Not Constitutional?

The Standing Senate 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 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*. The Committee was persuaded by a number of constitutional scholars, including Gerald Horgan from Queen's University and Meg Russell from University College, London, 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 to ensure regional and provincial representation. The Committee looked approvingly at the proposals for reform of the House of Lords in the United Kingdom, particularly the 15-year non-renewable term.(23)

2. Non-Renewable Appointments

A second concern of the Standing Committee was the renewability of the eight-year term. The Committee noted that renewable terms would be compatible with an elected Senate. It noted, however, 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, the Committee expressed concern that the bill could undermine the independence with which senators have traditionally approached their work. This independence was characterized by the Committee as one of the fundamental features or essential characteristics of the Senate and a constitutional requirement. The Committee pointed to some empirical work done by Professor Andrew Heard in support of the traditional view of the Senate as fostering more independent voting than the House of Commons.(24) Renewable terms would

(23) Thirteenth report, p. 6.

(24) Thirteenth report, p. 7.

interfere with this tradition by making senators who wished to have their appointments renewed susceptible to influence from the Prime Minister. In light of these and other concerns, the Committee recommended a non-renewable 15-year term. Such a term was viewed as more likely to meet the Supreme Court of Canada's test for constitutionality.

3. 75-Year Age Limit

With respect to the retirement age, the Committee noted that the bill would result in currently serving senators being required to retire at age 75, while those appointed after the coming into force of the bill 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.(25) It noted that, without a retirement age, senators could conceivably serve for life, thus frustrating the policy behind the decision to eliminate life terms in 1965. Removing the age limit may be appropriate for an elected Senate, but again the Committee noted that there are no proposals to amend the *Constitution Act, 1867* to effect such a change.

4. Which Amending Formula?

In its report, the Committee expressed serious reservations about the amending process proposed by the Government to effect the amendment to the *Constitution Act, 1867*. The critical question that the Committee poses in its report is 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* (BNA Act)? The Committee considered that, overall, the expert evidence supported the *Upper House Reference* 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 BNA 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 BNA Act.(26)

The Committee rejected the Government's position, as presented to the Committee by a Government witness, that the alterations that would affect the fundamental features or essential characteristics of the Senate, as expressed by the Supreme Court of Canada,

(25) Thirteenth report, p. 10.

(26) Thirteenth report, p. 14.

have all been codified in section 42. Those requirements that require the general amending formula (the "7/50" formula in section 38 of the 1982 Act), have been enumerated in section 42.(27) The report comments on the expert evidence presented to the Committee to the effect that section 42 of the 1982 Act cannot be considered as an exhaustive list of matters that require Parliament to seek provincial concurrence under the "7/50" formula.

As noted earlier, an important factor in the Committee's analysis was the introduction of Bill C-43, tabled in the House of Commons two months after the Special Senate Committee tabled its report. Bill C-43 suggests that Bill S-4 is part of a broader package of reforms.(28) In the evidence of various expert witnesses, the effect of Bill S-4 and its constitutional implications must be considered together with these other measures. According to the witnesses, a court, reviewing the constitutionality of Bill S-4 and whether it falls within the scope of section 44, could not ignore the related measures for Senate reform. These measures would likely be seen to have, as their object or effect, to change regional representation, tenure, method of selection and – possibly through constitutional amendment – provincial representation. The package of measures would likely be seen as changing the fundamental features or essential characteristics of the Senate, and thus as not meeting the test for constitutionality set out by the Supreme Court of Canada.(29)

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*. This position was taken, for instance, by the Province of Quebec, which had initially expressed support for the bill during the hearings conducted by the Special Senate Committee, because they considered it as part of a broader package of reforms, of which Bill C-43 was a part. These provinces 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.

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 1982 Act.(30)

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(27) Thirteenth report, p. 14.

(28) Thirteenth report, p. 16.

(29) Thirteenth report, pp. 16-17, referring to the evidence of Professor Joseph Magnet and Roger Gibbins, President and Chief Executive Officer, Canada West Foundation.

(30) Thirteenth report, pp. 20-21.

E. Arguments For and Against Reduced Senate Terms

It has been argued that reduced Senate terms, and the accompanying greater turnover, would invigorate the Senate, make it more effective as an upper chamber, and give it more credibility in the eyes of Canadians.

Concerns have been expressed that the long terms that Senators are currently permitted to serve in Canada are anachronistic and out of line with the experience in other Western democracies with an upper chamber, whose members are subject to term limits, and who must go to the voters periodically to obtain support for further terms. At present, a person can be appointed to the Senate as long as he or she is at least 30 years old, and then can remain in office until age 75. Such lengthy terms are sometimes viewed as undermining the legitimacy of the Senate as a legislative body.

Opponents of reduced terms argue that shorter terms will erode the institutional strength of the Senate that results from its lengthy and secure tenure. Its function as a "house of sober second thought" would by this view be impeded by the greater turnover of Senators, since institutional memory would disappear when a Senator's term limit is reached.

It has also been argued that, in the absence of elections, eight-year terms will enhance the prime ministerial power of appointment, further eroding the independence of the Senate and its strength as a chamber of sober second thought. It has been noted that any prime minister with a majority government lasting two or more terms would be able to fill every Senate seat by the time he or she left office, effectively controlling the Senate.(31)

During first reading debate on the bill, a number of senators raised concerns about the independence of the Senate under shortened, renewable terms. A parallel was drawn between Senate independence and judicial independence, with the implication that the Senate should have a level of independence comparable to that enjoyed by the judiciary. Senator Dan Hays, PC, in particular, asked whether reducing judicial tenure to eight years would not "strike very close to – perhaps not at – the heart of the independence of the judiciary."(32) Other senators maintained that independence is an essential characteristic of the Senate that would be compromised by reducing tenure to the level proposed by Bill S-4. According to this argument, such an alteration to an essential characteristic would require a constitutional amendment involving the provinces.(33)

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(31) *The subject-matter of Bill S-4*, p. 13.

(32) Senate of Canada, *Debates*, 1st Session, 39th Parliament, 8 June 2006, Vol. 143, Issue 22, remarks of the Hon. Dan Hays, PC.

(33) Ibid., 1 June 2006, Vol. 143, Issue 9, remarks of the Hon. S. Joyal and the Hon. J. Grafstein.

In its seminal 1997 judgment on judicial independence, the Supreme Court of Canada, in the *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* case,(34) asserted the constitutional principle of judicial independence. In so doing, it emphasized that the relationship between the courts and the other branches of government must be "depoliticized," and the separation of powers between the various branches of government – the executive, Parliament and the courts – preserved.(35) The possibility or even the appearance of political interference by means of "economic manipulation" must be forestalled by constitutional protection.(36) In developing the principle of judicial independence, the Court placed significant emphasis on unwritten constitutional principles, most of which the Court drew from the preamble to the 1867 Act, which states that Canada shall have a constitution similar in principle to that of the United Kingdom.(37)

The validity and usefulness of comparing judicial independence with Senate independence was questioned by one government witness in the course of the Special Committee's hearings. It was suggested that the principle of judicial independence is premised upon the separation of powers among the judicial, executive and legislative functions.(38) However, Senate independence as an extension of the principle of the separation of powers loses some of its force when one considers that the Senate is a constituent part of the legislative branch. It is an integral part of Parliament. As suggested by the government witness, the Senate on its own, seen as separate and distinct from Parliament, would have no claim to independence as the term is understood in the context of the separation of powers.

A number of witnesses appearing before both the Special Senate Committee and the Standing Senate Committee on Legal and Constitutional Affairs expressed a general concern that renewable terms could erode the independence of senators, particularly if there were no accompanying process for election of Senators, whether by direct election or by an advisory

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(34) *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3.

(35) Ibid., para. 140.

(36) Ibid., para. 135.

(37) In a dissenting opinion Justice LaForest was harshly critical of the approach adopted by the majority. He challenged the majority's suggestion that the Constitution's express terms merely elaborate the underlying principles that, the majority maintained, could be found in the preamble to the 1867 Act.

(38) Senate of Canada, *Proceedings of the Special Senate Committee on Senate Reform*, 1st Session, 39th Parliament, 7 September 2006, p. 2:34:, evidence of Warren Newman, General Counsel, Constitutional and Administrative Law Section, Department of Justice, Canada.

election process. It was argued that Senators would be less inclined to be critical of the government and less independent in pursuing their functions if their continued presence in the Senate depended upon reappointment by the prime minister.(39)

Concerns about independence are sometimes countered with the observation that senators have been, and would continue to be, guided more by party loyalty than by a sense of personal conviction in their attachment to a particular issue, or in their position on a matter before the Senate.

(39) *The subject-matter of Bill S-4*, p. 15.