Legislative Summary

Bill C-10: An Act to amend the Constitution Act, 1867 (Senate term limits)

Publication No. 40-3-C10-E
6 April 2010

Sebastian Spano

Legal and Legislative Affairs Division
Parliamentary Information and Research Service

Legislative Summary of Bill C-10

HTML and PDF versions of this publication are available on Intraparl (the parliamentary intranet) and on the Parliament of Canada website.

In the electronic versions, a number of the endnote entries contain hyperlinks to referenced resources.

Ce document est également publié en français.

Library of Parliament ***Legislative Summaries*** summarize government bills currently before Parliament and provide background about them in an objective and impartial manner. They are prepared by the Parliamentary Information and Research Service, which carries out research for and provides information and analysis to parliamentarians and Senate and House of Commons committees and parliamentary associations. Legislative Summaries are revised as needed to reflect amendments made to bills as they move through the legislative process.

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.

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

Publication No. 40-3-C10-E
Ottawa, Canada, Library of Parliament (2010)

CONTENTS

LEGISLATIVE SUMMARY OF BILL C-10: AN ACT TO AMEND THE CONSTITUTION ACT, 1867 (SENATE TERM LIMITS)

1 BACKGROUND

1.1 BILL C-10 AND PRIOR VERSIONS

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

Bill C-10 is the latest version of a series of government bills introduced since 2006 proposing to limit Senate terms. Since the introduction of the first Senate term limits bill (Bill S-4), the government's proposals for reducing Senate terms have evolved, usually in response to concerns raised about some of the provisions contained in prior versions of the government's bills.

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

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

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

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

Bill C-19 was itself a reintroduction, with one important modification, of Bill S-4, An Act to amend the Constitution Act, 1867 (Senate tenure), introduced in the Senate on 30 May 2006 by Senator Gerald J. Comeau. Bill S-4 did not expressly foreclose

the possibility of renewable eight-year terms, whereas Bill C-19 provided for an eight-year non-renewable term.

1.2 Senate Committee Studies on Senate Tenure

In recent years, Senate tenure has been studied by two Senate committees in particular: the Special Senate Committee on Senate Reform, in 2006, and the Standing Senate Committee on Legal and Constitutional Affairs, in 2007. The Special Committee did a comprehensive review of the subject matter of Bill S-4, and also studied a motion that the *Constitution Act, 1867* be amended to alter the formulae for western representation in the Senate. The Standing Committee reviewed Bill S-4 after it was introduced in the Senate. The reports prepared by both committees are commented upon later in this summary (see "Commentary," sections 3.3. and 3.4).

1.3 Proposals for Reforming Senate Tenure

There has been only one reform affecting Senate tenure since 1867. In 1965 the *British North America Act* (BNA Act) was amended to establish a retirement age of 75 for senators. Prior to this amendment senators served for life.[1] 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.[2] 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.[3]

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,[4]

a judgment delivered in 1980, the Court articulated a number of guiding principles for the process of amending the Constitution in respect of the Senate. Although decided under the BNA Act and prior to the enactment of the current amending procedures in the *Constitution Act, 1982*, the judgment, for some scholars, continues to have relevance. At the time it was decided, the case established the proposition that amendments affecting the essential characteristics or fundamental features of the Senate could not be undertaken by Parliament acting alone. Provincial involvement would be necessary.

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

2 DESCRIPTION AND ANALYSIS

2.1 EIGHT-YEAR NON-RENEWABLE TERMS (CLAUSE 3)

Bill C-10 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)).[5]

Clause 3 in Bill C-10 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 3 amends section 29 so that it will state:

> 29. (1) Subject to sections 29A to 31, a person who is summoned to the Senate after the coming into force of the *Constitution Act, 2009 (Senate term limits)* shall hold a place in that House for one term of eight years.
>
> (2) Subject to sections 29A to 31, a person referred to in subsection (1) whose term is interrupted may be summoned again to fill the remainder of the term.

The amended subsection 29(1) specifically addresses the concern raised by some members of the Standing Senate Committee on Legal and Constitutional Affairs in their study of Bill S-4 that renewable terms could undermine the independence of the Senate (see 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 on Senate Reform, the prime minister indicated that the silence could be construed as allowing for the possibility of renewal. He further noted that his position on renewability would be compatible with, and reflect his desire for, an elected Senate. The prime minister indicated, however, that if the committee was strongly opposed to the idea of renewable terms, this could be accommodated by means of an

amendment to the bill.[6] During debates on Bill S-7 at second reading in the Senate, Senator Marjory LeBreton (Leader of the Government and Minister of State [Seniors]), indicated that the government was addressing the concerns about the effect of renewable terms on the independence of senators, and thus, Bill S-7 made clear that the eight-year term is not renewable.[7]

2.2 Senators Appointed After 14 October 2008 Subject to Eight-Year Terms (Clause 2(1))

Clause 2(1) of Bill C-10 proposes to include senators appointed after 14 October 2008, but before the coming into force of the bill, among those senators who will be subject to the eight-year term limit.[8] This proposed amendment likely reflects a commitment made by the prime minister when he recommended 18 senators for appointment to the upper chamber, following the 40th general election, that the new appointees would be subject to an eight-year term should legislation to reduce Senate terms come into force in the current Parliament.

For this group of senators, the term will begin not on the date they were summoned, but on the coming into force of the bill. During second reading debates in the Senate on 9 June 2009,[9] concern was expressed that this provision might operate retroactively in an unlawful manner.[10]

2.3 Interruption of an Eight-Year Term (Clauses 2(2) and 3)

The bill makes an accommodation to enable senators who are subject to the eight-year term limit to complete their eight-year terms following an interruption of their term (Clause 2(2), and Clause 3, new subsection 29(2) of the *Constitution Act, 1867*). This amendment appears to be intended to clarify that senators who are unable to complete their 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-10.

2.4 A Uniform Retirement Age of 75 (Clause 3)

Clause 3 proposes to add section 29A to the *Constitution Act, 1867*, which will establish a retirement age of 75 for all senators, regardless of the date they were summoned to the Senate. In debates on Bill S-7 at second reading in the Senate, Senator Marjory LeBreton indicated that this amendment responds to the concerns expressed by the Standing Senate Committee on Legal and Constitutional Affairs during its review of Bill S-4 that senators subject to an eight-year term could sit beyond age 75.[11] In its report to the Senate, the committee took issue with this provision, noting that the absence of a retirement age for some senators could affect the nature and quality of the Senate's work and would run counter to one of the aims of the government, which is to encourage renewal and a diversity of ideas (see the "Commentary" section, below, for a discussion of this issue).

2.5 The Preamble

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

The fourth recital serves as a reminder that Parliament amended the Constitution in 1965 to limit Senate terms to age 75. The next recital asserts Parliament's exclusive authority, without the need for provincial involvement, as set out in section 44 of the *Constitution Act, 1982*, to amend the Constitution of Canada in relation to the Senate (see below, in the "Commentary" section, the discussion on the amending process). The final recital serves as a general acknowledgment that the essential characteristics of the Senate as a "chamber of independent, sober second thought" are not to be disturbed (this point 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 preamble in Bill C-10 serves 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.

In his historic appearance before the Special Senate Committee on Senate Reform in September 2006, 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 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]

3 COMMENTARY

3.1 Parliament's Exclusive Authority to Amend the Constitution of Canada in Relation to the Senate

The central constitutional question that preoccupied both the Special Senate Committee on Senate Reform and the Standing Senate Committee on Legal and Constitutional Affairs was whether amendments to the *Constitution Act, 1867* affecting Senate tenure could be achieved by Parliament without the involvement of the provinces. Parliament's exclusive authority to amend the Constitution of Canada is found in section 44 of the *Constitution Act, 1982*. That section provides that Parliament has exclusive authority, subject to sections 41 and 42 of the Act, to amend the Constitution of Canada in relation to the executive government of Canada, the Senate and the House of Commons. Section 41 lists the matters that require

unanimity among Parliament and all the provincial legislatures. Paragraphs 42(1)(*b*) and (*c*) specifically outline four exceptions to Parliament's exclusive power to amend the Constitution in relation to the Senate. These paragraphs provide that the concurrence of at least seven provinces representing at least 50% of the population of all the provinces (the "7/50" process)[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.

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

Section 44 of the *Constitution Act, 1982* replaced section 91(1) of the *British North America Act*, which granted broad authority to Parliament to exclusively amend the Constitution of Canada subject to five major exceptions.[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 proceedings of the Special Senate Committee on Senate Reform, most of the expert witnesses in the field of constitutional law favoured this textual interpretation of Parliament's exclusive amending power. Other witnesses, however, raised concerns about adopting a strict textual analysis of the amending process in sections 44 and 42. It was maintained by some witnesses that these provisions needed to be read in light of the 1980 judgment of the Supreme Court of Canada in the Upper House Reference case.

3.2 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]

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

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

In respect of abolishing the Senate, the Court held that Parliament could not act unilaterally. In respect of the remaining questions, all grouped under "Question 2," the Court made the following broad observation:[18]

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

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

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

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

There are differing views of the significance and continuing relevance of the Upper House Reference. Scholars such as 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.[19] 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.[20] Still another view holds that, while the essential characteristics of the Senate are now "for the most part" incorporated into the amending process in the *Constitution Act, 1982*, an interpretation of those provisions would be incomplete without considering the principles in the Upper House Reference. According to this view, an attempt by Parliament to act alone to limit Senate terms to an extreme level such as one year, for example, or to propose other radical alterations to the Senate, would not likely be permitted, notwithstanding the text of the *Constitution Act, 1982*.[21] Resort to the complex amending formula in section 38(1) would be required in those cases.

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

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.[22] On 28 June 2006, after debate on the motion by Senator Marjory LeBreton for second reading of the bill, Senator Joan Fraser moved that the subject matter of the bill be referred to the Special Committee.[23]

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

The Senate also referred to the Special Committee a motion by Senator Lowell Murray, seconded by Senator Jack Austin, that the *Constitution Act, 1867* be amended to alter the formulae for western representation in the Senate. In particular, the motion called for an amendment to recognize British Columbia and the Prairie provinces as separate regions for purposes of Senate representation. The motion sought to alter the distribution of Senate seats in the western provinces as follows: British Columbia – 12 senators (up from 6); Alberta – 10 senators (from 6); Saskatchewan – 7 senators (from 6); and Manitoba – 7 senators (from 6). The revised distribution would result in a total of 117 Senate seats, rather than the current 105.[24]

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.[25] The report on the Murray-Austin motion was tabled on the same day.

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

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

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

On 30 May 2006, Bill S-4 was given first reading in the Senate. After second reading, it was referred to the Standing Senate Committee on Legal and Constitutional Affairs on 20 February 2007. The committee conducted hearings on the bill from 21 March 2007 to 6 June 2007. The bill was reported back to the Senate with amendments, a recommendation and observations on 12 June 2007.[26] The report was adopted by the Senate on 19 June 2007. Following the recommendation in the report that the bill "not be proceeded with at third reading until such time as the Supreme Court of Canada has ruled with respect to its constitutionality," and given the adoption of the report by the Senate, the bill did not proceed to third reading.

It should be noted that the report was a majority report that was entirely written by the Opposition. In addition, concern was expressed about whether the committee could proceed as it did, reporting the bill back with amendments, observations and a recommendation that the bill not proceed further. It was noted by Senator Donald Oliver, Chair of the Standing Senate Committee on Legal and Constitutional Affairs, in remarks made during his report to the Senate, that the committee's recommendation appeared to have no precedent in the Senate's rules. The rules provide that a committee is empowered to report a bill with or without amendments, or it can recommend that a bill not be proceeded with further. According to Senator Oliver, there seemed to be no precedent for recommending that a bill not proceed further pending some other event, such as a reference opinion from the Supreme Court of Canada.[27]

In its report to the Senate, the majority of the members of the Standing Committee also considered the potential impact of Bill C-43, An Act to provide for consultations

with electors on their preferences for appointments to the Senate (the Senate Appointment Consultations Act), on the constitutional issues raised by Bill S-4.[28]

3.4.1 Eight-Year Terms Not Constitutional?

The majority of the members of the Standing Committee considered the eight-year term appointment prescribed in the bill to be inadequate to preserve the essential characteristics and fundamental features of the Senate and recommended a 15-year non-renewable term in its report on the bill. The majority drew a number of conclusions as to the characteristics of the Senate that must be preserved in order for a reduction in Senate tenure to meet the constitutional requirements established in the Upper House Reference. Three characteristics were considered critical:[29]

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

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

The majority of the committee members concluded that a longer term would be necessary to protect the role envisaged for the Senate, as articulated by the Supreme Court of Canada, as a chamber of sober second thought and one ensuring regional and provincial representation. The majority of the committee looked favourably on the proposals for reform of the House of Lords in the United Kingdom, particularly the 15-year non-renewable term.[30]

Another concern was that an eight-year term would allow a two-term prime minister to appoint every senator, effectively threatening the Senate's independence.

3.4.2 Non-Renewable Appointments

A second concern expressed in the report was the renewability of the eight-year term. The majority of committee members noted that renewable terms would be compatible with an elected Senate but that no constitutional amendment had been proposed by the government for an elected Senate. In the absence of an elected Senate to complement the renewable terms, there were concerns that the bill could undermine the independence with which senators have traditionally approached their work.[31] Renewable terms would interfere with this tradition by making senators who wished to have their appointments renewed susceptible to influence from the prime minister. A non-renewable eight-year term, as proposed in Bill C-10, addresses part of this concern.

3.4.3 AGE LIMIT OF 75

With respect to the retirement age, the majority of the committee's members noted that Bill S-4 would result in a situation whereby currently serving senators would be required to retire at age 75, while those appointed after the coming into force of Bill S-4 could serve beyond the age of 75. This, it was feared, would have an effect on the nature and quality of the work of the Senate. It would also run counter to the government's stated aim of renewal and diversity of ideas and perspectives in the Senate.[32] The majority noted that, in the absence of an imposed retirement age, newly appointed senators could conceivably serve for life, thus frustrating the policy behind the decision to eliminate life terms in 1965. It was also pointed out that removing the age limit might be appropriate for an elected Senate, but that there were no proposals to amend the *Constitution Act, 1867* to effect such a change.

Bill C-10 addresses these concerns by proposing a universal retirement age of 75.

3.4.4 WHICH AMENDING FORMULA?

In its report, the majority of the members of the committee raised a number of questions about the amending process proposed by the government to effect the amendment to the *Constitution Act, 1867* that would set a fixed term for senators. The critical question that the committee posed in its report was whether the Upper House Reference continues as good law, or whether it has been superseded by the enactment of an amending formula in section 44 of the *Constitution Act, 1982*. Does section 44 give Parliament new amending powers, or was it intended to reproduce the powers in section 91(1) of the *British North America Act* (BNA Act), the provision in effect at the time the Upper House Reference was decided? The majority of the committee members accepted that the Upper House Reference continued to stand as good law and that section 44 of the *Constitution Act, 1982* does not grant Parliament an exclusive amending power that is greater than the power it had under section 91(1) of the pre-1982 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.[33]

The committee rejected the government's position that the alterations that would affect the fundamental features or essential characteristics of the Senate, as expressed by the Supreme Court of Canada, have all been codified in section 42, and that the requirements necessitating the use of the general amending formula (the "7/50" formula in section 38 of the 1982 Act) have been enumerated in section 42.[34] The majority of the committee members also questioned whether section 42 of the 1982 Act can be considered as an exhaustive list of matters that require Parliament to seek provincial concurrence under the "7/50" formula.[35]

With respect to the impact of Bill C-43, the majority of the committee was of the view that Bill S-4 and its constitutional implications needed to be considered together with the government's proposals in Bill C-43 for a new selection process for the appointment of senators. According to the majority of the committee, a court, reviewing the constitutionality of Bill S-4 and the possibility of its falling within the scope of section 44, could not ignore the related measures for Senate reform, which

could affect regional representation, tenure, method of selection and provincial representation. In the view of the majority, the package of measures could be perceived as altering the fundamental features or essential characteristics of the Senate.[36]

It is noteworthy that various provinces indicated that they could not support Bill S-4 and the government's proposal to proceed unilaterally to amend the *Constitution Act, 1867*. Provinces and territories that opposed Parliament's acting unilaterally to reduce Senate tenure as proposed in Bill S-4 included Quebec, Ontario, New Brunswick, Newfoundland and Labrador, and Nunavut. 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.

3.5 Arguments For and Against Reduced Senate Terms

3.5.1 Arguments in Favour of Term Limits

- Most upper houses in Western democracies are subject to term limits and members of those chambers are required to seek periodic voter support for further terms. Moreover, the standard length of tenure in upper chambers in Western democracies is more in line with the proposed eight-year term in Bill C-10. An eight-year term would qualify as the second longest term among second chambers with limited terms. Only the French Senate, at nine years, would have a longer term.
- An eight-year term would enable a senator to gain the experience necessary to fulfill his or her role in legislative review and policy investigation while ensuring a renewal of ideas and perspectives on a regular basis.
- An eight-year term is consistent with the range of proposals put forward in some of the leading studies on Senate reform, including those by the Molgat-Cosgrove Committee (a term of nine years) and the Canada West Foundation and the Alberta Select Committee (terms equivalent to the life of two legislatures).
- Based on the reports, proposals and recommendations prepared by various governmental and non-governmental bodies over the past 30 years, it would appear that a large number of Canadians support term limits.

3.5.2 Arguments Against Term Limits

- Under shortened term limits, the Senate's function as a "house of sober second thought," and its capacity to conduct careful legislative reviews and in-depth studies, drawing upon its institutional memory, would be impeded by the greater turnover of senators. Lengthy and secure tenure is one of the sources of the Senate's institutional strength.
- Term limits could enhance the prime ministerial power of appointment, eroding the independence of the Senate and its sober second thought function as well as its historical role of protecting regional and provincial interests. As previously noted, prime ministers with a majority government lasting two or more terms

could conceivably fill every Senate seat by the time they left office, effectively controlling the Senate. This would also exacerbate political partisanship in the Senate, further eroding the Senate's capacity for independent and thorough legislative review and regional and provincial representation.

- The Senate is a unique institution which the framers of the Constitution of Canada conceived as a counterbalance to the elected and partisan House of Commons. It was intended that senators be appointed to serve long terms as a means of instilling independence in senators to enable them to carefully and effectively review legislative proposals, free from political partisanship. Term limits would cause the Senate to depart from its historical, constitutional and political origins and undermine Canada's unique system of governance.

NOTES

1. *Constitution Act, 1965*, S.C. 1965, c. 4, in force on 1 June 1965.
2. Senate, Special Committee on Senate Reform, *Report on the subject-matter of Bill S-4, An Act to amend the Constitution Act, 1867 (Senate tenure)*, 1st Session, 39th Parliament, October 2006, pp. 3–5. For a more detailed discussion of the various proposals for Senate reform, see also Jack Stilborn, *Senate Reform Proposals in Comparative Perspective*, BP-316E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, November 1992.
3. Bill C-60, The Constitutional Amendment Act, 1978.
4. *Re: Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54 (1979) [Upper House Reference].
5. Senators appointed to the Senate for life prior to the coming into force of section 29(2) continued to serve for life (see s. 29(1)).
6. Senate, Special Committee on Senate Reform, *Proceedings*, 1st Session, 39th Parliament, 7 September 2006, p. 2:12.
7. Senate, *Debates*, 2nd Session, 40th Parliament, 9 June 2009, p. 1039.
8. Clause 2 will be a separate enactment, within the *Constitution Act, 2009 (Senate term limits)*, that will not amend the *Constitution Act, 1867*.
9. Senate, (9 June 2009), p. 1041.
10. According to R. Sullivan in *Sullivan on the Construction of Statutes*, 5th ed., LexisNexis Canada Inc., Markham, Ont., 2008, p. 669, a retroactive application of legislation is one that changes the past legal effect of a past situation. A retrospective application is one that changes the future legal effects of a past situation. An immediate application changes the future legal effects of an ongoing situation. Retroactive legislation may be permissible, provided certain rights under the *Canadian Charter of Rights and Freedoms* are not violated, and provided there is a clear intention in legislation that it should apply retroactively. With respect to Charter rights, subsections 11(*g*) and (*i*) forbid the retroactive application of new offences, while section 7 would likely prohibit the retroactive deprivation of life, liberty and security of the person (see p. 665).
11. Senate (9 June 2009), p. 1039.

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.

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

14. Senate (7 September 2006), p. 2:9.

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

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 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, p. 56.

18. Ibid.

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

20. P. Monahan, *Constitutional Law*, 2nd ed., Irwin Law, Toronto, 2002, p. 68.

21. Senate, Special Committee on Senate Reform, *Proceedings*, 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).

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

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

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

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

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

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

28. Bill C-43 was reintroduced in the House of Commons as Bill C-20, An Act to provide for consultations with electors on their preferences for appointments to the Senate (short title: Senate Appointment Consultations Act). It received first reading on 13 November 2007, and was referred to the House of Commons Legislative Committee on Bill C-20 before second reading. The committee held hearings on the bill. With the dissolution of Parliament on 7 September 2008, the bill died on the *Order Paper*. For a description and discussion of this bill, see Michel Bédard, *Bill C-43: Senate Appointment Consultations Act*, LS-553E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 23 April 2007.

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

30. Ibid., p. 6.

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

32. Ibid., p. 10.

33. Ibid., p. 14.

34. Ibid.

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

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