Senate reform is not a simple issue, primarily because of its constitutional dimension. What follows is intended as an overview of some of the constitutional aspects of this reform, a summary of the main attempts at reform over the years and a description of the two major legislative focuses of reform contemplated by the current government.

CONSTITUTIONAL ISSUES

The Senate’s powers, the selection and qualifications of senators, and the length of their terms are all defined in sections 21 to 36 of the Constitution Act, 1867. Consequently, any change to these characteristics requires a constitutional amendment.

Appointment of senators: Under the Constitution Act, 1867, senators are “summoned” by the Governor General “by Instrument under the Great Seal of Canada.” This means that they are “appointed” by the executive power (the government) and not the legislative power (Parliament). Senators can therefore be appointed to the Senate when Parliament is not sitting, and the prime minister may fill, or not fill, vacant seats as he or she pleases. The “Instrument” used is normally an order in council signed by the prime minister that conveys his or her advice to the Governor General, who endorses the appointment.

Senators must be at least 30 years old and subjects of the Queen, and they must reside in the province they represent, where they must own property worth at least $4,000. In Quebec, senators are appointed to each of 24 electoral divisions, and these senators must own property or live in the electoral division they represent.

Powers of the Senate: The Senate’s legislative powers are identical to those of the House of Commons, with two exceptions: under section 53 of the Constitution Act, 1867, money bills can “originate” only in the House of Commons; and, under subsection 47(1) of the Constitution Act, 1982, the Constitution can be amended without the agreement of the Senate, which possesses a 180-day “suspensive” veto over such proposed amendments.

Another important difference derives from a convention called “responsible government,” whereby the government must enjoy the confidence of the majority of the elected members of the House of Commons in order to govern legitimately. However, since the convention does not require the government to have the confidence of the Senate, the Senate cannot defeat the government by a non-confidence motion.

Following Confederation, the Senate frequently rejected bills. Over the years, senators came to accept that, on legislative matters, the will of the elected representatives should take precedence over that of the upper chamber. Consequently, while the Senate often proposes amendments to bills, it rarely uses its veto.

Constitutional amendments: There have been very few constitutional amendments affecting the Senate: mandatory retirement at age 75 (1965); a 180-day suspensive veto on constitutional amendments (1982); and the increase in the number of senators as the number of provinces and territories increased (there are 105 senators today, although there can be as many as 113 under exceptional circumstances).

There is, however, an involved debate as to whether the constitutional amendment procedures introduced in the Constitution Act, 1982 would allow Parliament to modify the main characteristics of the Senate without the consent of the provincial legislative assemblies. The Supreme Court has issued an opinion stating that Parliament does not have that authority,
but the decision dates from 1980 and thus precedes the amendment mechanisms introduced in the Constitution Act, 1982. The question is therefore unresolved.

REFORM ATTEMPTS OVER THE YEARS

For the most part, the questions about Senate reform are as old as the institution itself.

The various proposals debated during the 40 years that followed Confederation often touched on the Senate’s ability to ensure equitable regional representation. The Senate’s role again became an issue in the 1960s, as a result of separatist pressure from Quebec and discontent in the Western provinces, which wanted more influence over decisions made in Ottawa.

During the debates preceding the repatriation of the Constitution, the Canada West Foundation in Calgary published, in 1981, a report describing for the first time the model of a “Triple E” Senate, that is, elected (single transferable vote system in each province), equal (equal number of senators for each province) and effective (primacy of the House of Commons for the adoption of bills, Senate veto on constitutional amendments, certain appointments and certain exceptional Crown powers). These ideas would influence subsequent reform projects presented in connection with the negotiations surrounding the Meech Lake Accord (1987) and would be included in the Charlottetown Accord (1992).

After the failure of the constitutional reform attempts of the 1980s and 1990s, proposals focused on reforms that did not require constitutional amendments.

The central issue remains the election of senators. In 1989, Alberta passed the Senatorial Selection Act. The year after that, Stan Waters was elected by the citizens of Alberta and appointed to the Senate by the federal government. The proponents of an elected Senate argue that there has never been a constitutional challenge to this appointment and that this method of appointment is thus completely legitimate. Others argue that making this a widespread practice would modify an important characteristic of the Senate and would thus require the support of the provinces.

CURRENT ATTEMPTS AT REFORM

The current government has focused its reform efforts on two points: the length of senators’ terms and the concept of consultative elections for the appointment of senators.

The length of terms. On 30 May 2006, the government tabled a bill (S-4) in the Senate that would have limited senators to a single non-renewable term of eight years. The measure would have required a constitutional amendment, but the government did not believe that the consent of the provinces was required. The Senate Standing Committee on Legal and Constitutional Affairs expressed some reservations about this view. It recommended that the bill not be adopted until the Supreme Court had ruled on its constitutionality. Following the resumption of Parliament after the prorogation of 14 September 2007, a similar bill (C-19) was presented to the House of Commons on 13 November 2007, only to die on the Order Paper with the dissolution of Parliament on 7 September 2008. A third version of the bill (S-7), tabled on 28 May 2009, is currently at second reading in the Senate.

The main argument in favour of a single term of eight years is that it is long enough to allow senators to acquire the experience needed to perform their legislative duties while being short enough to allow a regular renewal of ideas and experiences in the upper chamber.

The opponents of such a limit argue that it would further strengthen the prime minister’s influence on the upper chamber. In fact, a prime minister who won two or three consecutive terms could end up appointing every senator.

Consultative elections. On 13 December 2006, the government tabled a bill (C-43) in the House of Commons that would have introduced a consultation process to allow the voters in each province and territory to rank candidates for the Senate in order of preference. The prime minister would then fill the vacancies in the Senate on the basis of the expressed preferences. As with the bills relating to the length of terms, the main question at issue is the constitutionality of the measure. The government did not believe that the bill required any constitutional amendment. Parliament prorogued in September 2007, and when it resumed sitting, the same bill was tabled on 13 November 2007 (C-20), only to die on the Order Paper with the dissolution of Parliament on 7 September 2008.

The main argument in favour of an elected Senate is that it would have far greater democratic legitimacy than an appointed body. Many who think that the constitutional powers of the upper chamber allow it to provide valuable services to Canadians also recognize...
that, without some form of direct or indirect popular validation, senators do not have the necessary legitimacy to oppose the control a majority government can exert over the House of Commons. This weakness of the Senate strengthens the position of those who support its abolition. Another argument in favour of having voters elect senators in the provinces and territories they represent is the more effective regional representation the Senate could provide as a result.

The opponents of senatorial elections are primarily concerned about the loss of senators’ current independence, which would throw them into a partisan spiral analogous to that in the House of Commons. Rather than playing a complementary role, an elected Senate would risk reproducing the political parties’ stranglehold on the legislative process. The evolution of the Australian senate, which has become a partisan chamber, is often invoked in support of this argument.

Finally, partisans of the status quo argue that the practice of appointing senators tends to result in a greater proportion of women and minority representatives in the Senate. They also contend that the length of terms allows people of great experience and recognized judgment to make a significant political contribution in a climate that is less partisan than that which exists in the House of Commons. Some maintain that the Senate’s institutional wisdom might be lost if it became an elected chamber and thus more concerned about short-term issues.

(1) More information on this issue can be found in Andre Barnes, Michel Bédard, Carolyn Hyslop, Hilary Jensen, Célia Jutras, Jean-Rodrigue Paré, James Robertson and Sebastian Spano, Reforming the Senate of Canada: Frequently Asked Questions, PRB 09-02E, Ottawa, Library of Parliament, 7 April 2009.