Legislative Summary

Bill S-8:
The Senatorial Selection Act

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Legislative Summary of Bill S-8

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

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LEGISLATIVE SUMMARY OF BILL S-8: THE SENATORIAL SELECTION ACT

1 INTRODUCTION

On 27 April 2010, the Honourable Gerald J. Comeau (Deputy Leader of the Government in the Senate) introduced Bill S-8, An Act respecting the selection of senators. Its short title is the *Senatorial Selection Act*.

Bill S-8 proposes to establish a framework for the selection of Senate nominees within a province or territory for consideration by the prime minister in recommending persons to be summoned to the Senate by the Governor General. The bill sets out, in effect, a model statute that prescribes an electoral process, which provinces and territories may choose to adopt. This legislative model would allow voters to select candidates wishing to be considered for appointment to the Senate.

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

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

2 BACKGROUND

2.1 PREVIOUS BILLS

There have been two earlier attempts by the government to enact legislation proposing to establish a process allowing the voters of a province or a territory to select senatorial nominees.

Bill C-20, An Act to provide for consultations with electors on their preferences for appointments to the Senate (the Senate Appointment Consultations Act), proposed a federally regulated electoral process to be conducted by the Chief Electoral Officer of Canada. The bill was introduced on 13 November 2007 and was referred to the House of Commons Legislative Committee on Bill C-20. The Committee held a total of

10 meetings in studying the bill, which then died on the *Order Paper* with the dissolution of Parliament on 7 September 2008. The bill included directly, or by reference, several substantive provisions of the *Canada Elections Act*. In addition, it contained special rules for financing of campaigns by candidates wishing to become senatorial nominees. The bill also proposed a preferential voting system for senatorial selection.[1]

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

Bill S-8 may be seen as a companion to the Senate reform bill on Senate tenure introduced by the government in the current session of the 40th Parliament. Bill C-10, An Act to amend the Constitution Act, 1867 (Senate term limits), was introduced in the House of Commons by the Honourable Steven Fletcher, Minister of State for Democratic Reform, on 29 March 2010.[2] The bill limits the tenure of senators appointed after 14 October 2008 to one non-renewable eight-year term and sets the retirement age at 75 years regardless of the date of appointment.

2.2 Proposals for Reforming Senate Selection

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." In 1909, Senator Richard Scott moved that a proportion of senators (approximately two-thirds) be elected for seven-year terms.[3] At the outset of the first Interprovincial Conference in 1887, the premiers passed a resolution that half the members of the Senate be appointed by the federal government and that the other half be appointed by the provincial governments.[4]

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 Constitutional Conference echoed the 1887 resolution by suggesting that the Senate "could be partly selected by the federal government and partly selected by provincial governments. The method of selection of Senators by the provinces could be by nomination of 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, 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.[9]

In 1980, the Supreme Court of Canada held that Parliament could not unilaterally alter the Senate if such alteration would affect its fundamental features or essential characteristics. The Court held that the direct election of senators would constitute such an alteration. Although it declined to comment on whether Parliament could unilaterally establish other forms of selecting senators that would not involve direct elections, given that the Court felt it lacked specific examples of the alternative methods, its opinion is implicit in the judgment that any alternative means of selecting senators should not interfere with the essential characteristics or fundamental features of the Senate.[10] (A more detailed discussion of the *Upper House Reference* is provided in the Commentary section below.)

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 Constitution affecting the method of selecting senators must be agreed upon 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, provincial and federal first ministers reached an agreement on constitutional reform that would have had implications for the method of selecting senators. Under the Meech Lake Accord, once a vacancy occurred in the Senate, the provincial government to which the vacancy related could submit a list of names of persons who could be summoned to the Senate. The Accord also provided that this procedure for appointment to the Senate was to apply pending approval by the provincial legislatures of the constitutional agreement.[13] On 23 June 1990, however, the Meech Lake Accord expired because it lacked the approval of the provinces of Manitoba and Newfoundland and Labrador.

The 1992 Charlottetown Accord proposed that the Constitution be amended in order to provide that senators be elected by voters in each province or territory, or by members of provincial or territorial legislatures. 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 nationwide referendum held on 26 October 1992.

2.3 Provincial Legislation Affecting the Selection of Senators

On 16 October 1989, Alberta held an election under its recently enacted *Senatorial Selection Act* (SSA).[14] Reform Party candidate Stan Waters was elected. He was appointed to the Senate on 11 June 1990.

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

In 1990, British Columbia enacted the *Senatorial Selection Act*,[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 2009, Saskatchewan passed the *Senate Nominee Election Act*,[16] modelled on the Alberta SSA. It received Royal Assent but has not been proclaimed in force.

In Manitoba, the Special Committee on Senate Reform released a report in November 2009 that proposed an electoral process for selecting Senate nominees, to be administered by Elections Canada and to be paid for by the federal government. It further proposed that the province's allotment of six Senate seats be allocated by region (three in Winnipeg, one in the North, two in the South).[17]

In addition, various federal and provincial private Members' bills have proposed advisory elections for appointments to the Senate, but none have been enacted.[18]

3 Description and Analysis

Bill S-8 consists of three clauses, a preamble with several recitals and a schedule that sets out a legislative framework for the selection of senators.

3.1 The Preamble

The preamble reflects generally the government's desire to have Senate nominees selected on the basis of a democratic process within the province or territory that a senator is to represent. The preamble also draws upon the history of efforts to reform the method of selecting senators. It cites an agreement by First Ministers in 1987, presumably the Meech Lake Accord, that provides that, as an interim measure until Senate reform is achieved, any nominees for appointment to the Senate should be chosen from among individuals whose names have been submitted by the government of the province or territory the prospective senator is to represent.[19]

3.2 The Basis for the Selection of Senate Nominees (Clauses 2 and 3)

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

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

3.3 The Framework Electoral Process (Schedule to the Bill)

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

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

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

3.3.2 Timing of Election (Sections 2 and 5)

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

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

As noted earlier, the number of persons that are to be elected as Senate nominees is to be determined by order in council (paragraph 5(1)(c)). It is not indicated in the model legislation how this number is to be determined, particularly whether the

number is to correspond to the number of vacancies in the Senate for a particular province or territory or whether there may be a number of senators-in-waiting should a vacancy in the Senate occur at some later date.[20]

3.3.4 Political Affiliation (Section 3)

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

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

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

If the Senate nominee election is to be held at the same time as a municipal election, the rules that govern municipal elections will apply and municipal election officials will oversee the process. (See section 2.4 of this document, below.)

3.3.6 Campaign Financing (Section 27)

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

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

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

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

A number of other requirements include:

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

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

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

3.3.9 The Voting Process (Sections 22 and 35)

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

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

3.3.10 Duration of Nominations (Section 4)

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

- they are appointed to the Senate;
- they resign as a Senate nominee;
- the sixth anniversary of the person's selection as a nominee; or

- they become subject to disqualification as a senator in accordance with subsections 31(2) to (4) of the *Constitution Act, 1867* by:
  - taking an oath or making a declaration of allegiance to a foreign power;
  - becoming bankrupt or insolvent; or
  - being convicted of treason or an indictable offence ("felony" or "infamous crime").

Senate nominees must also continue to satisfy the eligibility requirements to be a candidate for election under section 8 of the schedule (see section 2.3.7 of this document).

3.4 Special Rules for Municipally Conducted Elections (Part 3)

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

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

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

4 COMMENTARY

4.1 Constitutional Issues

4.1.1 The Governor General's Power to Summon and the Prime Minister's Prerogative to Recommend

Sections 24, 26 and 32 of the *Constitution Act, 1867* empower the Governor General to summon qualified individuals to serve in the Senate. The Governor General is the sole individual on whom the authority to summon has been conferred by the Constitution of Canada.[21]

The Governor General, however, exercises his or her appointment powers on the advice and recommendation of the prime minister. The power of the prime minister to provide advice and recommendation to the Governor General with respect to Senate appointments is not mentioned in the *Constitution Act, 1867*. Instead, it arises from constitutional convention.[22] Since 1897, this power to recommend has been formalized by an order in council, the most recent version of which was promulgated in 1935. It is entitled "Memorandum regarding certain of the functions

of the Prime Minister" and states that the recommendation of senators is one of the special prerogatives of the prime minister.

Only on rare occasions has a Governor General refused the advice of a prime minister on appointments to the Senate.[23] This fact highlights the strong constitutional character of the prime minister's power to recommend and advise – a power that, as a matter of convention and practice, is rarely challenged by the Governor General.

4.1.2 The Constitutional Amendment Formulae

With the patriation of the Constitution of Canada, and the enactment of the *Constitution Act, 1982*, a new constitutional amending provision was introduced. Parliament's exclusive authority to amend the Constitution of Canada is now 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. 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) 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.

Section 42(1)(*b*) of the *Constitution Act, 1982* thus 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.

4.1.3 The Supreme Court of Canada's Views on Senate Reform

The Supreme Court of Canada has considered some of the constitutional issues surrounding Senate reform in a 1980 judgment.[24] A series of questions was put to the Court on a reference from the Government of Canada, including: whether the Parliament of Canada could unilaterally abolish the Senate; and whether the Parliament of Canada could enact legislation altering the method by which senators are chosen.[25] The government proposed a number of options for the selection of senators, including:

- selection by provincial legislatures;

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

In respect of the question dealing with selection of senators, the Court relied on the preamble to the *Constitution Act, 1867*, which provides that Canada shall have a "Constitution similar in Principle to that of the United Kingdom," where the House of Lords is not elected. The Court viewed direct elections as altering a fundamental character of the Senate, and, therefore, contrary to the Constitution.[26] It held that the Senate was intended to be a "thoroughly independent body which could canvass dispassionately the measures of the House of Commons."[27] Parts of the judgment bear quoting at length:[28]

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

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

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

There are differing views concerning the effect and continuing relevance of the *Upper House Reference*. Scholars such as Peter Hogg maintain that any principles that may be derived from the decision have likely been overtaken by the amending process that came into effect with the patriation of the Constitution of Canada in 1982. The *Constitution Act, 1982* may be viewed, therefore, as providing "a code" for determining what constitutional amendments affecting the Senate may be made by Parliament acting alone.[29] Others take the view that the new amending process may be seen as articulating and codifying the essential characteristics of the Senate described by the Court in the *Upper House Reference*.[30] 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, any attempt by Parliament alone to radically alter the Senate would not likely be permitted, notwithstanding the text of the *Constitution Act, 1982*. In such cases, the complex amending formula in section 38(1) would be required.[31]

4.1.4 Some Scholarly Views on the Constitutional Implications of Bill S-8

The government has expressed the view that the premise of Bill S-8 is that it does not, as such, amend the method of selecting senators and therefore does not require a constitutional amendment.[32] Instead, it establishes a list of selected nominees that reflects electors' preferences. The bill creates a process to enable electors of a province or territory to express a preference as to who should represent them in the Senate. Professor Patrick Monahan believes that non-binding elections for the nomination of senators would not formally need a constitutional amendment: "It should be noted that certain changes are possible in federal institutions without formal constitutional amendment, such as the appointment of senators on the basis of non-binding 'elections.'"[33]

It has also been suggested that in future years, it may be that an informal practice of appointing senators from a list of selected nominees will transform itself into a constitutional convention that would "constrain" the prime minister in making his or her choice for Senate appointments.[34]

Other academics, such as Andrew Heard, consider the impact of the *Upper House Reference* and the current amending procedures in the Constitution in the context of Bill C-20, the Senate Appointment Consultations Act. In a recent article, Heard canvasses the views of various scholars and commentators on these issues.[35] He also discusses the extent to which the discretion of the prime minister to recommend Senate nominees to the Governor General, and the Governor General's discretion to make those appointments, may be affected by a reformed selection process. Although his commentary focuses on Bill C-20,[36] with its federally imposed selection process, some of his more general concerns about modifying the process of selecting senators – including the potential impacts on the discretion or prerogatives of the prime minister and the Governor General, and whether the constitutional amendment process may be engaged – bear consideration in the context of Bill S-8.

NOTES

1. See Michel Bédard, *Bill C-20: Senate Appointment Consultations Act*, LS-588E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 13 December 2007.
2. See Sebastian Spano, *Bill C-10: An Act to amend the Constitution Act, 1867 (Senate term limits)*, Publication No. 40-3-C10-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 6 April 2010.
3. F. Leslie Seidle, "Senate Reform and the Constitutional Agenda: Conundrum or Solution?" in *Canadian Constitutionalism: 1791-1991*, ed. Janet Ajzenstat, Canadian Study of Parliament Group, Ottawa, 1991, pp. 94–95 .
4. Ibid., p. 95.
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 the 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. Task Force on Canadian Unity, *A Future Together: Observations and Recommendations*, Minister of Supply and Services Canada, Ottawa, 1979, p. 97.
10. *Re: Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54 (hereinafter, *Upper House Reference*).
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.
15. *Senatorial Selection Act*, S.B.C. 1990, c. 70.
16. *Senate Nominee Election Act*, 2009, c. S-46.003 [Saskatchewan statute].
17. Legislative Assembly of Manitoba, Report of the Special Committee on Senate Reform, 9 November 2009.

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

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

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

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

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

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

24. *Upper House Reference*.

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

26. *Upper House Reference*, para. 49.

27. Ibid., para. 48.

28. Ibid., paras. 48–49.

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

30. See Patrick J. Monahan, *Constitutional Law*, 2nd ed., Irwin Law, Toronto, 2002, p. 68.

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

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

33. Monahan (2002), p. 488.

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

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

36. The important difference between Bill C-20 and Bill S-8 is that the former effectively imposed a selection process on the provinces, while Bill S-8 provides the provinces and territories with an optional alternative to the current selection process.