

**REFORMING THE SENATE OF CANADA:
FREQUENTLY ASKED QUESTIONS**

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REFORMING THE SENATE OF CANADA: FREQUENTLY ASKED QUESTIONS

PART I – CONSTITUTIONAL DIMENSIONS OF SENATE REFORM

1. What are the constitutional implications of Senate reform?

The powers of the Senate and the selection, qualifications and terms of senators are for the most part governed by sections 21 to 36 of the *Constitution Act, 1867*. Therefore, reform initiatives revolving around these matters would require amending the Constitution of Canada. Canada's constitutional amending procedures provide different formulae for amending the Constitution, some of which enable the federal Parliament to act alone and some of which require provincial concurrence.

Section 44 of the *Constitution Act, 1982* permits Parliament to amend the Constitution without provincial concurrence in limited situations. It grants Parliament the authority to exclusively amend the "Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons." Paragraphs 42(1)(b) and (c), however, list four Senate-related exceptions to Parliament's exclusive amending power in section 44, and indicate that alterations falling within these exceptions require provincial concurrence under section 38(1).⁽¹⁾ The Senate-related exceptions are:

(1) The full text of section 42(1) reads as follows:

(1) An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with subsection 38(1):

- (a) the principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada;
- (b) the powers of the Senate and the method of selecting Senators;
- (c) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators;
- (d) subject to paragraph 41(d), the Supreme Court of Canada;
- (e) the extension of existing provinces into the territories; and
- (f) notwithstanding any other law or practice, the establishment of new provinces.

- changes to the powers of the Senate;
- the method of selecting senators;
- the number of senators to which a province is entitled; and
- the residence qualifications of senators.

Whether this list of matters is exhaustive, and therefore suggestive of a broad authority for Parliament to amend the Constitution in respect of the Senate subject to the four listed exceptions in section 42(1), remains an important element in the debate surrounding constitutional reform for the Senate. If the list can be viewed as exhaustive, then Parliament would be free to effect a whole range of reforms to the Senate, provided they do not touch on the four exceptions. A change affecting the term of senators, for example, is not specified as a matter requiring provincial consent. This omission is sometimes relied upon by proponents of unilateral action by Parliament to limit Senate terms.

A lingering question is whether sections 44 and 42 of the *Constitution Act, 1982* alone can provide the basis for determining Parliament's exclusive authority to amend the Constitution in respect of the Senate, or whether the Supreme Court of Canada's judgment in *Re: Authority of Parliament in Relation to the Upper House*⁽²⁾ has added a further element to be considered. Some have argued that in accordance with the judgment, any major changes affecting the "essential characteristics" or "fundamental features" of the Senate cannot be made unilaterally by the Parliament of Canada. It should be noted that the decision was rendered before the amending procedures were introduced in the Constitution in 1982. The case was decided under the amending procedure in the *British North America Act*, section 91(1), which did not elaborate on Parliament's authority to amend the Constitution in relation to the Senate.⁽³⁾ There is, therefore, continuing debate as to what weight, if any, should be given to this decision.

(2) *Re: Authority of Parliament in Relation to the Upper House*, [1980] S.C.R. 54 [Upper House Reference].

(3) Section 91(1) of the *British North America Act* simply provided that Parliament could amend "the Constitution of Canada," except in respect of matters coming within provincial jurisdiction and the maximum duration of a Parliament (five years) as well as the minimum number of sessions of Parliament in a year.

2. What role do the Canadian provinces play in Senate reform?

Provincial governments can potentially play significant roles in Senate reform whether or not specific reform proposals require a constitutional amendment. If a Senate reform measure contemplates a constitutional amendment, the *Constitution Act, 1982*, prescribes whether and to what extent provincial concurrence may be required.

As noted earlier, Parliament may amend the Constitution in relation to the Senate on its own with the exception of four matters listed in section 42. These four matters are:

- the powers of the Senate;
- the method of selecting senators;
- the number of senators to which a province is entitled; and
- the residency requirement of senators.

If a reform proposal were to touch on any of these four matters, provincial approval would be required, pursuant to section 38 of the *Constitution Act, 1982*, which prescribes that the legislative assemblies of at least two thirds of the provinces (seven provinces) with at least 50% of the population of all the provinces must consent to such amendments.

As noted earlier, however, it is unclear whether this list may be viewed as exhaustive, thus providing Parliament with broad authority to amend the Constitution in respect of the Senate. There is also uncertainty as to whether the Upper House Reference, if it remains good law, adds another element, or unwritten principle, to be considered: that changes affecting the essential characteristics or fundamental features of the Senate require provincial concurrence. If so, then provincial involvement in Senate reform would not be limited to the four matters listed in section 42. Provincial involvement could be required in a broad range of reform proposals affecting the Senate.⁽⁴⁾

It should also be mentioned that historically, provinces have played significant roles in the constitutional amendment process. They have participated in major reform exercises, including the process of developing the Meech Lake Accord and the Charlottetown Accord.

(4) An additional layer of complexity is created by the *Constitutional Amendment Act*, sometimes referred to as the “regional veto Act,” which may require a higher degree of provincial involvement in the amending process. (See Part I, Question 3 of this publication.)

Finally, the stance of a province or territory on a Senate reform initiative can also play a significant political role in shaping the reform initiative's prospects. Substantial provincial and territorial support could enhance the credibility of a proposal. Conversely, negative provincial and territorial reaction could erode this credibility, and intense opposition could affect intergovernmental relations in other areas.

3. What is the process for amending the Constitution in Canada?

Much of the debate on amending the Constitution to effect Senate reform turns on the issue of whether provincial concurrence would be required and to what degree. The Constitution sets out several amending formulae. Different formulae will apply depending upon the subject matter of a proposed amendment.

The general procedure for amending the Constitution of Canada is set out in section 38 of the *Constitution Act, 1982*. It states that an amendment to Canada's Constitution:

- requires the approval of at least two thirds of the provinces having at least 50% of the total provincial population (the "7/50" procedure);
- requires the approval of the House of Commons and the Senate (although the Senate's approval can be dispensed with after six months if the House of Commons reaffirms its approval);
- requires the approval of a majority of the total number of members in each legislature, rather than a simple majority of the members present at the vote, for any amendment reducing provincial powers or rights; and
- can be opted out of by a province if the amendment reduces provincial powers or rights, provided a majority of the total number of members in the legislature pass a resolution of dissent.

Other formulae for amending the constitution are set out in sections 41, 42, 43, 44 and 45 of the *Constitution Act, 1982*. These include:

- amendment by unanimous consent for some matters particularly crucial to Canada's federal principles;
- amendment of provisions relating to some but not all provinces;
- amendments by Parliament alone that relate to the executive government of Canada or the Senate and the House of Commons; and
- amendments by a province alone to the constitution of the province.

Additionally, the *Constitutional Amendments Act*,⁽⁵⁾ often referred to as the “regional veto Act,” holds that a minister of the federal Crown may not introduce a resolution to authorize a constitutional amendment, other than an amendment which already requires the approval of all affected provinces or an amendment from which a province can opt out, unless “the amendment has first been consented to” by a majority of the provinces, including:

- Ontario;
- Quebec;
- British Columbia;
- at least two Atlantic provinces, having 50% of the Atlantic population; and
- at least two Prairie provinces having 50% of the Prairie population.

The legislation was introduced in 1996 and applies only in respect of constitutional amendments under section 38(1) of the *Constitution Act, 1982* (the “7/50” formula).⁽⁶⁾ Therefore, if Parliament is competent to proceed under section 44, the Act would not apply. It has also been noted that the Act only prevents a minister of the federal Crown, and not other members of Parliament, from introducing a resolution to authorize an amendment to the *Constitution Act, 1982*. Similarly, it does not prevent Parliament from passing such a resolution.

4. What has the Supreme Court of Canada pronounced on Senate reform?

There have been relatively few cases from Canadian courts dealing with Senate reform. The leading judgment on this issue was rendered by the Supreme Court of Canada in its decision in *Re: Authority of Parliament in Relation to the Upper House* in 1980. In its decision, the Court expressed the view that Parliament cannot unilaterally make 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” or

(5) S.C. 1996, c. 1.

(6) It has been estimated that the Act raises the population requirement for a constitutional amendment in section 38(1) of the *Constitution Act, 1982* from 50% to 92%. (See P. Monahan, *Constitutional Law*, 2nd ed., Irwin Law, Toronto, 2002, p. 207.)

that would affect its function as a house of sober second thought.⁽⁷⁾ The Court was asked by the federal government to render opinions on a number of reference questions, including whether Parliament could act alone to amend the Constitution to effect the following changes: abolish the Senate; alter the method of appointment of senators by giving provincial legislatures or the House of Commons or the Lieutenant-Governors of the provinces a role in their selection; require the direct election of senators; change the provincial distribution of Senate seats; alter Senate tenure; and change the qualification of senators.

In respect of abolishing the Senate, the Court held that Parliament could not act unilaterally. Regarding the remaining questions, all grouped under “question 2” of the reference, the Court made the following broad observation:

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.⁽⁸⁾

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 the alternative method of appointment of senators), or it lacked a sufficiently detailed proposal from the government (senate tenure and qualifications of senators). The Court declined to answer the reference question on Senate tenure, because the term of office might impair the function of the Senate as a body of sober second thought.

(7) Upper House Reference, p. 78.

(8) *Ibid.*, pp. 77–78.

There are differing views concerning the significance and continuing relevance of the Upper House Reference. Such scholars as Peter Hogg maintain that any principles that may be derived from the decision have been overtaken by the amending formulae that came into effect with the patriation of the Constitution of Canada in 1982.⁽⁹⁾ Sections 41, 42 and 44 of 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.

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.⁽¹⁰⁾ 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*.⁽¹¹⁾ In such cases, the complex amending formula in section 38(1) would be required.

5. What Senate reforms would not require amending the Constitution?

Options for Senate reform within the existing constitutional structure are wide-ranging. As the master of its internal affairs, the Senate can (and periodically does) alter practices in the Chamber or in its committees. Past examples have included altering the committee structure, and the allocation of time and resources among activities.

Following the demise of major reform initiatives proposed in the late 1980s and early 1990s, the attention of proponents of major Senate reform turned to non-constitutional options for achieving at least some of their objectives. For example, some proponents of a “Triple E” Senate (equal, elected, effective) argued that at least the “elected” element could be achieved without constitutional change.

In 1989, the Alberta government enacted the *Senatorial Selection Act*, and held an election that was won by Mr. Stan Waters. In 1990, as the federal government attempted to

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

(10) Monahan, *Constitutional Law* (2002), p. 68.

(11) 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).

prevent the rejection of the Meech Lake constitutional agreement, it was persuaded to appoint Mr. Waters to the Senate. This appointment was never challenged on constitutional grounds, perhaps in part because it was a single occurrence and was not portrayed by the prime minister as the beginning of a systematic attempt to alter the method of selection of senators. Nevertheless, the fact that such an appointment was made, and was not challenged, is seen by some as a precedent indicating that advisory elections could be used more widely as a basis for Senate appointments without giving rise to constitutional issues.

PART II – A BRIEF HISTORY OF SENATE REFORM IN CANADA

1. What formal constitutional changes were made to the Senate during the period from Confederation to 1982?

Formal constitutional changes to the Senate have been limited. These include:

- a constitutional amendment in 1965 that established a mandatory retirement age for senators of 75;
- a suspensive veto over certain constitutional amendments given to the Senate in 1982; and
- an increase in the number of seats in the Senate (now 105) with the addition of provinces and territories to the federation.⁽¹²⁾

Evolving interpretation of the Constitution has resulted in at least one other major change: in 1929, women became eligible for appointment to the Senate as a result of a decision by the British Judicial Committee of the Privy Council, at the time Canada's highest appellate court, that the term "persons" includes women as well as men.

2. What informal changes have occurred within the Senate since Confederation?

Informal changes to the Senate have been more extensive. Perhaps the most noteworthy is the practice of deferring to the will of the elected House of Commons on legislative matters, which has gradually emerged since 1867 (in the early years, some 8% of public bills were rejected and 25% amended). This practice reflects the recognition by senators

(12) Some of these amendments were made under the pre-1982 amending formula in the *British North America Act*, section 91(1), which gave the federal government the power to amend the "Constitution of Canada" subject to five listed exceptions, none of which dealt with the Senate.

that public attitudes have evolved considerably since the mid-19th century, and that it has become appropriate for the directly elected House of Commons to prevail on legislative matters, except in extraordinary circumstances.

Since 1867, the composition of the Senate has also become more diverse. Senators now come from a variety of ethnic and cultural and economic backgrounds with greater female representation.

3. What major Senate reform proposals were made before the 1980s?

The issue of Senate reform dates back to 1874 at least. In that year – just seven years after the *British North America Act* (now referred to as the *Constitution Act, 1867*) had been adopted – the House of Commons heard a proposal that it consider amending the Constitution to allow each province to choose senators. Proposals, focusing either on the limitation of terms of appointment (appointments were originally for life) or on abolition of the body, appeared regularly during the ensuing years, and in 1906 the Senate itself first debated reform.

Beginning in the 1960s, the issue of Senate reform was pursued with new urgency. Heightened public and governmental attention reflected developments both in Quebec, where the Quiet Revolution was fostering new autonomist pressures, and in western Canada, where perceptions of the unresponsiveness of central institutions were exacerbating longstanding resentments.

During the 1960s and 1970s, the emphasis was on the rehabilitation of the appointed Senate, by means of some degree of provincial involvement in the appointment of senators. The Senate thus would have become a kind of proxy for the provincial governments, with the anticipation that the process of accommodating provincial concerns might shift from the domain of intergovernmental relations and First Ministers' Conferences to the federal legislative process itself.

4. What are the main reform proposals that have been put forth since 1980?

Beginning in the early 1980s, the assumption underlying successive proposals came to be that the Senate could not have a major and durable impact on the legislative process unless it, like the House of Commons, was a product of democratic electoral choice-making.

Among the major proposals are those that promote the so-called “Triple E” Senate, whose members would be elected, which would have equal representation for each province, and which would be efficient in its use of clearly defined powers. These proposals include the 1981 Canada West Foundation proposal,⁽¹³⁾ the 1985 report of the Alberta Select Special Committee on Upper House Reform (Alberta Select Committee)⁽¹⁴⁾ and the 1992 Charlottetown Accord proposals.⁽¹⁵⁾

Other major proposals were made in the 1984 report of a special joint committee of the Senate and House of Commons on Senate reform (the Molgat-Cosgrove committee);⁽¹⁶⁾ the 1985 report of the Royal Commission on the Economic Union and Development Prospects for Canada (the Macdonald Commission);⁽¹⁷⁾ and the 1992 report of the Special Joint Committee on a Renewed Canada (the Beaudoin-Dobbie committee).⁽¹⁸⁾

a. “Triple E” Senate Proposals

(i) Canada West Foundation (1981)

The Canada West Foundation-sponsored study of 1981 argues that the Senate was originally created to serve the need for regional representation, but has not done so because its status as an appointed body has undermined its legitimacy. Its proposals to address these deficiencies in the representativeness of the Senate include:

- equal representation of provinces;
- a single transferable vote system – a variant of proportional representation, in which voters rank individual candidates in order of preference, after which a formula taking account of these rankings is employed to identify winners;

(13) Peter McCormick, Ernest C. Manning and Gordon Gibson, *Regional Representation: The Canadian Partnership – A Task Force Report*, Canada West Foundation, Calgary, September 1981.

(14) Alberta Select Special Committee on Upper House Reform, *Strengthening Canada: Reform of Canada’s Senate*, Edmonton, March 1985.

(15) *Consensus Report on the Constitution*, Charlottetown, 28 August 1992.

(16) Parliament, *Report of the Special Joint Committee of the Senate and of the House of Commons on Senate Reform*, Ottawa, 1984.

(17) Royal Commission on the Economic Union and Development Prospects for Canada, *Report*, Volume III, Ottawa, 1985.

(18) Parliament, *A Renewed Canada: Report of the Special Joint Committee of the Senate and the House of Commons on a Renewed Canada*, Ottawa, 1992.

- province-wide constituencies which would underline the differences in the roles of members of Parliament, who represent localities, and senators, who should represent regional concerns; and
- simultaneous Senate and House of Commons elections.

The Canada West Foundation proposals would give a reformed Senate:

- powers over ordinary legislation similar to those of the House of Commons, with the House retaining the power to override the Senate by special majority;
- the power to reject money bills or revise them downwards (subject to House override), but not to initiate money bills or to revise them upwards; and
- the power to ratify (or veto):
 - amendments to the Constitution;
 - appointments to federal boards, tribunals or agencies;
 - extensions of the emergency power beyond a maximum period prescribed in the Constitution;⁽¹⁹⁾
 - use of the federal declaratory power;⁽²⁰⁾ and
 - use of the powers of reservation and disallowance by the Governor General and the Queen.⁽²¹⁾

(19) This is a reference to the power to continue a House of Commons beyond the five-year maximum period set out in section 50 of the *Constitution Act, 1867*, after which an election must be called. The emergency power is now found in section 4(2) of the *Constitution Act, 1982*, which states that “in time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament ... beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons.” It has been suggested by one source that section 4(2) may require, in addition to a two-thirds vote of the House of Commons, a majority vote of the Senate and assent by the Governor General, since the section authorizes “Parliament” to continue a House of Commons. As both the Senate and the Queen (as represented by the Governor General) are constituent parts of Parliament, their approval would be necessary. (See C. Forcese and A. Freeman, *The Laws of Government: the Legal Foundations of Canadian Democracy*, Irwin Law, Toronto, 2005, p. 583.)

(20) Under subsection 92(10)(c) of the *Constitution Act, 1867*, the federal government may “declare” a local work or undertaking in a province to be “for the general advantage of Canada or for the advantage of two or more of the provinces.” By this device, the federal government could assume legislative jurisdiction over a local work or undertaking that would otherwise be subject to provincial legislative jurisdiction.

(21) Section 55 of the *Constitution Act, 1867* grants the Governor General the power to withhold Royal Assent from a bill and the power to “reserve a bill for the signification of the Queen’s pleasure.” Under section 56, the Queen may disallow legislation (a bill to which the Governor General has assented) or disallow a bill that has been “reserved” by the Governor General for the Queen’s “signification.” However, as Professor P. Hogg has noted, it was resolved at the imperial conference of 1930 that the power of reservation and disallowance should never be exercised. There is now an established convention that the Governor General must always give Royal Assent to bills that have passed both houses. (See P. Hogg, *Constitutional Law of Canada*, 5th ed. (supplemented), Thomson Carswell, Toronto, 2007, pp. 9–20.)

With this proposal, the Senate could not:

- consider motions of non-confidence; or
- ratify foreign treaties, and appointments of ambassadors and Supreme Court justices.

(ii) Alberta Select Committee (1985)

The rationale for the Alberta Select Committee proposals is similar to that developed by the Canada West Foundation. Regarding representation, the Select Committee recommended:

- equal representation of provinces;
- multiple-member province-wide constituencies;
- the first-past-the-post system, as exists now in provincial and federal elections, so as to avoid the addition of an experimental electoral system to the other changes connected with an elected Senate;
- elections simultaneous with those for provincial legislatures as a means of placing provincial perspectives in the forefront during the election campaigns for both the Senate and provincial legislatures; and
- term limits equivalent to the life of two legislatures, with the terms of half of the representatives being renewed at each provincial election.

Regarding legislative powers, the Committee recommended that the proposed Senate have:

- the power to initiate any legislation (excluding a money or taxation bill, but including bills concerning its own operational budget);
- a 180-day suspensive veto over ordinary legislation, or constitutional amendments;
- a 90-day suspensive veto over money or taxation bills;
- the power to amend any bill (the House of Commons would be able to override this action by re-passing the bill with a larger majority in percentage terms than passed the amendment in the Senate);
- the power to veto any bill except a supply bill (the House would be able to override a veto on money or taxation bills by a simple majority);

- the power to ratify non-military treaties; and
- a double-majority voting procedure for bills affecting the French and English languages.

(iii) Charlottetown Accord (1992)

The Charlottetown Accord proposed an elected Senate, but it did not recommend a particular electoral system for elections. It recommended simply that:

- federal legislation would govern elections by the population of the provinces and territories or by members of provincial or territorial legislatures. Seats would be distributed equally across provinces, with each province receiving six Senate seats, while the Northwest Territories and Yukon would receive one seat each;
- Senate seats would be set aside for Aboriginal people over and above provincial and territorial seats; and
- elections to the Senate would be simultaneous with those for the House of Commons.

The Charlottetown Accord included recommendations regarding the following powers for a reformed Senate:

- the power to delay ordinary legislation for up to 30 sitting days, or to defeat or amend legislation, which would, with some exceptions, trigger a joint sitting with the House of Commons (outcome determined by simple majority);
- a suspensive veto over revenue and expenditure bills for up to 30 calendar days, and the power to defeat or amend such legislation (the House could re-pass a defeated bill with a simple majority);
- the power to amend or defeat bills materially affecting French language or culture, by means of a double-majority procedure (majorities of all senators and Francophone senators) (no House of Commons override);
- the power to amend or defeat, by simple majority, bills involving “fundamental tax policy changes directly related to natural resources” (no House of Commons override);
- the power to initiate bills, except money bills; and
- the power to ratify key appointments to federal institutions, including the appointment of the Governor of the Bank of Canada, within not more than 30 sitting days of the House.

b. Non-“Triple E” Proposals

(i) Molgat-Cosgrove Committee (1984)

The Molgat-Cosgrove Committee report contained the following recommendations:

- single-member constituencies drawn with special attention to geographic, community, linguistic and cultural factors to reflect the composition of natural communities;
- plurality voting;
- triennial elections on fixed dates, each of which would renew one third of the Senate’s membership;
- overrepresentation of small provinces, which would result from the principle of equality weighted according to population; and
- nine-year non-renewable term limits.

The committee recommended that a reformed Senate have the following powers:

- a suspensive veto of up to 120 sitting days, applying to all legislation except supply bills, which would not be subject to any delay;
- the power to amend any bill except a supply bill (the House of Commons would retain the power to reject an amendment, after a delay of at least 60 sitting days, to ensure passage of the original bill);
- the power to initiate bills affecting such internal matters as the Senate’s budget, while other supply bills could be initiated only in the House of Commons;
- an absolute veto over legislation or other initiatives relating to official languages (with voting by a double-majority procedure: majorities of the whole Senate and French-speaking senators); and
- subject to a 30-day time limit, the power to ratify order-in-council appointments to federal agencies whose decisions have important regional implications.

(ii) Macdonald Commission (1985)

The key proposals of the Macdonald Commission included:

- six-member constituencies;
- proportional representation in six-member constituencies; and

- elections simultaneous with those for the House of Commons.

The Macdonald Commission recommended the following powers for a reformed Senate:

- a suspensive veto of six months on all ordinary legislation other than spending, taxing, and borrowing bills; and
- an absolute veto over measures having special linguistic significance (with a double-majority voting procedure: majorities of all senators and French-speaking senators).

(iii) Beaudoin-Dobbie Committee (1992)

The Beaudoin-Dobbie Committee recommended:

- a proportional representation system with the following features:
 - the nomination of slates of candidates by political parties;
 - facilitating independent candidates to run;
 - the promotion of gender equality and diversity by political parties within their slates of candidates
 - providing voters with the option of selecting candidates from several party slates
- multi-member constituencies electing at least four senators;
- fixed electoral terms;
- elections separate from those of either the House of Commons or provincial legislatures; and
- enhanced representation for smaller provinces.

The committee proposed the following powers for a reformed Senate:

- powers to amend or defeat ordinary legislation, with a House of Commons override of Senate votes in the case of deadlock, and a double-majority procedure for measures affecting French language or culture;
- the power to delay ordinary legislation by up to 180 days, after which the legislation would be deemed to have passed;
- powers to amend, defeat or delay supply bills for up to 30 days (the House could override the Senate by simple majority); and

- the power of ratification of important federal appointments, including the appointments of the Governor of the Bank of Canada, heads of national cultural institutions, and heads of regulatory boards and agencies.

5. What reforms have been proposed by the government since 2004?

- ***Term limits:*** Bill S-7, An Act to amend the Constitution Act, 1867 (Senate term limits) was introduced in the Senate on 28 May 2009. The bill reintroduces, with some modifications, Bill S-4, introduced in the Senate on 30 May 2006, and Bill C-19, introduced in the House of Commons on 13 November 2007.⁽²²⁾ The current version of the bill proposes limiting the tenure of senators appointed after 14 October 2008 to one non-renewable eight-year term. At the same time, Bill S-7 preserves the existing retirement age of 75 for all senators, regardless of their date of appointment. It further allows a senator whose term has been interrupted to return to the Senate and complete his or her term. The bill is currently at second reading stage in the Senate.
- ***Consultative elections of senators:*** Bill C-20, An Act to provide for consultations with electors on their preferences for appointments to the Senate (the “Senate Appointment Consultations Act”) was introduced on 13 November 2007 (the bill had been previously introduced in the House as Bill C-43 on 13 December 2006). Bill C-20 set out a procedure for “electing” Senate nominees, in which voters would rank candidates in order of preference. Senators would then be appointed by the prime minister on the basis of electors’ preferences. The premise of Bill C-20 was that the proposed change in the method of selecting senators would remain within the ambit of the powers of Parliament, and therefore would not require a constitutional amendment. As stated in its preamble, the bill created a “method for ascertaining the preferences of electors in a province on appointments to the Senate within the existing process of summoning senators.”⁽²³⁾ The bill died on the *Order Paper* when the 39th Parliament was dissolved.

(22) Bill C-19 died on the *Order Paper* when Parliament was dissolved on 7 September 2008, while Bill S-4 was reported to the Senate by the Standing Senate Committee on Legal and Constitutional Affairs with amendments, observations and a recommendation that the bill not proceed to third reading until the government had sought a reference opinion from the Supreme Court of Canada on the constitutionality of the bill. With the prorogation of Parliament on 14 September 2007, Bill S-4 did not proceed further. See Sebastian Spano, *Bill C-19, An Act to Amend the Constitution Act, 1867 (Senate tenure)*, LS-580E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 21 November 2007.

(23) See Michel Bédard, *Bill C-20, Senate Appointment Consultations Act*, LS-588E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 13 December 2007.

PART III – ELEMENTS OF SENATE REFORM

A. Selection of Senators

1. How many Senate seats are there?

There are 105 Senate seats, but because of vacancies, not all seats are filled. In addition, section 26 of the *Constitution Act, 1867* provides that four or eight additional senators may be appointed, (one or two from each of the original regional divisions). The total number of senators, however, must not exceed 113. Despite the doubt expressed by two provinces as to whether section 26 was still operative, the provision to avert a deadlock when the Senate was considering legislation relating to the introduction of the Goods and Services Tax was invoked in 1990. The government of then-Prime Minister Brian Mulroney appointed an additional eight senators to ensure that bills implementing the GST and another bill dealing with employment insurance would pass in the Senate, and thus avoid a deadlock.⁽²⁴⁾ (The bills had been delayed in the Senate for various lengths of time.) Two constitutional challenges to the federal government’s use of the provision to expand the Senate failed.⁽²⁵⁾

2. How are senators appointed?

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.

(24) In fact, the procedure under the *Constitution Act, 1867* requires that the Governor General recommend to the Queen the addition of up to eight senators. By constitutional convention, the Governor General acts on the advice and recommendation of the prime minister.

(25) See the analysis of sections 26, 27, and 28 of the *Constitution Act, 1867* by the British Columbia Court of Appeal in *Re: Constitutional Question Act (British Columbia)* (1991), 78 D.L.R. (4th) 245 (BCCA). See also, *Leblanc v. Canada* (1991), 80 D.L.R. (4th) 641, 3 O.R. (3d) 429, in which the Ontario Court of Appeal also held that there need not be a deadlock to justify the use of section 26 to increase the number of senators.

3. What qualifications does a person need to be appointed to the Senate?

To be summoned to sit in the Senate, a person must:

- be at least 30 years old;
- be a subject of the Queen (senators are now traditionally Canadian citizens);
- own or have equity in property worth \$4,000 in the province for which he or she is appointed;⁽²⁶⁾
- have a net worth of \$4,000, including real and personal property; and
- be a resident of the province for which he or she is appointed.⁽²⁷⁾

Where a person's qualifications are in dispute, it is the Senate itself that decides whether a person is qualified to be a senator or not.

4. Is there a specific time limit for filling vacancies in the Senate?

No, the Governor General does not have to fill a vacant seat in the Senate within a certain timeframe.

During the 2nd Session of the 39th Parliament, Bill S-224, An Act to amend the Parliament of Canada Act (vacancies), was introduced in the Senate. The bill proposed that the prime minister be required, within 180 days of a vacancy occurring in the Senate, to recommend the name of a fit and qualified person for appointment to fill that vacancy. Bill S-224 died on the *Order Paper* when the 39th Parliament was dissolved, but was reintroduced as Bill S-215 in the 1st Session of the 40th Parliament. That bill was re-introduced again as Bill S-224 in the 2nd Session of the 40th Parliament.

5. What are the main arguments for and against an elected Senate?

The main argument in favour of an elected Senate is that this arrangement would greatly increase its democratic legitimacy. 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

(26) For historical reasons, Quebec is divided into 24 electoral divisions, and senators must have their property in, or be resident in, the division for which they are appointed.

(27) In Quebec, a senator must be a resident of, or own property in, the relevant electoral division.

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. Proponents of an elected Senate believe that electing senators would solve the issue of the institution's legitimacy.

Another argument in favour of having provincial and territorial voters elect their own senators is that this would allow the Senate to provide much more effective regional representation.

The main argument against an elected Senate is that the current independence of senators would be scuttled by the partisan politics prevalent in the House of Commons. Instead of fulfilling roles that complement those of the House, an elected Senate would tighten the stranglehold parties have on the legislative process. The Australian Senate is often held up as an example in support of this argument. When it became an elected chamber, party representation took precedence over regional representation.

Another argument against an elected Senate is that it would lead to an under-representation of women and minorities, whereas the current appointment process addresses this situation much more satisfactorily.

One argument often made in support of the appointment process is that it allows individuals with considerable experience and sound judgment to make a valuable political contribution in an environment where partisanship is mitigated by the length of the mandates. Some people believe that this institutional knowledge will be lost if the Senate becomes an elected chamber. Elections are fought on short-term issues in which party cohesion and public visibility are crucial, yet these are incompatible with the relative independence and deeper reflection that characterizes the work of senators.

6. What have been the government's recent proposals for the selection of senators?

The government introduced Bill C-20, An Act to provide for consultations with electors on their preferences for appointments to the Senate (the "Senate Appointment Consultations Act") on 13 November 2007, during the 2nd Session of the 39th Parliament, and it was given first reading in the House of Commons. It died on the *Order Paper* with the dissolution of Parliament. The bill had been introduced previously in the House as Bill C-43 during the 1st Session of the 39th Parliament. Bill C-20 would have permitted the government to provide the public with an opportunity to vote for nominees for Senate appointments from their

province at the time of a federal or provincial election. Successful nominees would have comprised a pool of potential appointees who could be considered by the prime minister as Senate vacancies occurred. Furthermore, Bill C-20 set out in detail the procedure for “electing” Senate nominees, making reference to several substantive provisions of the *Canada Elections Act*, and included provisions regarding the selection of nominees, the conduct of the consultation, advertising and the financial administration of the elections.

On its own, this legislation would gradually have altered the political status of Senate appointments by removing any association with prime ministerial patronage.

During the 2nd Session of the 39th Parliament, Bill C-20 was given second reading and sent to a Legislative Committee on Bill C-20 on 13 February 2008. A recurring point of discussion during the committee hearings was the constitutionality of the bill’s proposals. Some witnesses argued that the measures introduced in Bill C-20 would require constitutional amendments (and therefore consent from a majority of the provinces) because the bill proposed changes to the method of selecting senators. Others argued that, because the elections would serve an advisory purpose only, there was no alteration to the current selection procedure, and so no constitutional amendment would be required.

7. How do other major Western democracies select the members of their upper chambers?

The following 15 major Western democracies have bicameral legislatures: Australia, Austria, Belgium, Canada, France, Germany, Ireland, Italy, Japan, Mexico, the Netherlands, Spain, Switzerland, the United Kingdom, and the United States of America.

In the majority of these countries (60%), some type of direct election is used to select the members of the upper chambers. In four countries (Austria, France, Germany, and the Netherlands), members are selected indirectly, while in Canada and the United Kingdom members are appointed. Belgium and Ireland have a mix of directly elected and appointed members, while Spain has both directly and indirectly elected members.

Country	Method of Selection	Voting Method
Australia	Directly elected	Proportional
Austria	Indirectly elected	Proportional
Belgium	Directly elected and appointed	Proportional
Canada	Appointed	
France	Indirectly elected	Proportional and majority

Germany	Indirectly elected	Members of Länder (state) governments
Ireland	Directly elected and appointed	Proportional
Italy	Directly elected	Proportional and simple majority
Japan	Directly elected	Proportional and simple majority
Mexico	Directly elected	Proportional and majority list
Netherlands	Indirectly elected	Proportional
Spain	Directly and indirectly elected	Simple majority
Switzerland	Directly elected	Simple majority
United Kingdom	Appointed	
USA	Directly elected	Simple majority and absolute majority*

* Two states – Georgia and Louisiana – require absolute majorities to be elected.

Source: Inter-Parliamentary Union, PARLINE Database.

Of the nine major Western democracies that use direct elections, six countries use some form of proportional voting methods. Only three major Western democracies (Spain, Switzerland, and the United States) use simple majority systems for the most part.

Of the major Western democracies in which members of the upper chamber are indirectly elected, Austria, France and the Netherlands use proportional methods to choose members, while in Germany, members of the upper chamber are chosen from members of the Länder (state) governments.

8. What can be learned from Australia's elected Senate?

A number of similarities exist between the Canadian Senate and the Australian Senate. The original intent in both cases was that the chambers would play an important role in the protection of less populous regions; the review of legislation was seen as a crucial role for both; and both were given legislative powers essentially equal to those of their respective lower houses (the exception being powers concerning money bills).

Unlike the Canadian Senate, the Australian Senate has always been elected, although the electoral system has undergone several major changes over the years. The present system employs a single transferable vote, which results in the proportion of Senate seats held by competing parties being close to their share of the popular vote.

Recognizing that the existence of two popularly elected houses created a significant possibility of conflict and stalemate, the drafters of the Australian constitution created a deadlock-breaking procedure. Under this procedure, if the Senate rejects House legislation, the legislation is returned to the lower chamber, which may then send it back unamended. If the

Senate rejects the legislation a second time or amends it in a way which is not acceptable to the lower house, the Governor General, acting on the advice of the prime minister, may dissolve both houses for a general election. If deadlock still persists following the election, the Australian constitution calls for a joint session of the two houses at which the fate of the legislation will be determined by simple majority voting (thus giving the larger House of Representatives an ultimate advantage).

Several lessons can be gleaned from Australia's experience with an elected Senate. Consensus appears to exist among Canadian political scientists that:

- an elected Canadian Senate might be less likely to defer to the House of Commons than it now is because both chambers would be legitimized by popular vote; and
- an elected Canadian Senate would likely be dominated by the established political parties, with levels of party discipline and partisanship similar to those of the House of Commons.

Beyond general agreement on these observations, Canadian observers differ on further conclusions to be drawn from the Australian experience. Some of the major areas of disagreement include:

- **Effectiveness.** Many proponents of reform argue that the greater assertiveness of the Australian Senate is proof that elections would make the Senate more credible and effective. Conversely, concerns have been expressed that an assertive Senate could be a threat to responsible government, which requires that a government command a majority in the lower house, and that deadlocks between the houses could impede the overall functioning of Parliament.
- **Regional representation.** There is also continuing debate about whether party interests dominate Senate activities at the expense of effective regional representation, or whether parties and party discipline facilitate the Senate's representational function.

9. Have similar reforms been proposed for the United Kingdom's House of Lords?

The United Kingdom shares with Canada both an appointed upper chamber and continuing debate about its reform.⁽²⁸⁾ In addition, the preamble to the *Constitution Act, 1867*, which states that Canada shall have a constitution similar in principle to that of the United Kingdom, has often been cited as the historic rationale for creating an upper chamber modelled

(28) See Brian O'Neal, James R. Robertson and Sebastian Spano, *British House of Lords Reform: Recent Developments*, PRB 08-40E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 27 February 2009.

on the House of Lords. Given this historical context and the recent developments in the UK concerning reform of the House of Lords, the current debate in the UK and the various proposals for reform of the House of Lords have particular relevance to Senate reform in Canada.

Reforming the House of Lords has been a continuing subject of debate and discussion in the United Kingdom. Before the election of the Labour Party in 1997, some small-scale reforms affecting the powers of the upper chamber took place, but it was not until after that election that any proposals for fundamental reform were developed. The government released a White Paper in January 1999 setting out various options for reforms that would affect the powers, the method of selection of, and terms for members of the House of Lords.⁽²⁹⁾ The 1999 White Paper listed four models for a reformed upper chamber: a nominated chamber, a directly elected chamber, an indirectly elected chamber, and a mixed chamber. The government expressed a preference for a mixed chamber. This was followed by legislation, the *House of Lords Act, 1999*, which eliminated all but 92 of the 759 hereditary peerage positions. The changes did not affect life peers. The legislation was a transitional measure. Subsequent reform proposals have continued to grapple with the issue of the status of remaining peers and the future composition and selection of members of the upper chamber, as well as their terms.

The 1999 White Paper was followed by the creation of a commission to study and make recommendations on the role, function, composition and selection of members of the House of Lords. The Wakeham Commission, named for its chair, recommended that the House should have a primary function of advising on and revising legislation and that its work should complement that of the House of Commons. It recommended that the majority of members of the upper chamber be appointed by a statutory appointments commission that would report to the House of Commons.⁽³⁰⁾ Shortly after the release of the report in January 2000, a non-statutory Appointments Commission, reporting to Cabinet, was created to deal with the appointment of non-party members of the House of Lords.

Since the 1999 White Paper and the Wakeham Commission report, there have been a series of further reports and responses to reports, some from the government and some

(29) United Kingdom, Cabinet Office, *Modernising Parliament: Reforming the House of Lords* (Cm 4183), London, 1999 [1999 White Paper].

(30) United Kingdom, Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534) London, 2000.

from Parliament, each with differing reform proposals.⁽³¹⁾ In addition, the *Constitutional Reform Act, 2005* was enacted. Among other things, the Act modified the office of the Lord Chancellor, established a Supreme Court of the United Kingdom (the Court will open in October 2009), abolished the jurisdiction of the House of Lords as the final court of appeal, and made provision for the election of the Speaker of the House of Lords. Previously, the Lord Chancellor filled the role of Speaker of the House of Lords, as well as the role of the official head of the judiciary.

Among the more recent reports, the February 2007 White Paper entitled *The House of Lords: Reform* lays out three options on the composition of the House of Lords: an appointed house, a fully elected house, and a hybrid with 50% elected members, 30% political appointees and 20% non-partisan appointees.⁽³²⁾ The paper emphasized a role for the House of Lords as a complementary chamber to the House of Commons having as its central role the scrutiny and revision of legislation in a way that would not merely duplicate the role of the Commons or rubber-stamp its work.

In its most recent report on House of Lords reform, the July 2008 White Paper, the government recommended a wholly or mainly elected upper chamber with all members serving a maximum of three non-renewable terms totalling 12 to 15 years. It also set out options for the removal of all peers, as elected and appointed members gradually join the upper chamber during a transitional phase.

(31) These reports include:

- *House of Lords: Completing the Reform*, Government White Paper, November 2001;
- House of Commons Public Administration Select Committee, *The Second Chamber: Continuing the Reform* (HC 494, 2001-02), 14 February 2002;
- Joint Committee on House of Lords Reform, *House of Lords Reform: First Report* (HL 17, 2002-03), 11 December 2002, and *House of Lords Reform: Second Report* (HL 97, 2002-03), 9 May 2003;
- *Constitutional Reform: Next Steps for the House of Lords*, Government Consultation Paper, September 2003;
- *The House of Lords: Reform*, Government White Paper, February 2007;
- *An Elected Second Chamber: Further Reform of the House of Lords*, Government White Paper, July 2008; and
- House of Commons Public Administration Select Committee, *Response to White Paper "An Elected Second Chamber"*, January 2009.

(32) United Kingdom, *The House of Lords: Reform*, London, February 2007, <http://www.official-documents.gov.uk/document/cm70/7027/7027.pdf>.

B. Term Limits

1. How long is the tenure of a senator?

In 1965, a section was added to the *British North America Act* stipulating that senators hold office from the time of their appointment until they reach 75 years of age, unless they resign or are disqualified from serving in the Senate. The original provision stated that senators, once appointed, held their terms for life.

2. How can a senator lose his or her seat in the Senate?

A senator can lose his or her seat by:

- reaching the age of 75 years;
- resigning for any reason;
- not attending the Senate for two consecutive parliamentary sessions;
- becoming a subject or citizen of a foreign power;
- declaring bankruptcy, applying for the benefit of any law relating to insolvency, or becoming “a public defaulter”;
- being “attainted of treason” or convicted of a felony or “infamous crime”; or
- ceasing to be qualified in respect of property or residence.

As is the case with qualifications, any dispute as to whether a place in the Senate has become vacant is decided by the Senate itself.

3. What are some of the arguments for and against term limits for senators?

The arguments for and against instituting term limits in the Senate typically hinge on the length of the term. In setting out the arguments for and against term limits, it is useful to use the government’s most recent proposed eight-year non-renewable term limit as the benchmark for discussion. The principal arguments that have been made in favour of or against term limits have been thoroughly canvassed in the various reform proposals made over the years. These are summarized below. Arguments in favour of term limits include:

- Long senate terms are no longer the standard in upper chambers in Western democracies. The majority of members in upper houses are subject to term limits and must go to the voters periodically to obtain support for further terms.
- Even with the adoption of an eight-year term, the Canadian Senate would still have the second longest term among second chambers with limited terms. Only France, at nine years, would have a longer term.
- An eight-year term is sufficiently long for a senator to gain the experience necessary to fulfil his or her role in legislative review and policy investigation while, at the same time, ensuring that the Senate regularly experiences a renewal of ideas and perspectives.
- An eight-year term is in line with the range of proposals previously put forward, by among others, the Molgat-Cosgrove committee report (which recommended a term of nine years), and the Canada West Foundation and the Alberta Select committee, which both recommended terms equivalent to the life of two legislatures.
- The consensus apparent in the reports, proposals and recommendations by a number of royal commissions and policy think-tanks over the past 30 years serves above all to suggest that a large number of Canadians desire Senate reform involving term limits.

Arguments against term limits include:

- Shorter terms could erode the institutional strength of the Senate that results from its members' lengthy and secure tenure. Its function as a "house of sober second thought" and its ability to conduct careful legislative reviews and in-depth studies would, according to this view, be impeded by the greater turnover of senators, since institutional memory would disappear when a senator's term limit was reached.
- Term limits could exaggerate cycles of one-party dominance in the Senate if prime ministers were to take advantage of higher turnover rates to maximize the number of senators from the governing party. This could enhance the prime ministerial power of appointment, further eroding the independence of the Senate and its strength as a chamber of sober second thought. It has been noted that prime ministers with a majority government lasting two or more terms would be able to fill every Senate seat by the time they left office, effectively controlling the Senate.
- Term limits would represent a break with the historical continuity of the institution and change the unique system of governance that Canada has developed.
- Term limits might serve to attract a different type of candidate for Senate appointment. It is possible that, over time, the Senate's membership would become less concerned with long-term views, which at present is a perceived strength of its membership.

4. What have been the government's recent proposals to limit the tenure of senators?

The government introduced Bill S-7, An Act to amend the Constitution Act, 1867 (Senate term limits),⁽³³⁾ and it was given first reading in the Senate on 28 May 2009. Bill S-7 proposes an eight-year non-renewable term for all senators appointed after 18 October 2008 and maintains the current mandatory retirement at age 75 for all senators regardless of their date of appointment.

Over time, a reduced term limit of eight years could increase the turnover of senators, as those serving eight-year terms replace those serving until the age of 75. It could preclude extremely lengthy terms (technically, up to 45 years for a senator appointed at the

(33) Bill S-7 is a reintroduction, with modifications, of Bill C-19, introduced in the 2nd Session of the 39th Parliament on 13 November 2007. Bill C-19, in turn, was a reintroduction, again with modifications, of Bill S-4, introduced in the 1st Session of the 39th Parliament on 30 May 2006. Bill S-4 received second reading in the Senate on 20 February 2007. The Standing Senate Committee on Legal and Constitutional Affairs reported the bill back to the Senate with amendments, observations and a recommendation that the bill not be proceeded with until the Supreme Court of Canada had ruled on its constitutionality. The committee recommended a non-renewable term of 15 years. The bill was debated at report stage, and, on 19 June, the Senate opted not to proceed with debate at third reading until such time as the Supreme Court of Canada had ruled with respect to its constitutionality. The bill thus died on the Senate *Order Paper* at prorogation. (See Sebastian Spano, *Bill S-4: An Act to amend the Constitution Act, 1867 (Senate tenure)*, LS-540E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, revised 5 October 2007.)

minimum qualifying age of 30). The shortened term could also reduce the length of the average term from approximately 9.7 years (as calculated since 1975) to close to eight.

Bill S-7 proposes a constitutional change, but one which the government has argued falls within the ambit of section 44 of the *Constitution Act, 1982*, allowing the Parliament of Canada, on its own, to amend the Constitution where such amendments concern “the executive government of Canada or the Senate and the House of Commons,” and which do not deal with any Senate-related exceptions to section 44 that are found in section 42 (see Part I of this document).

5. Are there proposals for term limits in the United Kingdom’s House of Lords?

In Part III, Section A, question 9, of this paper, which deals with the reforms to the selection process of the House of Lords, a discussion of the various studies and White Papers on House of Lords reforms is presented. Those studies and White Papers also considered the issue of term limits.

The Wakeham Commission recommended that lengthy non-renewable terms, ideally 12 to 15 years long, would help to preserve the continuity of membership of the proposed body. This continuity is viewed as important in fostering a long-term view of issues and a perspective based on extensive experience with the legislative process, both of which contribute to the distinctive role of the House of Lords. Non-renewable terms were seen as important in maintaining the required degree of independence from the executive.

Subsequent reports have made other recommendations for term limits in a reformed upper chamber. The government’s 2007 White Paper proposed a non-renewable 15-year term for both elected and appointed members (if the government-preferred option of a hybrid upper chamber consisting of partly elected and partly appointed members were to be chosen). In its 2008 White Paper, the government proposed a maximum of three non-renewable terms totalling 12 to 15 years for both elected and non-elected members.

The issue of term limits has generated considerable debate in the UK Parliament. Proponents of term limits have argued that the 12- to 15-year single terms would create an atmosphere of greater legislative experience and independence, along with less partisanship, and would attract experienced people in the later stages of other careers, but without long-term political ambitions. Opponents have argued that term limits would create the appearance of democracy but, without re-election, the absence of accountability. In addition, it has been said that lengthy non-renewable terms would dissuade rather than attract young people.

C. Regional Distribution of Seats

1. What are the Senate's regional divisions?

There are four regional divisions in the Senate of Canada as prescribed in the *Constitution Act, 1867*: Ontario, Quebec, the Maritime provinces and the western provinces. Each regional division has 24 senators. Newfoundland and Labrador is the only province which is not part of a regional division. The territories are not part of a regional division, either.⁽³⁴⁾

2. What is the representation of each province and territory in the Senate?

Provinces	
Alberta	6
British Columbia	6
Ontario	24
Manitoba	6
New Brunswick	10
Newfoundland and Labrador	6
Nova Scotia	10
Prince Edward Island	4
Quebec	24
Saskatchewan	6
Territories	
Northwest Territories	1
Nunavut	1
Yukon	1
Total	105

Source: *Constitution Act, 1867*, section 22; *Constitution Act, 1999 (Nunavut)*, S.C. 1998, c. 15, section 43(3).

3. How can the current distribution of Senate seats be amended?

Section 42(c) of the *Constitution Act, 1982* states that the usual amending formula (approval of at least seven provinces with at least 50% of the population of all provinces) applies if a proposal amends “the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of senators.”

4. Does the Senate effectively fulfill its role of regional representation?

Originally, the purpose of regional representation in the Senate was to compensate for the shortcomings of representation by population in the House of Commons. Quebec worried

(34) *Constitution Act, 1867*, s. 22.

that members from Anglophone provinces could use their majority to prevail against Francophone members, and the smaller provinces worried that they would be at the mercy of Ontario and Quebec. Given that the role of the Senate was to ease these two concerns, it can be said that the Senate failed to some degree because it did not prevent the birth of an important sovereignist movement in Quebec, nor did it prevent large numbers of people outside Ontario and Quebec, particularly in the West, from feeling excluded from federal decision making. In the beginning, it was thought that having 24 senators from each region (the West, Ontario, Quebec and the Maritimes) and the later addition of nine (six in Newfoundland and one each for the three territories) guaranteed sufficient representation for Quebec and under-representation for Ontario, which appeased the smaller provinces.

Two main factors have prevented the Senate from adequately fulfilling its role. Most importantly, its lack of democratic legitimacy has hampered it from effectively opposing the House of Commons. The upper chamber has not been a strong counterweight to the principle of representation by population, unlike the elected US Senate, for example. Secondly, the growth in population in the western provinces has resulted in under-representation from these provinces, further exacerbating the belief of many in the West that they are excluded from decision making in Ottawa.

5. How did the Charlottetown Accord “Triple E” reform proposal suggest that Senate seats should be distributed?

Noteworthy among proposals for seat redistribution in the Senate is the “Triple E” reform proposal included in the Charlottetown Accord. This proposal aimed to strengthen the Senate’s role in regional representation and to increase its democratic legitimacy. Under the proposal, this was to be achieved by electing senators and by guaranteeing an equal number of seats to each province so as to over-represent the smaller provinces to an even greater extent than was the case at Confederation. Originally, the formula of 24 senators per region (the West, Ontario, Quebec and the Maritimes), to which 9 others were added later (6 in Newfoundland and 1 for each of the three territories), was seen as guaranteeing sufficient representation for Quebec and under-representation for Ontario, a state of affairs that assuaged the concerns of the smaller provinces.

One of the arguments advanced by “Triple E” proponents was that the original formula of 24 senators per region was arbitrary and contrary to the principle of equality of the provinces.

Other proposals over the past 40 years, regardless of whether they included an elected Senate, have all put forward increased representation for the provinces (except Ontario and Quebec) but have not gone so far as to recommend equal representation for each province.

6. Have there been recent proposals to redistribute seats in the Senate?

On 27 June 2006, Senator Lowell Murray moved a motion in the Senate that the *Constitution Act, 1867* be amended to recognize British Columbia and the Prairie provinces as regions to be separately represented in the Senate. The motion proposed the number of seats representing each province be adjusted as follows:

- British Columbia – 12 (from 6);
- Alberta – 10 (from 6);
- Saskatchewan – 7 (from 6); and
- Manitoba – 7 (from 6).

This resulted in a new total of 117 senators (from 105).

A report on the motion was prepared by the Special Senate Committee on Senate Reform and tabled on 26 October 2006. During debate on the adoption of the report, the main objections to the motion were these: that it did not propose enough seats for the West; that additional Senate seats for the West ought to be part of a broader set of considerations to address so-called western alienation; and that the motion would unduly dilute the representation of other regions to an unacceptable extent. The motion died on the *Order Paper* when the 39th Parliament was dissolved.

D. Reforms Affecting the Powers of the Senate

1. What are the key provisions of the Constitution that govern the powers and functioning of the Senate?

Proponents of incremental, and typically Senate-initiated, reforms have maintained that a number of meaningful reforms could be achieved from within the Senate by renewing any number of provisions in the *Constitution Act, 1867* that relate to the Senate. Depending on the proposal, renewal could be effected by employing either the appropriate constitutional amending formula or through modifications to the *Rules of the Senate*.

The *Constitution Act, 1867* sets out the following key provisions, among others, in relation to the Senate:

- qualifications;
- disqualifications;
- number of members;
- addition of senators in certain cases;
- appointment of the Speaker; and
- voting in the Senate.

The Senate's rules and procedures, which outline the chamber's legislative, investigative and representative functions, as well as how it organizes and conducts its business, are found in the *Rules of the Senate*.

2. How do the powers of the Senate compare with those of the House of Commons?

The powers of the Senate and the House of Commons differ in three important instances: the introduction of money bills, constitutional amendments, and confidence motions.

a. Money Bills

Section 53 of the *Constitution Act, 1867* states that bills “for appropriating any part of the public revenue, or for imposing any tax or impost” may not originate from the Senate but must originate from the House of Commons. The House of Commons has claimed that its exclusive authority in respect of the introduction of money bills, including appropriation and taxation bills, extends to modifying those bills. The House has historically maintained, through its standing orders, that money bills are not alterable by the Senate.⁽³⁵⁾ The Senate, however, has challenged this claim as “unwarranted” under the provisions of the Constitution, which places no restrictions on its power to amend money bills originating in the House of Commons.⁽³⁶⁾ A practice has evolved, however, whereby when the Senate returns a money bill to the House with amendments, and the House accepts those amendments, the House will maintain that such

(35) Standing Orders of the House of Commons, S.O. 80(1).

(36) *Report of the Special Committee Appointed to Determine the Rights of the Senate in Matters of Financial Legislation*, 1918.

acceptance is not to be construed as a precedent and, therefore, an abandonment of the historical position of the House. For its part, the Senate has construed its powers to amend a money bill to include only the power to reduce an appropriation or a tax, not to increase it without the consent of the Crown.⁽³⁷⁾

b. Constitutional Amendments

Section 47(1) of the *Constitutional Act, 1982* states that the Senate has a 180-day suspensive veto on constitutional amendments. That means that the Constitution can be amended without the agreement of the Senate, but that the Senate can delay the adoption of the amendments for up to 180 days.

c. Confidence Motions

The upper chamber shares legislative power with the House of Commons, but the Senate cannot defeat the government through a confidence motion. This follows from the unwritten constitutional principle of “responsible government,” whereby, to legitimately exercise its executive power, the government – the prime minister and Cabinet – must always have the confidence of a majority of elected members in the House of Commons. That principle does not apply to the Senate.

3. What mechanisms are currently in place to resolve a deadlock between the Senate and the House of Commons?

There are no mechanisms to break a deadlock if the Senate refuses to pass a bill already passed by the House of Commons. This means that the Senate may veto any legislation voted on in the House. However, the appointed Senate rarely opposes decisions of the House of Commons. On one occasion, section 26 of the *Constitution Act, 1867*, which provides for the appointment of four or eight additional senators, was invoked by the government to avert a potential deadlock. (See Part III, Section A, Question 1, for a discussion on section 26.) Should a Senate with greater democratic credibility be established, it is likely that deadlocks could become more frequent.

4. What is a conference between the houses?

Conferences between the houses have largely lapsed into disuse, the last one having taken place in 1947. Since Confederation, 13 conferences have occurred, and were once

(37) Ibid., p. 3.

commonly used as a second step to resolve disagreement and to avoid protracted legislative deadlock. A conference may be requested by either of the two houses in the following cases:

- to communicate a resolution or an address with which the concurrence of the other house is desired;
- to discuss the privileges of Parliament;
- to discuss any matter that warrants the use of this procedure;
- to require or to communicate statements of facts on which bills have been passed by either house; and
- to offer reasons for disagreeing with, or insisting on, amendments to a bill.⁽³⁸⁾

5. Would an elected Senate be compatible with the principle of responsible government?

Responsible government means that the government – the prime minister and Cabinet – must always have the confidence of the majority of elected members in the House of Commons to legitimately exercise its executive power. This principle does not apply to the Senate. The upper chamber shares legislative power with the House of Commons, but, strictly speaking, the government is not dependent upon Senate support in order to continue to govern. This means that the Senate cannot defeat the government through a non-confidence motion.

An elected Senate might consider that it had the required standing to demand that the government be accountable to it. This would likely lead to serious ambiguities concerning the principle of responsible government. The government could find itself responsible to two separate chambers, both claiming to represent the will of the people. That is why most reform proposals that have recommended an elected Senate include a more explicit redefinition of its powers so as to entrench responsible government as an enduring basis for the exercise of executive power.

A key aspect of current reform proposals is the establishment of advisory elections that would morally bind the prime minister when appointing senators. Such an arrangement might lend the Senate greater credence without requiring constitutional reform. However, these reform proposals could not amend the Senate's powers in any way, because such

(38) R. Marleau and C. Montpetit, *House of Commons Procedure and Practice*, House of Commons, Ottawa, 2000, p. 676. See also John George Bourinot, *Parliamentary Procedure and Practice with an Introductory Account of the Origin and Growth of Parliamentary Institutions in the Dominion of Canada*, 4th ed., 1916, pp. 274–280.

amendments would necessarily require constitutional reform. The principle of responsible government might well be called into question, then, if the Senate's democratic legitimacy is strengthened through advisory elections without a simultaneous redefinition of the powers of the Senate.

6. What powers should a reformed Senate have?

Proponents of Senate reform argue that the institution would benefit from enhanced democratic legitimacy and accountability. However, reforms of any significance adopted by the Senate would inevitably affect the present balance of power between the upper and lower houses. During the 1980s and early 1990s, comprehensive Senate reform proposals were advanced by a number of sources. These proposals envisaged a new equilibrium of powers between the houses in legislative areas such as money bills, as well as the event of legislative deadlock. Table 1 provides a sampling of these proposals and the powers that they proposed for a reformed Senate.

Table 1 – Senate Reform Proposals

Legislative authority	Canada West Foundation (1981)	Special Joint Committee (Molgat-Cosgrove Committee) (1984)	Macdonald Commission (1985)	Alberta Select Committee (1985)	Government of Canada Proposals (1991)	Special Joint Committee on a Renewed Canada (Beaudoin-Dobbie Committee) (1992)	Charlottetown Accord Proposals (1992)
Money bills	The Senate could reject or reduce money bills (subject to House of Commons override), but not increase or initiate them.	Supply bills would not be subject to delay.	Not specified.	The House of Commons could override the Senate on money or taxation bills by simple majority.	The Senate would have no role in relation to appropriation bills and measures to raise funds, including borrowing authorities.	The Senate would have 30 days to deal with supply bills. There would be a House of Commons simple majority override on bills defeated or amended by the Senate.	The Senate could force the House of Commons to repass supply bills within 30 calendar days. The Senate could veto bills that result in fundamental tax policy changes directly related to natural resources.
Ordinary legislation	The Senate would have powers similar to those of the House of Commons, but the House could override the Senate by special majority.	The Senate would have a suspensive veto of 120 sitting days.	The Senate would have a six-month suspensive veto.	The House of Commons could override the Senate by a vote greater in percentage terms than the vote in the Senate.	Senate approval would be required.	Senate approval would be required, and there would be a House of Commons override. The nature of the override is not specified.	Defeat or amendment of ordinary legislation would lead to a joint sitting with the House of Commons. A simple majority would decide the outcome.

Legislative authority	Canada West Foundation (1981)	Special Joint Committee (Molgat-Cosgrove Committee) (1984)	Macdonald Commission (1985)	Alberta Select Committee (1985)	Government of Canada Proposals (1991)	Special Joint Committee on a Renewed Canada (Beaudoin-Dobbie Committee) (1992)	Charlottetown Accord Proposals (1992)
Linguistic/cultural matters	Not specified.	A double majority (all senators and all Francophone senators) would be required for “legislation of linguistic significance.”	A double majority would be required for “matters of special linguistic significance.”	A double majority would be required for “all changes affecting the French and English languages.”	A “double majority special voting rule” would be in place for “matters of language and culture.”	A double majority would be required for “measures affecting the language or culture of French-speaking communities.”	A double majority would be required for bills “materially affecting the French language and culture.”
Ratification of appointments	The Senate could ratify or reject appointments to national boards, tribunals or agencies.	The Senate could ratify appointments to federal agencies with important regional implications.	Not specified.	Not specified.	The Senate could ratify the appointment of the Governor of the Bank of Canada and heads of national cultural institutions, regulatory boards and agencies.	The Senate could ratify the appointment of the Governor of the Bank of Canada and heads of national cultural institutions, regulatory boards and agencies.	The Senate would be able to block all key appointments, including those naming heads of key regulatory agencies and cultural institutions.

Legislative authority	Canada West Foundation (1981)	Special Joint Committee (Molgat-Cosgrove Committee) (1984)	Macdonald Commission (1985)	Alberta Select Committee (1985)	Government of Canada Proposals (1991)	Special Joint Committee on a Renewed Canada (Beaudoin-Dobbie Committee) (1992)	Charlottetown Accord Proposals (1992)
Other	The Senate would have the power to ratify or veto constitutional amendments.	Not specified.	Not specified.	The Senate could ratify non-military treaties.	The Senate would have a six-month suspensive veto over “matters of national importance, such as national defence and international issues.”	Not specified.	Not specified.

Sources: Adapted from F. Leslie Seidle, “Senate Reform and the Constitutional Agenda: Conundrum or Solution?” in Janet Ajzenstat, ed., *Canadian Constitutionalism: 1791–1991*, Canadian Study of Parliament Group, Ottawa, 1992, p. 116; and Jack Stilborn, *Senate Reform Proposals in Comparative Perspective*, BP-316E, Parliamentary and Information Research Service, Library of Parliament, Ottawa, November 1992.

E. Abolition of the Senate

1. Has abolishing the Senate been discussed in the past?

Proponents of abolishing the Senate have voiced their opinions ever since the institution was first created:

- Goldwin Smith, a British-Canadian historian and journalist, advocated abolishing the Senate at the end of the 19th century.
- In 1906, the Senate debated at great length its own historical merits and its possible abolition.
- Abolition was a plank in the platforms of numerous agrarian and socialist movements well into the 20th century.

Abolishing the Senate has also been the subject of a number of legislative initiatives, including Bill C-60, which was introduced in the House of Commons in 1978. The bill proposed to abolish the Senate and replace it with a “House of the Federation.” This institution would have had reduced legislative powers, and its members would have been appointed through a process jointly administered by the provinces. In response to a reference from the government for an opinion, the Supreme Court of Canada held that the Constitution did not permit such an alteration of the structure of law-making as set out in the Constitution of Canada. The Senate was seen as an integral part of the legislative process, in which a general legislative power can be exercised only by the Queen with the advice and consent of the Senate and House of Commons.⁽³⁹⁾ The Court held that the government’s proposal would effectively enable Parliament to interfere with the exercise of legislative authority elaborated in sections 91 and 92 of the *British North America Act*, which is beyond the scope of Parliament’s power to amend the Constitution, as set out in section 91(1) of the *British North America Act*.⁽⁴⁰⁾ The Court was mindful of the historical background in which a particular legislative process that included the Senate was conceived, a process in which the provinces were characterized as contracting parties to the constitutional arrangement elaborated in the *British North America Act*. The Act in this context was regarded as a compromise under which the original provinces agreed to federate. To alter the terms of that compromise would amount to imposing a “new and different contract upon the federating bodies.”⁽⁴¹⁾

(39) Upper House Reference.

(40) Upper House Reference, pp. 71–72.

(41) In this part of the judgment, the Court cited with approval a passage written by Lord Sankey in *The Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54.

2. What are some of the arguments for and against abolishing the Senate?

The following arguments in favour of abolishing the Senate have been put forward by Canadian scholars and political observers:

- The Senate, as an unelected institution, lacks democratic legitimacy because the public is unable to hold senators responsible for their decisions.⁽⁴²⁾
- Senators are not necessarily appointed based on presumed ability to serve Canadians. Rather, they may be appointed because they have contributed to the party of the prime minister that appointed them. Whatever lack of democratic legitimacy the Senate has because its members are appointed is compounded by this partisan and potentially unimpressive motivation in appointment.⁽⁴³⁾
- Senators are not representative of the Canadian people. The appointment procedure creates a Senate that is comprised of members who are old and wealthy; unduly biased in favour of the long-lived government party; totally unrepresentative of minor parties; and male (though this is not so much the case as it is in the House of Commons). On average, they are more politically experienced than members of Parliament.⁽⁴⁴⁾
- The Senate is not needed to protect regional or provincial interests. It has often been argued that this founding role as it, among others, was envisaged for the Senate, has not been adequately fulfilled.⁽⁴⁵⁾
- One of the presumed benefits of an appointed upper house whose members serve long terms was that it would be an independent, forward-looking institution above partisan politics that would scrutinize legislation carefully. In reality, partisan affiliation has a strong influence in the workings of the Senate.

The following arguments against abolishing the Senate have been put forward by Canadian scholars and political observers:

- The Senate provides representation for the regions at the national level.⁽⁴⁶⁾

(42) Colin Campbell, *The Canadian Senate: A Lobby from Within*, Macmillan of Canada, Toronto, 1978, p. 31.

(43) C.E.S. Franks, *The Parliament of Canada*, University of Toronto Press, Toronto, 1987, p. 190.

(44) *Ibid.*, p. 188.

(45) Robert A. Mackay, *The Unreformed Senate of Canada*, (rev. ed.), McClelland and Stewart, Toronto, 1963, p. 113.

(46) Eugene Forsey, "Senator Eugene Forsey and Member of Parliament Stanley Knowles Debate the Abolition of the Senate," CBC Radio, Transcript, 14 January 1974, p. 6.

- Governments that lack elected members in the House of Commons from certain parts of the country can ensure that these areas are represented in Cabinet by drawing ministers from the Senate. Both Liberal and Conservative governments have done this in the recent past to compensate for a lack of representation from Quebec and western Canada in their caucuses.⁽⁴⁷⁾
- Senate committees can and do make a valuable contribution. Investigations by the Senate are usually conducted in a non-partisan manner. As these studies rarely get excessive exposure in the media, senators have the time and leisure to conduct diligent research and exhaustive analysis.⁽⁴⁸⁾
- The Senate can tidy up drafting errors in legislation originating in the House of Commons. While this revisory role is of somewhat less importance than it was in the past, it is still a very useful function performed by the Senate.⁽⁴⁹⁾
- The Senate plays a key role in the review of delegated legislation (legislation enacted by Cabinet through statutory instruments under powers delegated by Parliament). Although there is a joint committee of the House and Senate that reviews this legislation (the Joint Committee on Scrutiny of Regulations), senators have been credited with making the most valuable contribution.⁽⁵⁰⁾
- The Senate acts as a counterweight to the executive (Cabinet). Abolishing the Senate would substantially diminish the present capacity of Parliament as a whole to exercise adequate scrutiny of the executive.⁽⁵¹⁾
- Relative to the services it provides, the Senate does not cost the taxpayers very much money. For instance, to replace senators with a large body of expert lawyers to go over all the legislation would likely be less cost effective than the status quo.⁽⁵²⁾

3. Which Canadian provinces are in favour of abolishing the Senate?

The position of a province regarding the abolition of the Senate depends on the government of the day. At present, the following provinces,⁽⁵³⁾ when asked for their input regarding Senate reforms, have indicated that they are in favour of abolishing the Senate:

(47) Randall White, *Voice of Region: The Long Journey to Senate Reform in Canada*, Dundurn Press, Toronto, 1990, p. 74.

(48) Franks (1987), p. 190.

(49) Ibid.

(50) J.R. Mallory, "Curtailing the 'Devine Right': The Control of Delegated Legislation in Canada," in O.P. Dwivedi, ed., *The Administrative State in Canada: Essays in Honour of J.E. Hodgetts*, University of Toronto Press, Toronto, 1982, p. 145.

(51) Dan Mathis, "The Entire System Needs a New Look," *Policy Options*, March 1991, p. 17.

(52) Forsey (1974).

(53) As of the writing of this publication in 2009, these provinces have indicated their preference for abolishing the Senate.

- **British Columbia:** The government favours abolishing the Senate rather than reforming it. If reform is to be undertaken, however, the province believes that it should be comprehensive, requiring substantive changes and the use of the 7/50 amending formula (plus potentially the regional veto legislation).
- **Manitoba:** The province favours abolition, but has established a legislative committee to explore options for electing provincial senators.
- **Ontario:** The government would favour abolition rather than protracted Senate reform negotiations. It also opposes incremental and unilateral federal action.

The following provincial legislatures have abolished their upper houses: Ontario (1867), Manitoba (1867), New Brunswick (1892), Prince Edward Island (1893), Nova Scotia (1928), Newfoundland (1934) and Quebec (1968).⁽⁵⁴⁾

4. What are the constitutional implications of abolishing the Senate, and how could the abolition be accomplished?

Abolishing the Senate would require a constitutional amendment, but there is some doubt as to which of the following two procedures would apply.

- **Option 1: The 7/50 Formula**

Some constitutional experts have suggested that the 7/50 formula set out in section 42 of the *Constitution Act, 1982* would have to be followed.⁽⁵⁵⁾ This section provides that any amendment to the Constitution regarding “the powers of the Senate and the method of selecting Senators” would require the approval of the Senate and the House of Commons, in addition to the support of seven provinces representing at least 50% of the population of all the provinces.

Consideration must also be given to the *Act respecting constitutional amendments*, which additionally requires the prior consent of “a majority of the provinces,” defined as follows: Ontario, Quebec, British Columbia, at least two of the Atlantic provinces comprising at least 50% of the population of those provinces and at least two of the Prairie provinces comprising at least 50% of the population of those provinces.

(54) Alberta and Saskatchewan have had no experience with an upper chamber. The province of British Columbia has never had an upper chamber but the colony of Vancouver Island had one before union with the mainland.

(55) Osgoode Hall Law School, York University, “Abolishing Senate Would be Difficult, Say Constitutional Experts Dean Patrick Monahan and Professor Emeritus Peter Hogg,” 13 September 2007, <http://osgoode.yorku.ca/media2.nsf/83303ffe5af03ed585256ae6005379c9/9f63607a09c3020a85257355004cb6a3!OpenDocument>.

- **Option 2: Unanimous Consent**

Other constitutional experts have suggested that any attempt to abolish the Senate would require the unanimous consent of the provinces, in addition to the approval of the Senate and the House of Commons.⁽⁵⁶⁾ Furthermore, section 41 of the *Constitution Act, 1982* requires such approval for any amendment to the amendment procedures themselves. Because any constitutional amendment would require Senate approval, abolition of the Senate would be an amendment to the amendment procedures. The requirement for unanimous consent of the provinces would therefore apply.

F. Election of the Speaker of the Senate

1. What are the powers and mandate of the Speaker of the Senate?

The Speaker of the Senate of Canada is appointed by the Governor General, on the advice of the prime minister, in accordance with section 34 of the *Constitution Act, 1867*.

Originally, the Speaker of the Senate was not given any specific powers or responsibilities to enforce the *Rules of the Senate*. The office of Speaker of the Senate was modelled, in part, on the office of the British Lord Chancellor, and accordingly, the Speaker only intervened in debate to rule on a procedural question at the request of another honourable member. A revision of Senate rules in 1906 gave the Speaker much the same powers as his or her counterpart in the House of Commons. A new rule simply stated that the Speaker “shall preserve order and decorum, and shall decide points of order, subject to an appeal to the Senate.”⁽⁵⁷⁾ The effect of the adoption of this new rule was neither immediate nor profound, as there was some uncertainty about the extent of the powers conferred and the circumstances under which they could or should be used.

At present, the Speaker is responsible for administering the *Rules of the Senate*, and can be asked to rule on procedural questions, but his or her decisions are subject to appeal to the full Senate. That the Speaker does not have a casting vote underlines the fact that he or she is just one of 105 senators. The Speaker represents the Senate, and performs various ceremonial and protocol functions, but he or she plays a minimal role in the administration of the Senate and does not sit on or preside over the Standing Senate Committee on Internal Economy, Budgets and Administration, the body responsible for the management and administration of the Senate. This is in strong contrast to the Speaker of the House of Commons, who presides over the Board of Internal Economy, the Senate’s counterpart in the House, and who effectively presides over the management of the House.

(56) Benoît Pelletier, *La modification constitutionnelle au Canada*, Toronto, Carswell, 1996, pp. 217–225.

(57) Grant Purves, *Speakers of the Senate*, Library of Parliament, Ottawa, 1988, p. 1.

2. What are the arguments for and against an elected Speaker?

Arguments in favour of the Senate electing its own Speaker are often based on the evolution of the powers and role of the office since Confederation. Currently, the prime minister appoints the Speaker. The trend, embodied by rule changes in 1906 and 1991, has been towards an increasingly impartial and proactive Speaker. He or she, at present, oversees debate, rules on points of order and ensures that decorum is maintained, with senators increasingly relying on the Speaker to act fairly and judiciously in these matters. In this respect, proponents of the proposal that the Speaker be elected have argued that:

- The Speaker is a servant of the Senate, not the executive branch of government.
- The members of the upper chamber can best demonstrate their support of and confidence in their Speaker through an election. This would not only enhance the validity and moral authority of the Speaker, as well as the responsibility of senators, but might also improve the reputation of the Senate in the eyes of the public.
- Mechanisms could be devised to elect a Speaker without requiring a formal constitutional change. The Senate could advise the prime minister of its preferred candidate or ratify the choice through a “vote of confidence” following the appointment.

Those arguing against changing the status quo have also contended that, as a position appointed by the executive branch of government, the office of the Speaker is intertwined with certain other structural aspects of the Senate. They assert that the Senate, as an appointed body, was historically designed to be controlled by the executive and that the appointment of the Speaker by the prime minister is simply another part of this larger framework. One could further argue the following:

- While the Speaker plays a lesser role in the Senate chamber and with regards to administration than does the Speaker of the House of Commons, these arrangements could be significantly altered if the Speaker of the Senate were elected.
- It is questionable whether senators, who are themselves appointed, have the right to elect a Speaker, and whether such a move would indeed enhance the standing of the office.
- Constitutional implications of an elected Speaker must also be taken into account. If the election of a Speaker is deemed to alter the “powers of the Senate,” a reform of this nature would require a constitutional amendment under section 38 of the *Constitution Act, 1982*.

3. Have there been any recent proposals for the election of the Speaker?

On 19 October 2004, Senator Donald Oliver introduced Bill S-13, An Act to amend the Constitution Act, 1867 and the Parliament of Canada Act (Speakership of the Senate)⁽⁵⁸⁾ in the Senate, and it was given first reading. The bill would have amended section 34 of the *Parliament of Canada Act* to provide for the election of the Speaker and the Deputy Speaker of the Senate. Bill S-13 prescribed a secret ballot voting procedure similar to that in place in the House of Commons and provided that the elected Speaker not be able to vote in the Senate chamber except to break a tie. Bill S-13 was given second reading on 17 November 2004 and was sent to the Standing Senate Committee on Legal and Constitutional Affairs. It died on the *Order Paper* when the 37th Parliament was dissolved.

4. How is the Speaker of the House of Lords in the United Kingdom selected?

The House of Lords recently began electing its Speaker. The review of the appointment process began on 12 June 2003 when the Prime Minister's Office announced an end to the judicial function of the Lord Chancellor and his or her role as Speaker of the House of Lords. The House of Lords appointed a Committee on the Speakership of the House to examine, in 2003 and again in 2005, the prospect of modifying the role of Speaker. The committee's recommendations formed the basis of the current position of Lord Speaker.⁽⁵⁹⁾ Lord Speakers can sit for two terms only, which last a maximum of five years each. The Lord Speaker assumes some of the responsibilities previously held by the Lord Chancellor, but, unlike the Lord Chancellor, is independent of government in the appointment and role. Although the Lord Speaker chairs the Lords debating chamber, she or he has less authority than the counterpart Speaker in the Commons. This is because the Lords regulate themselves and the order of business in the House.

The main responsibilities of the Lord Speaker include:

- chairing daily business in the House of Lords debating chamber;

(58) The bill was previously introduced as S-3 during the 3rd Session of the 37th Parliament and S-16 during the 2nd Session of the 37th Parliament.

(59) The response to this question is based on excerpts from United Kingdom Parliament, *The Lord Speaker of the House of Lords – Briefing*, December 2006, <http://www.parliament.uk/documents/upload/HofLbriefDec06.pdf>, and United Kingdom Parliament, *The Lord Speaker*, http://www.parliament.uk/about/how/principal/lord_speaker.cfm.

- offering advice on procedure (the formal and informal rules of the Lords' everyday activities);
- formal responsibility for security in the Lords area of the parliamentary estate;
- speaking for the House on ceremonial occasions; and
- acting as an ambassador for the work of the Lords both at home and abroad.

In June 2006, the first election for the Speakership in the House of Lords was held. More than three weeks prior to the election, a candidates list was published and sent to all members of the House of Lords, together with a statement of each candidate's parliamentary service, entry in the Register of Lords' Interests, and election addresses of up to 75 words. Voting occurred from 10 a.m. to 8 p.m. on 28 June 2006, and the result was announced on 2 July 2006.⁽⁶⁰⁾

G. Other Reforms

1. Are property qualifications of senators still appropriate and relevant?

Sections 23(3) and 23(4) of the *Constitution Act, 1867* stipulate that senators must own property valued at \$4,000, over and above debts and liabilities. This requirement presumably was designed to ensure that the appointee was mature and established. Moreover, this sum was likely considered sufficiently lofty to guarantee senators of their independence. At present, however, the net worth of \$4,000 probably disqualifies few citizens.

In January 2009, Senator Tommy Banks introduced Bill S-215, An Act to amend the Constitution Act, 1867 (Property qualifications of Senators) in the Senate, and it was given first reading.⁽⁶¹⁾ The bill proposes to amend the *Constitution Act, 1867* to eliminate the property qualification for appointment to the Senate and to maintain a senator's place in the Senate. Bill S-215 was referred to the Standing Senate Committee on Legal and Constitutional Affairs for consideration on 24 March 2009.

(60) The House of Lords elected Baroness Helene Hayman as its first Lord Speaker.

(61) The bill was previously introduced as S-212 during the 1st Session of the 40th Parliament and S-229 during the 2nd Session of the 39th Parliament.

2. What are senatorial divisions in Quebec and how useful are they?

Quebec is unique as the only province to have senatorial divisions, where senators are required to own land in specific regions according to section 23(6) of the *Constitution Act, 1867*. Devised in the mid-1800s, the divisions include only the southern areas of the present province. As a result, areas in the north of the province are not represented in the Senate. The boundaries of Quebec's senatorial divisions could be revised to reflect the full size of the province; however, it may be difficult to decide on what basis this should be done. Alternatively, the divisions could be abolished, but this would no longer protect the interests of religious and linguistic minorities inside the province, as was the original intention of senatorial divisions. The purpose was to provide for an adequate representation for both the French-Catholic and the Anglo-Protestant groups in Quebec.⁽⁶²⁾

3. Should attendance requirements in the Senate chamber be improved?

Section 31(1) of the *Constitution Act, 1867* stipulates that senators may lose their seats if they fail to attend Senate sittings at least once during two consecutive sessions of Parliament. Reform proposals have included making this attendance requirement stricter, requiring, for example, that senators attend once every parliamentary session. This reform might improve the public's perception of the institution and it would likely benefit the Senate as a whole, allowing it to receive more fulsome contributions from a greater proportion of its members. It might also lead, however, to the disqualification of senators who cannot attend for reasons of illness, unforeseen circumstances, etc.

4. Is the minimum age to sit as a senator relevant?

Section 23(1) of the *Constitution Act, 1867* states that senators must be at least 30 years of age to be appointed. It is sometimes argued that an age restriction for the Senate is congruent with the notion of its being the "chamber of sober second thought." Conversely, consideration has been lent to lowering the age restriction, noting that the minimum age of a member of the House of Commons mirrors the minimum age at which a citizen can vote and run for election.⁽⁶³⁾

(62) Claude Bélanger, "Quebec, the Constitution and Special Status," Department of History, Marianopolis College, 23 August 2000, <http://faculty.marianopolis.edu/c.belanger/QuebecHistory/readings/special.htm>.

(63) Senator Dan Hays, "Renewing the Senate of Canada: A Two-Phase Proposal," 25 May 2007, p. 15.

5. Should senators be Canadian citizens rather than “subjects of the Queen”?

Section 23(2) of the *Constitution Act, 1867* refers to a senator as a “Subject of the Queen.” Senator Daniel Hays, among others, has noted that the language of this section could be renewed by requiring senators to instead hold Canadian citizenship (a concept that did not exist in 1867). Further, the Act with reference to the Senate could be revised to ensure it is gender-neutral. These modifications would in a certain respect be largely symbolic. On the other hand, they might also be construed as a significant gesture of willingness on the part of the Senate to modernize and be responsive to current standards.

6. What are the recent proposals for other Senate reforms?

Proposals to reform the Senate’s functions and membership have been advanced in recent years. In 2006, the Standing Senate Committee on Rules, Procedures and Rights of Parliament received an Order of Reference on a motion from Senator Daniel Hays to:

examine and report upon the current provisions of the *Constitution Act, 1867* that relate to the Senate and the need and means to modernize such provisions, either by means of the appropriate amending formula in the Act and/or through modifications to the *Rules of the Senate*.

The Committee held one hearing on the matter but did not produce a report for the Senate.

APPENDIX

FURTHER READING

The following bibliography lists selected materials on Senate reform in Canada, a small assemblage from the vast number on the subject. Canadian parliamentarians are encouraged to contact the Library of Parliament for further resources. Non-parliamentarians may consult their local public libraries or university libraries for assistance in researching the topic.

BOOKS

Joyal, Serge, ed. *Protecting Canadian Democracy: The Senate You Never Knew*. Canadian Centre for Management Development and McGill-Queen's University Press, Montreal and Kingston, 2003, which includes:

- Murray, Lowell, "Which Criticisms are Founded," pp. 133–150.
- Smith, David E., "The Improvement of the Senate by Nonconstitutional Means," pp. 229-270.
- Stilborn, Jack, "Forty Years of Not Reforming the Senate," pp. 31–66.

Kunz, F.A. *The Modern Senate of Canada: A Re-Appraisal*. University of Toronto Press, Toronto, 1967.

MacKay, R.A. *The Unreformed Senate of Canada*. McClelland and Stewart, Toronto, 1963.

Smith, David E. *The Canadian Senate in Bicameral Perspective*. University of Toronto Press, Toronto, 2003.

Smith, Jennifer, ed. *The Democratic Dilemma: Reforming the Canadian Senate*. McGill-Queen's University Press, 2009.

White, Randall. *Voice of Region: The Long Journey to Senate Reform in Canada*. Dundurn Press, Toronto, 1990.

ARTICLES

Heard, Andrew. *Assessing Senate Reform Through Bill C-19: The Effects of Limited Terms for Senators*. Working Paper 2008-12. Institute of Intergovernmental Relations, Queen's University School of Policy Studies, 2008. See also other papers in the series: Special Series: Working Papers on Senate Reform. <http://www.queensu.ca/iigr/working/papers.html>.

- Hogg, Peter. “Comments” [Comment on the Upper House Reference]. *Canadian Bar Review*, Vol. 58, No. 3, September 1980, pp.631–645. http://www.cba.org/cba_barreview/Search.aspx?VolDate=09%2f01%2f1980.
- Joyal, Serge. “Reflections on the Path to Senate Reform.” *Canadian Parliamentary Review*, Vol. 22, Fall 1999, pp. 2-6. <http://www2.parl.gc.ca/Sites/LOP/Infoparl/english/issue.asp?param=72&art=143>.
- Pellerin, Daniel. “Between Despair and Denial: What to Do About the Canadian Senate.” *Review of Constitutional Studies*, Vol. 11, No. 1, 2005, pp.1–35.
- Russell, Meg and Mark Sandford. “Why Are Second Chambers so Difficult to Reform?” *Journal of Legislative Studies*, Vol. 8, No. 3, Autumn 2002, pp. 79–89.
- Senate of Canada. Committees and Private Legislation Directorate. *A Legislative and Historical Overview of the Senate of Canada*, 2001. <http://www.parl.gc.ca/information/about/process/senate/legisfocus/legislative-e.htm>.

LIBRARY OF PARLIAMENT PUBLICATIONS

- Barnes, Andre. *Becoming a Senator: When and How It Occurs*. PRB 08-35E. Parliamentary Information and Research Service, Library of Parliament, Ottawa, 20 January 2009. <http://www.parl.gc.ca/information/library/PRBpubs/prb0835-e.htm>.
- Bédard, Michel. *Bill C-20: Senate Appointment Consultations Act*. LS-588E. Parliamentary Information and Research Service, Library of Parliament, Ottawa, 13 December 2007. <http://www.parl.gc.ca/LEGISINFO/index.asp?Language=E&query=5313&Session=15&List=ls>.
- Bédard, Michel. *Bill C-30: Senate Ethics Act*. LS-646E. Parliamentary Information and Research Service, Library of Parliament, Ottawa, 2 June 2009. <http://www2.parl.gc.ca/Sites/LOP/LEGISINFO/index.asp?Language=E&query=5819&Session=22&List=ls>.
- Bédard, Michel. *Bill C-43. Senate Appointment Consultations Act*. LS-553E. Parliamentary Information and Research Service, Library of Parliament, Ottawa, 23 April 2007. <http://www.parl.gc.ca/LEGISINFO/index.asp?Language=E&query=4899&Session=14&List=ls>.
- O’Neal, Brian, James Robertson and Sebastian Spano. *British House of Lords Reform: Recent Developments*. PRB 08-40E. Parliamentary Information and Research Service, Library of Parliament, Ottawa, 27 February 2009. <http://www.parl.gc.ca/information/library/PRBpubs/prb0840-e.htm>.

Spano, Sebastian. *Bill C-19: An Act to amend the Constitution Act, 1867 (Senate tenure)*. LS-580E. Parliamentary Information and Research Service, Library of Parliament, Ottawa, 21 November 2007. <http://www.parl.gc.ca/LEGISINFO/index.asp?Language=E&query=5312&Session=15&List=ls>.

Spano, Sebastian. *Bill S-4: An Act to amend the Constitution Act, 1867 (Senate tenure)*. LS-540E. Parliamentary Information and Research Service, Library of Parliament, Ottawa, 5 October 2007. <http://www.parl.gc.ca/LEGISINFO/index.asp?Language=E&query=4771&Session=14&List=ls>.

Spano, Sebastian. *Bill S-7: An Act to amend the Constitution Act, 1867 (Senate term limits)*. LS-647E. Parliamentary Information and Research Service, Library of Parliament, Ottawa, 2 June 2009. <http://www2.parl.gc.ca/Sites/LOP/LEGISINFO/index.asp?Language=E&query=5841&Session=22&List=ls>.

Stilborn, Jack. *Senate Reform: Issues and Recent Developments*. PRB 07-42E. Parliamentary Information and Research Service, Library of Parliament, Ottawa, 21 January 2008. <http://www.parl.gc.ca/information/library/PRBpubs/prb0742-e.htm>.

Stilborn, Jack. *Senate Reform Proposals in Comparative Perspective*. BP-316E. Parliamentary Information and Research Service, Library of Parliament, Ottawa, November 1992. <http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/BP/bp316-e.htm>.

JURISPRUDENCE

Re: Authority of Parliament in Relation to the Upper House, [1980] 1 S.C.R. 54. <http://csc.lexum.umontreal.ca/en/1979/1980rcs1-54/1980rcs1-54.html>.

PARLIAMENT OF CANADA COMMITTEE REPORTS

Parliament, Special Joint Committee of the Senate and House of Commons on Senate Reform (Molgat-Cosgrove). *Report*. 1984.

Parliament, Special Joint Committee of the Senate and House of Commons on a Renewed Canada (Beaudoin-Dobbie). *Report*. 1992.

Senate, Special Committee on Senate Reform. *Report on the motion to amend the Constitution of Canada (western regional representation in the Senate)*. October 2006. <http://www.parl.gc.ca/39/1/parlbus/commbus/senate/com-e/refo-e/rep-e/rep02oct06-e.pdf>.

Senate, Special Committee on Senate Reform. *First Report: Report on the subject-matter of Bill S-4, An Act to amend the Constitution Act, 1867 (Senate tenure)*. 1st Session, 39th Parliament, 26 October 2006. <http://www.parl.gc.ca/39/1/parlbus/commbus/senate/com-e/refo-e/rep-e/rep01oct06-e.htm>.

Senate, Standing Committee on Legal and Constitutional Affairs. *Report on Certain Aspects of the Canadian Constitution* (“Lamontagne Report”). 1980.

Senate, Standing Committee on Legal and Constitutional Affairs. *Thirteenth Report* (Bill S-4, An Act to amend the Constitution Act, 1967 [Senate tenure] reported with amendments). 1st Session, 39th Parliament, 12 June 2007. <http://www.parl.gc.ca/39/1/parlbus/commbus/senate/com-e/lega-e/rep-e/rep13jun07-e.htm>.

PROVINCIAL LEGISLATIVE COMMITTEE REPORTS

Alberta Special Select Committee on Upper House Reform. *Strengthening Canada: Reform of Canada’s Senate*. Edmonton, March 1985.

GOVERNMENT REPORTS

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*. Ottawa, 1969.

Government of Canada. *A Time for Action: Highlights of the Federal Government’s Proposals for Renewal of the Canadian Federation*. Ottawa, 1978.

Royal Commission on the Economic Union and Development Prospects for Canada (Macdonald). *Report*. 1985.

INTER-GOVERNMENTAL REPORTS

Consensus Report on the Constitution: Final Text. Charlottetown, 28 August 1992.

OTHER REPORTS

McCormick, Peter, Ernest C. Manning and Gordon Gibson. *Regional Representation: The Canadian Partnership: A Task Force Report*. Canada West Foundation, 1981.