Bill S-221:
An Act to amend the Constitution Act, 1867 (Property qualifications of Senators)

Publication No. 42-1-S221-E
5 October 2017

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Parliamentary Information and Research Service

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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)

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LEGISLATIVE SUMMARY OF BILL S-221: AN ACT TO AMEND THE CONSTITUTION ACT, 1867 (PROPERTY QUALIFICATIONS OF SENATORS)

1 BACKGROUND

Bill S-221, An Act to amend the Constitution Act, 1867 (Property qualifications of Senators), was tabled in the Senate by Senator Dennis Glen Patterson on 10 March 2016.[1] The bill amends the *Constitution Act, 1867* to eliminate the stipulation that all senators have a personal net worth of at least $4,000 and that senators representing a province other than Quebec meet a real property requirement.

Senator Patterson also gave notice on 10 March 2016 of a related motion to amend the *Constitution Act, 1867* to eliminate the real property requirement for senators representing Quebec. Debate both of the bill at second reading and of the motion began on 24 March 2016.[2]

This is the fourth time that a bill has been tabled in the Senate to amend the *Constitution Act, 1867* to eliminate the property requirements for senators. The three previous bills were tabled by Senator Tommy Banks during the 2nd Session of the 39th Parliament (S-229), the 1st Session of the 40th Parliament (S-212) and the 2nd Session of the 40th Parliament (S-215). All three bills died on the *Order Paper*. The wording of these bills was identical, whereas the wording of Bill S-221 is slightly different.[3]

1.1 *CONSTITUTION ACT, 1867*

Section 23 of the *Constitution Act, 1867*[4] sets out the six qualifications a person must meet to be appointed to and to retain a seat in the Senate:

> The Qualifications of a Senator shall be as follows:
>
> 1. He shall be of the full age of Thirty Years;
> 2. He shall be either a natural-born Subject of the Queen, or a Subject of the Queen naturalized by an Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of One of the Provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, before the Union, or of the Parliament of Canada after the Union;
> 3. He shall be legally or equitably seised as of Freehold for his own Use and Benefit of Lands or Tenements held in Free and Common Socage, or seised or possessed for his own Use and Benefit of Lands or Tenements held in Franc-alleu or in Roture, within the Province for which he is appointed, of the Value of Four thousand Dollars, over and above all Rents, Dues, Debts, Charges, Mortgages, and Incumbrances due or payable out of or charged on or affecting the same;
> 4. His Real and Personal Property shall be together worth Four thousand Dollars over and above his Debts and Liabilities;
> 5. He shall be resident in the Province for which he is appointed;

> 6. In the Case of Quebec he shall have his Real Property Qualification in the Electoral Division for which he is appointed, or shall be resident in that Division.

On the subject of property, then, section 23 requires senators to own land worth at least $4,000 in the province for which they are appointed and to have a net worth of at least $4,000.

Section 23(6) establishes a special arrangement for Quebec. The property qualifications for senators representing this province in the Senate differ from those for the other provinces. Each of the 24 senators from Quebec is appointed to represent one of the 24 electoral divisions that were in effect in Lower Canada at the time of Confederation.[5] According to section 23(6), senators must reside in or have their real property qualifications in the electoral divisions they represent.

Senators' property qualifications are also mentioned in the "Declaration of Qualification," which is found in the Fifth Schedule to the *Constitution Act, 1867* and is required of anyone appointed to the Senate:

> I *A.B.* do declare and testify, That I am by Law duly qualified to be appointed a Member of the Senate of Canada [*or as the Case may be*], and that I am legally or equitably seised as of Freehold for my own Use and Benefit of Lands or Tenements held in Free and Common Socage [*or* seised or possessed for my own Use and Benefit of Lands or Tenements held in Franc-alleu or in Roture (*as the Case may be*),] in the Province of Nova Scotia [*or as the Case may be*] of the Value of Four thousand Dollars over and above all Rents, Dues, Debts, Mortgages, Charges, and Incumbrances due or payable out of or charged on or affecting the same, and that I have not collusively or colourably obtained a Title to or become possessed of the said Lands and Tenements or any Part thereof for the Purpose of enabling me to become a Member of the Senate of Canada [*or as the Case may be*], and that my Real and Personal Property are together worth Four thousand Dollars over and above my Debts and Liabilities.

1.2 *Reference re Senate Reform*

In 2014, as part of the *Reference re Senate Reform*,[6] the Supreme Court of Canada was asked to determine whether Parliament can, acting pursuant to section 44 of the *Constitution Act, 1982*,[7] unilaterally repeal the provisions in the *Constitution Act, 1867* establishing senators' net worth and real property requirements. Section 44 states that: "Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons."

When considering whether Parliament could make the proposed amendments regarding property qualifications unilaterally, the Court pointed out that "the unilateral federal procedure to amend the Constitution is limited in scope. It does not permit amendments that engage the interests of the provinces by modifying the Senate's fundamental nature or role."[8] It examined whether or not the proposed amendments fit within this criterion.

1.2.1 Net Worth Requirement

With regard to the net worth requirement in section 23(4) of the *Constitution Act, 1867*, the Supreme Court of Canada found that removing the requirement would have absolutely no effect on the independence of senators or the role of the Senate. It also stated that removing the requirement "does not engage the interests of the provinces."[9]

Therefore, it concluded that under section 44 of the *Constitution Act, 1982*, the Parliament of Canada can unilaterally repeal this requirement:

> We conclude that the repeal of s. 23(4) is precisely the type of amendment that the framers of the *Constitution Act, 1982* intended to capture under s. 44. It updates the constitutional framework relating to the Senate without affecting the institution's fundamental nature and role.[10]

1.2.2 Real Property Requirement

As is the case for the net worth requirement, the Supreme Court found that removing the real property requirement (stipulated in section 23(3) of the *Constitution Act, 1867*) would not alter the fundamental nature and role of the Senate. It also stated that removing the requirement would not engage the interests of the provinces, aside from Quebec.

In the Court's view, removing this requirement would affect the special arrangement with Quebec. The Court made the following observation regarding this special arrangement:

> Historically, this was intended to ensure that Quebec's Anglophone minorities would be represented in the Senate, by making it mandatory to appoint Senators specifically for divisions in which the majority of the population was Anglophone …. Section 23(6) is linked to the implementation of this special arrangement: it provides a degree of flexibility to Senators from Quebec by allowing them to either reside in the electoral division for which they are appointed *or* to simply fulfill their real property qualification in that division.[11]

The Court said that, given the special arrangement with Quebec, the full repeal of section 23(3)

> would render inoperative the option in s. 23(6) for Quebec Senators to fulfill their real property qualification in their respective electoral divisions, effectively making it mandatory for them to reside in the electoral divisions for which they are appointed. It would constitute an amendment in relation to s. 23(6), which contains a special arrangement applicable to a single province, and consequently would fall within the scope of the special arrangement procedure. The consent of Quebec's National Assembly is required.[12]

To apply to Quebec, therefore, this constitutional amendment would require approval by the Senate, the House of Commons and the Quebec National Assembly, pursuant to the procedure set out in section 43 of the *Constitution Act, 1982*[13] (also known as a bilateral amendment). That being said, the Supreme Court of Canada concluded

that Parliament can unilaterally remove the real property qualification from section 23(3) by making it inapplicable to senators from all provinces except Quebec.[14]

1.3 Senator Patterson's Motion to Remove Real Property Qualifications for Quebec Senators

On 10 March 2016, Senator Patterson gave notice of a motion to amend the provisions in the *Constitution Act, 1867* regarding senators' real property qualifications.[15] While Bill S-221 would remove the property requirements that fall under the Parliament of Canada's exclusive jurisdiction, Senator Patterson's motion, which includes repealing section 23(6) regarding the special property qualifications for Quebec senators, is the first step in applying a bilateral amendment. To come into force, the motion must be passed by the Senate, the House of Commons and the Quebec National Assembly, and the Governor General must issue a proclamation to that effect, in accordance with section 43 of the *Constitution Act, 1982*.

Adoption of both Bill S-221 and the motion would make three fundamental changes, by:

- removing the net worth requirement for senators from all provinces;
- removing the real property requirement for senators from all provinces; and
- removing the requirement for Quebec senators to reside in or possess real property in the electoral division for which they are appointed. However, they must still reside in the province of Quebec.

2 DESCRIPTION AND ANALYSIS

Bill S-221 contains six clauses. Essentially, it eliminates the stipulation that all senators have a personal net worth of at least $4,000 and that senators representing a province other than Quebec meet a real property requirement.

2.1 Short Title (Clause 1)

Clause 1 of Bill S-221 states that the short title of the legislation is "Constitution Act, 2016 (Property qualifications of Senators)."

2.2 Amendments to the *Constitution Act, 1867* (Clauses 2 to 4)

Clauses 2 to 4 amend the net worth and real property qualifications for senators stipulated in section 23 of the *Constitution Act, 1867*.

Clause 2 repeals section 23(4) of the Act and thus removes the requirement for senators to have a net worth of at least $4,000. This amendment applies to all senators, including those from Quebec.

Clause 3 adds new section 23A to the Act. It removes the real property requirement for senators representing a province other than Quebec. This provision relates to the *Reference re Senate Reform*, in which the Supreme Court confirmed that the

Parliament of Canada may use its ability to make certain unilateral constitutional amendments in order to repeal the real property requirement for all senators except those representing Quebec.

Lastly, clause 4 replaces the "Declaration of Qualification" in the Fifth Schedule to the *Constitution Act, 1867* with a simplified version that does not include reference to property qualifications. The amended wording of the declaration is as follows:

> I, *A.B.*, do declare and testify that I am by law duly qualified to be appointed a member of the Senate of Canada.

2.3 Coordinating Amendments (Clause 5)

Clause 5 of Bill S-221 coordinates the amendments that the bill makes to the *Constitution Act, 1867* with those in Senator Patterson's motion, which calls for the repeal of the special arrangement for senators representing Quebec's electoral divisions. The objective of clause 5 is to ensure that the *Constitution Act, 1867* will not contain any provisions that are inconsistent or are null and void once these two instruments come into force.

Clause 5(1) specifies that the word "amendment" means the repeal of sections 23(3) and 23(6) of the *Constitution Act, 1867*. This is essentially the constitutional amendment proposed in Senator Patterson's motion regarding requirements for Quebec senators.

Clause 5(2) stipulates that if clause 3 comes into force before the amendment is made, new section 23A of the Act will automatically be repealed once the amendment is made.

Clause 5(3) states that if the amendment is made before clause 3 comes into effect, clause 3 is deemed never to have come into force and is repealed.

Clause 5(4) stipulates that if clause 3 enters into force on the same day that the amendment is made, the amendment is deemed to have been made before clause 3, and clause 5(3) applies as a result.

Lastly, clause 5(5) concerns section 31 of the *Constitution Act, 1867*, which sets out the circumstances in which a senator's seat is declared vacant. According to section 31(5) of the Act, a senator's seat becomes vacant if "he ceases to be qualified in respect of Property or of Residence." According to clause 5(5) of the bill, on the first day on which the amendment is made and the Act is in force, this wording is replaced by "[i]f he ceases to be qualified in respect of Residence."

2.4 Interpretation (Clause 6)

Clause 6 provides that any reference to the *Constitution Acts, 1867 to 1982* includes a reference to Bill S-211.

NOTES

1. Bill S-221, An Act to amend the Constitution Act, 1867 (Property qualifications of Senators), 1st Session, 42nd Parliament.
2. Senate, *Debates*, 1st Session, 42nd Parliament, Vol. 150, No. 24, 24 March 2016, pp. 415–416 and 418–420.
3. See, for example, Bill 215, An Act to amend the Constitution Act, 1867 (Property qualifications of Senators), 2nd Session, 40th Parliament.
4. *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.).
5. Ibid., s. 22.
6. *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 SCR 704.
7. *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982*, c. 11 (U.K.).
8. *Reference re Senate Reform*, para 87.
9. Ibid., paras. 88 and 89.
10. Ibid., para. 90.
11. Ibid., para. 92 [references omitted].
12. Ibid., para. 93.
13. Section 43 of the *Constitution Act, 1982* states that an amendment to the Constitution that applies to one or more, but not all, provinces

    > may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies.

    Section 47 of the *Constitution Act, 1982* stipulates that such an amendment may be made without a resolution of the Senate if the Senate has not authorized the proclamation within 180 days of the House of Commons having adopted a similar resolution (excluding periods when Parliament is prorogued or dissolved).
14. *Reference re Senate Reform*, para. 94.
15. Senate, "Notice of Motion to Resolve that an Amendment to the Real Property Qualifications of Senators in the Constitution Act, 1867 be Authorized to be Made by Proclamation Issued by the Governor General," *Debates*, 1st Session, 42nd Parliament, Vol. 150, Issue 21, 10 March 2016.