THE SENATE LE SÉNAT

CANADA

Special Senate Committee on Senate Reform

Report on

The subject-matter of Bill S-4, An Act to amend the Constitution Act, 1867 (Senate tenure)

Chair
The Honourable Daniel Hays

Deputy Chair
The Honourable W. David Angus

October 2006

Special Senate Committee on Senate Reform

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39th Parliament, 1st Session

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NOTE: In this report, the testimony received by witnesses printed in the *Proceedings of the Special Senate Committee on Senate Reform* will be hereinafter referred to only by issue number and page number within the text, e.g. *(1:89)*.

Extract from the *Journals of the Senate*, Wednesday, June 21, 2006:

The Honourable Senator Fraser moved, seconded by the Honourable Senator Cook:

That a Special Senate Committee be appointed to undertake a comprehensive review of the Senate Reform or any other related matter referred to it by the Senate;

That, notwithstanding rule 85(1)(b), the Special Committee comprise ten members namely the Honourable Senators Adams, Austin, P.C., Bacon, Baker, P.C., Banks, Biron, Andreychuk, Angus, Carney, P.C. and Murray, P.C., and that four members constitute a quorum;

That, pursuant to Rule 95(3)(a), the Committee be authorized to meet during periods that the Senate stands adjourned for a period exceeding one week;

That the Committee have power to send for persons, papers and records, to examine witnesses, to report from time to time and to print such papers and evidence from day to day as may be ordered by the Committee;

That the Committee have power to engage the services of such counsel and technical, clerical, and other personnel as may be necessary for the purpose of its examination and consideration of such bills and subject-matters of bills as are referred to it;

That the Committee be authorized to permit coverage by electronic media of its public proceedings with the least possible disruption of its hearings; and

That the Committee submit its final report no later than September 28, 2006.

After debate,

The question being put on the motion, it was adopted.

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Extract from the *Journals of the Senate* of Wednesday, September 27, 2006:

The Honourable Senator Hays moved, seconded by the Honourable Senator Fraser:

That, notwithstanding the Order of the Senate adopted on Wednesday, June 21, 2006, the date for the Special Senate Committee on Senate Reform to submit its final report be extended from September 28, 2006 to October 26, 2006.

After debate,

The question being put on the motion, it was adopted.

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Extract from the *Journals of the Senate* of Wednesday, June 28, 2006:

Resuming debate on the motion of the Honourable Senator LeBreton, P.C., seconded by the Honourable Senator Comeau, for the second reading of Bill S-4, An Act to amend the Constitution Act, 1867 (Senate tenure).

After debate,

In amendment, the Honourable Senator Fraser moved, seconded by the Honourable Senator Austin, P.C., that Bill S-4 be not now read a second time but that the subject-matter thereof be referred to the Special Senate Committee on Senate Reform; and

That the Order to resume debate on the motion for the second reading of the bill remains on the Order Paper and Notice Paper.

The question being put on the motion in amendment, it was adopted.

Paul C. Bélisle
Clerk of the Senate

Special Senate Committee on Senate Reform

The Honourable Daniel Hays, Chair

The Honourable W. David Angus, Deputy Chair

The Honourable Senators:

Jack Austin, P.C.
Maria Chaput
Gerald J. Comeau
Dennis Dawson
Elizabeth Hubley
Jim Munson
Lowell Murray, P.C.
Hugh Segal
David Tkachuk
Charlie Watt

Note: Senators Marjory LeBreton, P.C. (or Gerald J. Comeau) and Daniel Hays (or Joan Fraser) are members *ex officio*.

Other Senators who participated in the work of the Committee :

The Honourable Senators: Downe, Fairbairn, P.C., Fraser, Harb, LeBreton, P.C., Losier-Cool, Prud'homme, P.C. and Tardif

Original Members agreed to by Motion of the Senate :

The Honourable Senators : Adams, Austin, P.C., Bacon, Baker, P.C., Banks, Biron, Andreychuk, Angus, Carney, P.C. and Murray, P.C.

INTRODUCTION

On June 21, 2006, the Senate established the Special Senate Committee on Senate Reform. The motion proposing the Committee was moved by Senator Joan Fraser and seconded by Senator Joan Cook, and provided that the Committee submit its final report no later than September 28, 2006. On September 27, 2006, the Senate agreed to extend the reporting date to October 26, 2006.

The motion establishing the Committee provided that it "…undertake a comprehensive review of Senate reform, or any other matter referred to the Committee by the Senate." Two specific matters were subsequently referred, and have provided the focus for the work reflected in the Committee's work to date. They are:

- The subject-matter of Bill S-4, An Act to amend the *Constitution Act, 1867*. The bill would require new senators to be appointed for eight year terms. These senators would not be subject to mandatory retirement at age 75, which would continue to apply to existing senators. The bill was introduced by the Government in the Senate on May 30, 2006 and its subject-matter was referred to this Committee on June 28.

- A motion of Senator Murray, seconded by Senator Austin, 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 number of seats representing each province would be as follows: British Columbia – 12 (from 6), Alberta – 10 (from 6), Saskatchewan – 7 (from 6), and Manitoba – 7 (from 6), for a new total of 117 senators (from 105). The motion was moved on June 27, 2006 and referred to this Committee on June 28.

Bill S-4 and the Murray/Austin motion deal with unrelated characteristics of the Senate, and are being addressed by this Committee in separate reports. This Report presents our findings and conclusions relating to the subject-matter of Bill S-4.

To make the most efficient use of the time expert witnesses gave to the Committee, hearings addressed both sets of issues simultaneously. These hearings focussed on the issues raised by Bill S-4 and the Murray/Austin motion, rather than revisiting the much broader range of Senate reform and related constitutional issues that have been considered, in some cases repeatedly, over the years. This report, like the discussions we had with our witnesses, does not seek to revisit the multiple issues that have been explored in previous parliamentary studies of Senate reform. Rather, this earlier work is used as a point of departure for focussed attention to the subject-matter of Bill S-4, along with a limited number of issues directly related to it.

Members of the Committee express their thanks to Prime Minister Stephen Harper, government officials and expert witnesses who appeared before the Committee during hearings held the week of September 4, 2006, and the week of September 18, 2006 (for a complete list of witnesses, see Appendix A). We also thank those who submitted written

briefs for our consideration. The briefs and advice received by the Committee have been immensely helpful to members, as will be evident throughout this report.

BACKGROUND

Bill S-4 would amend s. 29 of the *Constitution Act, 1867* to provide that senators be appointed for a term of eight years. If enacted, this amendment would result in the second change to the term of senators since 1867. Senators were originally appointed for life, until a 1965 amendment established the current mandatory retirement age of 75.[1]

Like the 1965 amendment, the amendment proposed in Bill S-4 would not apply to existing senators. If all existing senators remain in their positions until mandatory retirement, the result would be a period of transition in the composition of the Senate extending until 2030, when the last existing senator would reach the mandatory retirement age.[2] If, on the other hand, incentives to earlier retirement were put in place (as was done in 1965, with satisfactory pension arrangements for senators agreeing to retire at age 75), the transition in the Senate's composition could be accelerated.

Bill S-4 is silent with respect to the reappointment of eight-year senators when their terms are completed. It thus leaves the Prime Minister with the discretion to renew the terms of such senators. The terms of eight-year senators could be renewed at (or beyond) the age of 75, since the amendment proposed in Bill S-4 would remove, for eight-year senators, the mandatory retirement age established in 1965.

The Bill raises two sets of issues directly, and at least one further issue indirectly. This Part, including the review of background information provided immediately below, is structured accordingly.

First, there is a constitutional issue relating to how an amendment to the Constitution that changes the terms of senators needs to be made. It may fall within the class of amendments that can be made by Parliament acting on its own, as is the position of the government or, as has been suggested by some, it may require ratification by the Parliament and seven provincial legislatures representing at least two-thirds of the population of all the provinces.

Second, there is a set of institutional issues relating to possible benefits and drawbacks of an eight-year term for senators and, broadly, what impact this change would have on the Senate, Parliament, and Canada's democratic political process.

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[1] This change occurred four years after the imposition of mandatory retirement at age 75 for appointed superior court judges, who were also originally appointed for life. The latter measure was achieved when section 99 of the *British North America Act* was amended by an Act of the United Kindgom Parliament, the *Constitution Act, 1960*, 9 Eliz. II, c. 2 (U.K.). The amendment was also made retroactive, since the wording of the amended provision states that Superior Court judges "shall cease to hold office" upon reaching age 75 or on the coming into force of the provision if the judge had already reached age 75.

[2] This reflects the declared intention of Senator Michael Fortier, whose mandatory retirement date is 2037, to retire from the Senate to run in the next House of Commons election.

Third is the issue of advisory elections. The Bill does not address the basis on which future Senate appointments might be made, and the position of the government is that Bill S-4 can stand or fall on its own merit. However, during his appearance before the Committee on September 7, 2006, Prime Minister Harper affirmed the government's commitment to making the Senate more effective and democratic. He also stated that his government hoped at some later date, possibly this fall, to "introduce a bill in the House to create a process to choose elected senators."(speech notes, p. 4). Since the impact of Bill S-4 would be affected by such elections, the Committee has considered the implications of this prospective change as well, including evidence relating to the acceptability of implementing advisory elections as a practice, without altering the Constitution to reflect explicitly this basis for selecting senators.

Reflecting the three issues just outlined, this Report provides immediately below an overview of previous reports that have addressed the issue of term limits for senators, and key considerations that have been identified. A brief overview of recent Canadian experience with advisory elections is also presented. Under a separate heading, relevant background on the constitutional issue is also provided.

A. Institutional background

Term Limits

The implementation of limited terms for service in the Senate has been an integral part of the general discussions about, and proposals for, Senate reform for several decades.[3] This has been so particularly when the Senate itself has been involved in those discussions. The major difference among these reports is that early reports proposed reforms for an appointed Senate, including limits to the length of appointments. In contrast, later proposals focus on elected Senate proposals, which normally include limits to terms as a consequence of the operation of an electoral system.

In 1965, the first limit – that of fixing a mandatory retirement date for senators upon attainment of age 75 (when previously appointment was for life) – was implemented by way of constitutional amendment. This was followed, in 1972, by a recommendation from the Special Joint Committee on the Constitution of Canada (Molgat – MacGuigan Committee) that the compulsory retirement age for senators be further reduced to 70 years.[4] Eight years later, in 1980, the Senate Standing Committee on Legal and Constitutional Affairs argued in favour of an appointed, rather than elected, Senate, but

[3] See the *Hon. Serge Joyal, ed., Protecting Canadian Democracy: The Senate You Never Knew, Canadian Centre for Management Development and McGill-Queen's University Press, Montreal and Kingston, 2003* for wide-ranging recent scholarship on Senate reform.

[4] Special Joint Committee on the Constitution of Canada (1970-1972), *Final report* 1972. The Joint Committee's recommendation no. 41 reads: "The compulsory retirement age for all new senators should be seventy years. Upon retirement, senators should retain the right to the title and precedence of senators and the right to participate in the work of the Senate or of its Committees but not the right to vote or to receive the indemnity of senators."

asserted that appointments "should be for a ten-year term."[5] Terms could be renewed for an additional five years on the recommendation (by secret ballot) of a special committee of the Senate. A 1981 Canada West Foundation task force departed from previous studies with a call for an elected Senate. In its report, written by Ernest C. Manning and two scholars who appeared before this Committee, Peter McCormick and Gordon Gibson, the task force recommended that senatorial terms "should be measured in terms of the life of a Parliament" (recommendation 7) and that senators should serve for a term "that is to be defined as the life of two parliaments" (recommendation 8).[6]

In its 1984 Report, the Special Joint Committee of the Senate and the House of Commons on Senate Reform (Molgat-Cosgrove Committee) recommended that senators be elected to serve a non-renewable term of nine years. The Joint Committee reasoned that the principal role of the Senate is to provide regional representation and that an upper house composed of elected members was the "only kind of Senate that can adequately fill" that role.[7] The Special Joint Committee expressed a preference for single terms because, from the perspective of the Committee, this would give senators greater independence from political party influence and remove from them the kinds of constituency duties already performed by Members of the House of Commons. This, in turn, would permit them to concentrate on the work of the Senate and its committees.[8] Although the Joint Committee had difficulties in establishing the length of term, it settled on nine years with one-third of senators being elected every three years. This would "allow for continuity in the Senate", enhance the independence of senators, and give them the opportunity to become fully effective as legislators and regional representatives.[9]

In 1992, the Special Joint Committee of the Senate and House of Commons on a Renewed Canada (Beaudoin-Dobbie Committee) tabled its Report, *A Renewed Canada*, in which it responded to proposals put forward by the Government of Canada for constitutional renewal. One of the broad themes reflected by the Joint Committee's recommendations was the need for enhanced regional representation and capacity – particularly those regions in Atlantic and Western Canada – in the institutions of central government. If, according to the Joint Committee, the ability of the Senate to perform is principal role of regional representation were not enhanced, the Senate would "risk being irrelevant."[10] With this in mind, the Joint Committee called for senators to be elected by the people of Canada on the basis of a proportional representation electoral system. To distinguish senators from those serving in the House of Commons, the Joint Committee called for elections for the two chambers to be held separately, and for senators to serve fixed terms of no more than six years. The Joint Committee rejected staggered terms

[5] The Standing Senate Committee on Legal and Constitutional Affairs, *Report on Certain Aspects of the Canadian Constitution*, (Goldenberg Report), Ottawa, 1980, p. 43.
[6] Peter McCormick, Ernest C. Manning, and Gordon Gibson, *Regional Representation: The Canadian Partnership, Canada West Foundation*, Calgary, 1981, p. 111 – p. 113.
[7] Special Joint Committee of the Senate and the House of Commons on Senate Reform (Molgat-Cosgrove), January 1984, p. 1)
[8] Ibid, p. 26.
[9] Ibid, p. 27.
[10] Special Joint Committee of the Senate and the House of Commons on a Renewed Canada (Beaudoin-Dobbie Committee), February 1992, p. 42.

because it believed that proportional representation "works best when there are relatively large numbers of competing candidates, and staggered terms would mean that only a fraction of the Senate's membership would run in each election."[11] The Joint Committee recommended a six-year term because "terms as long as nine years would tend to insulate senators from their electors, and reduce their credibility."[12] The Joint Committee was silent on the issue of renewable versus non-renewable terms.

Others outside the Senate have also made proposals calling for limits on the length of service in the Upper House. The Alberta Select Committee on Senate Reform recommended in 1985, for example, that senators be directly elected in concert with provincial elections and that they should serve for the life of two legislatures of the provinces from which they had been elected. As well, the Government of Canada has put forward a number of important proposals over the years, including Bill C-60 (1978), which would have established terms coinciding with the interval between federal or provincial elections and, more recently, in the 1991 federal White Paper that proposed an elected Senate.[13] Proposals that addressed other dimensions of Senate reform have also been made, including the Resolution to authorize a constitutional amendment proposed by the government in 1985, which would have reduced the powers of the Senate to those of a suspensive veto, enabling the Senate to do no more than delay money bills for up to 30 days, and other bills for up to 45 days.

In their conclusions, based upon careful study and consultation with citizens, academics, and others, all of these exercises in constitutional renewal produced unanimous support for some form of limit on the length of time an individual could sit in the Senate. It is notable that despite variations in some areas and outright disagreement in others, virtually all who have thought about this issue have been in accord.

Advisory Elections

Following the defeat of attempts at comprehensive constitutional change (including Senate reform) in the 1980's and early 1990's, proponents of major Senate reform turned their attention to the exploration of options that promised to avoid the need for formal constitutional amendments. In particular, proponents of the Triple "E" Senate (equal, elected, effective) that has been promoted by Alberta since the mid-1980s have argued that at least the "elected" E could be achieved without constitutional change.[14] Elections could be held for the purpose of identifying "nominees," and the Prime Minister could routinely appoint the election winners, without any change to the constitutional requirement that the Governor General appoint senators (by convention, this is done at the request of the Prime Minister). The effect would be the gradual replacement of the existing appointed Senate with a body composed of elected senators.

[11] Ibid, p. 49.
[12] Ibid, p. 49.
[13] Government of Canada, Bill C-60, 1978, would have made one-half of the Senate appointed by the provincial legislatures and one-half by the federal House of Commons, with terms coinciding with elections in each jurisdiction. Government of Canada, "Shaping Canada's Future Together – Proposals", Chapter 2.2, 1991, did not specify the term, but an elected Senate would normally require a limited term.
[14] See, for example, Canada West Foundation, *For the Record: Alberta's 1998 Senate Election,* April 1998.

In 1989, the Alberta government enacted the *Senatorial Election Act*, and held an election on October 16 that was won by Mr. Stan Waters. In June 1990, as the federal government attempted to prevent the rejection of the Meech Lake constitutional agreement, it was persuaded to appoint Mr. Waters to the Senate. It is noteworthy that the constitutionality of this approach has never been considered by the Supreme Court. As the presentations of expert witnesses to this Committee illustrate, debate continues among scholars over whether the implementation of advisory elections would be consistent with the requirements of the constitutional amending procedure, in s. 42 of the *Constitution Act, 1982* which requires a constitutional amendment, ratified by the national Parliament and the legislatures of at least seven provinces containing at least 50% of the population of all the provinces, for changes to (among other matters) "the method of selecting senators." Advisory elections would leave the formal power to appoint senators unchanged, but would provide a Prime Minister with a new basis upon which to make the selection decision. There is thus room for debate as to whether it changes the method for selecting senators, or not. The 1990 Mulroney appointment of Senator Waters occurred some six months after the Alberta senatorial election, and he did not rely on the pool of senatorial nominees when he made the next Alberta Senate appointment (Senator Ron Ghitter, in 1993).

Elections were again held in Alberta, in 1998, but Prime Minister Jean Chrétien rejected them as a basis for selecting senators, as did Prime Minster Martin in 2004. In contrast, the 2006 Conservative campaign platform commits to the creation of a national process to choose "elected senators" from each province and territory. This commitment was reflected, in more open-ended language, in the 4 April 2006 Speech from the Throne, which indicated that the government will "…explore means to ensure that the Senate better reflects both the democratic values of Canadians and the needs of Canada's regions."[15] When Prime Minister Harper appeared before this Committee, he provided further details about the government's plans (see "What the Committee Heard," below).

House of Lords Reform in the United Kingdom – A Note

As the preamble of the *Constitution Act, 1867* and remarks of the Fathers of Confederation in the debates leading to its development make clear, the system of government established in the United Kingdom served as a general model for that of Canada. In the case of the Senate, major adaptations to two distinctive realities were required: the existence of a federal system reflecting the importance of regional identities, and the absence of a landed aristocracy. The Senate has thus always been a distinctively Canadian institution, and practices or reform options developed for the upper chambers of other countries need to be assessed carefully in that light.

Notwithstanding the differences between the United Kingdom and Canada, it is noteworthy that reform of the British House of Lords has emerged as a significant issue

[15] House of Commons, *Debates*, April 4, 2006, (http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=39&Ses=1&DocId=2155000#SOB-1498346).

in the United Kingdom in recent years, for reasons that will be familiar to participants in debates about Senate reform in Canada. Most importantly, concerns about the legitimacy (and consequent effectiveness) of an appointed body within the democratic political process have steadily grown. As a result, a series of proposals for the election of some or all members of the House of Lords have been developed over the years.

In 1997, the Labour government started a process for making significant changes to the House of Lords.[16] Subsequent to a White Paper, *Modernising Parliament: Reforming the House of Lords*, released in January 1999, the government established a Commission, chaired by Lord Wakeham, to examine proposals for comprehensive reform and, as a transitional measure, passed the *House of Lords Act, 1999* which removed the right of all but 92 hereditary peers (previously there were nearly 700) to sit in the upper house. More ambitious proposals, involving the election of some or all Lords were made by the Wakeham Commission (which reported in 2000), a series of subsequent parliamentary committees and the government itself. However, as debate proceeded, positions became increasingly polarized and reform came to a standstill. In general, election options were resisted by the Lords, while appointive or mixed options being proposed by the government were rejected by dissident backbench MPs.

In February 2005, an informal all-party working group of British parliamentarians that had been meeting to build on elements of consensus developed over the years released a report containing a range of practical recommendations.[17] The British working group has agreed on a proposal to elect 70% of the House of Lords in elections to be held in existing regions of the United Kingdom, based on single transferable votes so as to maximize voter choice. Elections would be held at the same time as general elections, and terms would normally correspond to three House of Commons terms, or about 12 years. Terms would also be non-renewable, which is seen by the authors of the report as an important basis for the independence of the proposed chamber, and for a distinctive role that would rely on a membership made up on people who are not career politicians.

B. Constitutional Background

When Bill S-4 was introduced in the Senate, the government maintained that the amending process in section 44 of the *Constitution Act, 1982* would be applicable. Section 44 states that Parliament can act alone in amending the Constitution of Canada in relation to the executive government of Canada, the Senate and the House of Commons subject to sections 41 and 42 of the Act. Section 41 prescribes the matters that require unanimity among all the provinces and Parliament. Section 42(1), paragraphs (b) and (c), specifically outline four exceptions to the powers that are given to Parliament in section 44. These paragraphs provide that where an amendment would alter the method of selection of senators, the powers of the Senate, the distribution of Senate seats, or the

[16] See Chris Clarke, *House of Lords Reform Since 1999: A Chronology*, Library Note, House of Lords Library, U.K., 19th July 2006.

[17] Paul Tyler, Kenneth Clarke, Robin Clarke, Tony Wright and George Young, *Reforming the House of Lords: Breaking the Deadlock*, The Constitution Unit, Government of the United Kingdom, 2005.

residence qualifications of senators, the concurrence of at least seven provinces representing at least 50% of the population of all the provinces is required. That amending process is set out in section 38(1) of the 1982 Act.

Section 44 replaced section 91(1) of the *British North America Act*, which prescribed Parliament's exclusive authority to amend the Constitution of Canada. Section 91(1) granted broad authority to Parliament to amend the Constitution of Canada subject to five major exceptions.[18] It is noteworthy that Parliament invoked this provision in 1965 to eliminate life terms for senators and impose a mandatory retirement age of 75. Under section 91(1), no provincial concurrence was required for this amendment. As a result, Parliament was able to establish the mandatory retirement age by acting on its own.

In 1996, the general amending formula in section 38(1) was made subject to the Regional Veto Act, which prohibits a Minister of the federal Crown from proposing a resolution for a constitutional amendment unless the consent of various provinces has been first obtained.[19] The provinces that must consent are: Ontario; Quebec; British Columbia; at least two Atlantic provinces having at least 50 percent of the total population of those provinces; and, at least two of the three prairie provinces representing at least 50% of the combined population of the prairie provinces. Because Alberta now has over 50% of the population of the prairie provinces, its consent is required in order to effect a constitutional amendment. Professor Monahan, who also appeared before this Committee as an expert witness, has estimated that the Regional Veto Act effectively raises the population requirement for a constitutional amendment under section 38(1) from 50% to 92%.[20] The Act does not apply to constitutional amendments where the provinces have a right of veto under sections 41 or 43 or a right of dissent under section 38(3).

The Act imposes restrictions only on Ministers of the Crown in proposing resolutions of Parliament to amend the Constitution. It does not prohibit someone other than a Minister from introducing a resolution where the required provincial consent is lacking. Similarly, it does not prohibit Parliament from passing such a resolution.[21]

Amendments under section 44 of the *Constitution Act, 1982* are not subject to the Regional Veto Act, since that section speaks of amendment by "laws" and not "resolutions." The Regional Veto Act specifically applies to "resolutions."

Bill S-4 does not appear to affect the Senate in the ways contemplated in section 42, which sets out the specific matters that require resort to the amending formula in section 38(1) of the 1982 Act. In the text of section 42, no mention is made of Senate tenure. Thus it is argued by most witnesses that Parliament has the capacity to act alone in

[18] There five exceptions included amendments that would affect: provincial legislative powers; schools; the use of the French and English languages; the requirement that there shall be a session of Parliament at least once each year; and, the requirement that the House of Commons should continue for no more than five years, or longer in times of war, invasion, or insurrection.
[19] *An Act Respecting Constitutional Amendments*, S.C. 1996, c. 1.
[20] P. Monahan, *Constitutional Law*, 2nd Ed. (Irwin Law: Toronto, 2002) p. 207.
[21] P. Hogg, *Constitutional Law of Canada*, 3rd Edition (Carswell: Toronto, 1997) (looseleaf), p. 4-23.

reducing Senate tenure as proposed in Bill S-4 and, as will be seen below, interpreted the amending provisions of the Constitution in this manner.

Another possible approach has resulted in differing views about whether Parliament has the capacity to act alone as proposed in Bill S-4, or not. This approach rests on the view that if a proposed amendment to the *Constitution Act, 1982* is such that it would affect a fundamental feature or essential characteristic of the Senate, provincial concurrence would be required. Proponents of this approach rely on the 1980 judgment of the Supreme Court of Canada in the *Upper House Reference*.[22] In that judgment, the Court made a number of comments on the possible implications of reducing Senate tenure. The Court commented that at some point, Parliament would not be able to act without the involvement of the provinces if the reduction in tenure was such that it interfered with the function of the Senate contemplated by the drafters of the Constitution as a house of sober second thought. More generally the Court stated that any alterations to the Senate that would affect the "fundamental features, or essential characteristics given to the Senate as a means of ensuring regional and provincial representation in the federal legislative process" could not be made by Parliament alone. As will be seen below, only a limited number of witnesses favoured this approach, and they were divided among themselves concerning its implications with respect to Bill S-4.

The *Upper House Reference*—An Overview

In the *Upper House Reference*, the Court considered a number of questions referred to it by the federal government concerning options for reforming the Senate. Among the questions referred to the Court were whether Parliament acting alone could:

- abolish the Senate;
- change the method of selection of senators by having some senators selected by provincial legislatures, some by the House of Commons and some by the Lieutenant Governor in Council or "some other body or bodies";
- change the method of selection of senators to provide for direct elections; and
- reduce the tenure of senators.

The Court's opinion was that Parliament could not act alone, without the consent of the provinces, in abolishing the Senate. The significance of this part of the judgment goes beyond the conclusion on this specific question. The Court's comments on the nature, function and significance of the Senate within Confederation were fundamental to its conclusions in the other parts of the judgment.

In reaching the conclusion that Parliament could not act alone in abolishing the Senate, the Court adopted a narrow interpretation of the phrase "the Constitution of Canada" in section 91(1) of the *British North America Act*, which at the time prescribed the exclusive authority of Parliament to amend the Constitution of Canada, subject to certain

[22] *Authority of Parliament in relation to the Upper House (Re)*, [1980] 1 S.C.R. 54 (hereinafter, *Upper House Reference*).

exceptions.[23] When the Constitution of Canada was patriated, this provision was replaced by section 44 of the *Constitution Act, 1982*.

The Court held that the power to amend the Constitution of Canada was limited to "matters of interest only to the federal government." In a commentary on the *Upper House Reference*, Professor P. W. Hogg noted that this further limitation on the power of amendment – that the power is limited to "matters of interest only to the federal government" – is key to understanding the opinion.[24] It is implicit in the opinion that the provinces also have an interest in the Senate, notwithstanding that it is a part of the federal Constitution and one of the institutions of the federal government.

The Court went to significant lengths to emphasize the role that had been contemplated for the Senate at the time of Confederation: providing representation to the less-populous regions of Canada by according equal representation to the regions of Canada (three at the time) to balance representation in the House of Commons based on population.[25] This aspect of the judgment also provides the context to the Court's opinions and commentary in respect of the other questions that were referred to the Court.

The Court declined to provide an opinion on the series of questions relating to the selection of senators by provincial legislatures and the House of Commons because it lacked a factual context in which to adequately address the question. It did, however, unequivocally state that Parliament could not amend the Constitution to provide for the *direct election* of senators as this would involve "a radical change in the nature of one of the component parts of Parliament."[26] The Court largely relied on the preamble to the BNA Act, (now in the *Constitution Act, 1867*) which states that Canada shall have "a Constitution similar in principle to that of the United Kingdom." This meant that an upper house modelled on the United Kingdom upper house could not be an elected body.

The Court also declined to answer the question relating to Senate tenure, because no specific term was proposed by the government. While declining to answer the question, the Court did comment that a reduction of the term of office might "impair the function of the Senate" as a body of "sober second thought." It noted again, in this part of the judgment, that the *Constitution Act, 1867* contemplates a Constitution similar in principle to that of the United Kingdom, where members of the upper house are appointed for life. The Court, however, also expressed the view that the imposition of a mandatory retirement age of 75 in 1965, achieved by means of an amendment to the BNA Act, did not change the essential character of the Senate. This amendment had been accomplished by Parliament acting without provincial concurrence, as noted above.

[23] See footnote 18.
[24] P.W. Hogg, "Comment" (1980) 58 *Can. Bar Review* 631, at p. 635 (hereinafter, Hogg Comment on Upper House Reference).
[25] *Upper House Reference*, especially paras. 15-20.
[26] *Upper House Reference*, para. 48.

More generally, the Court stated that any amendment to the Constitution that radically changes the Senate or alters the essential characteristics of the Senate cannot be undertaken by Parliament acting alone.[27]

A critical aspect of the decision was the narrow reading that the Court gave to the term "the Constitution of Canada" in section 91(1) of the BNA Act. The Court limited the power of amendment to "matters of interest only to the federal government." It followed, in the Court's reasoning, that any constitutional amendments affecting the essential character of the Senate were of interest not only to the federal government. The provinces were considered to have an interest in such fundamental reform. Parliament could not therefore act alone in effecting fundamental changes to the Senate by means of a constitutional amendment. It is noteworthy that the term "the Constitution of Canada" is also found in section 42. This raises the question whether the term as it is found in section 42 is to be given the same narrow construction as the Court gave to the term in section 91(1) of the BNA Act.

Ultimately, the Court declined to provide an opinion on whether reducing Senate tenure could by done by Parliament acting alone given that no specific term was provided in the reference question put to the Court. It simply stated that at some point, a reduction in Senate tenure could affect the role of the Senate as envisaged at the time of Confederation. This in turn could affect a fundamental feature of the Senate, requiring provincial consent.

It is noteworthy that one of the preamble clauses in Bill S-4 uses language that closely follows the language used by the Court. This suggests that, in developing the Bill, the government was alert to the risk of altering a fundamental or essential characteristic of the Senate, and has undertaken to reinforce these characteristics rather than disturb or alter them. Bill S-4 states:

> AND WHEREAS Parliament wishes to maintain the essential characteristics of the Senate within Canada's parliamentary democracy as a chamber of independent, sober second thought.

WHAT THE COMMITTEE HEARD

During his appearance before the Committee, Prime Minister Harper confirmed that Bill S-4 has been conceived as a stand alone piece of legislation to enhance the legitimacy of the Senate and fulfill in part the government commitment to Senate reform. It may be followed by later steps, possibly as soon as this fall, to be taken by the government.

He presented the bill as a change that, on its own, would enhance the legitimacy of the Senate; "…a modest but positive reform [that] …neither promises full-scale Senate reform nor will it deliver such, but it does represent a positive change by limiting senators to eight-year terms."*(2:7)*

[27] *Upper House Reference*, para. 49.

The Prime Minister went on to comment on another step that is planned: "As yet another step in fulfilling our commitment to make the Senate more effective and more democratic, the government – hopefully this fall, will introduce a bill in the House to create a process to choose elected senators."*(2:8)* In subsequent discussion, this was described as a "national process" that would involve "…the ability to consult the population before making Senate appointments."*(2:13)*

Reflecting these circumstances, the Committee sought the views of expert witnesses both about potential impacts of Bill S-4 on its own, and about its prospective impact if advisory elections were to be established. What follows is a review of what the Committee was told by witnesses, including recommendations on these and related matters.

A Term Limit

The direct impact of eight-year terms would be to increase turn-over in the Senate, as existing senators retire and are replaced with senators appointed for eight years. The view that this, even on its own, would be an improvement was central to Prime Minister Harper's defence of the Bill: "The fact that Canadians can be, and occasionally are, appointed for terms of 15, 30 or even 45 years is just not acceptable today to the broad mainstream of the Canadian community."*(2:7)* He went on to argue that eight-year terms would enhance the credibility of the Senate in the eyes of Canadians by lessening the danger of "ossification" and reduced effectiveness on the part of senators who have remained in office too long.*(2:12-13)* However, the Prime Minister also indicated: "The government can be flexible on accepting amendment to the details of S-4 …To adopt a six-year term or an eight-year term or a nine-year term."*(2:7)*

Similar arguments were made by other witnesses. Leslie Seidle, Senior Research Associate, Institute for Research on Public Policy, for example, anticipated a more vigorous circulation of ideas and positions as a consequence of the greater turnover of people.*(1:32)* Another witness, Roger Gibbins, President and CEO of the Canada West Foundation, concluded that eight-year terms would "invigorate the Senate to the benefit of Canadians."*(brief, pg.3)* He argued that the Senate has to evolve and that the creation of eight-year terms is an appropriate, if modest, place to begin. He noted, as well, that this move should enjoy broad public support.

Alberta Minister of International and Intergovernmental Affairs, the Hon. Gary Mar indicated that the Alberta government could support eight-year terms. He stressed, however, that the eight-year terms do not address "…the Senate's fundamentally undemocratic composition and structure," and that Alberta's support for Bill S-4 responds to the character of the bill as but a first step in the broader reform that the Alberta government believes is essential.*(3:65)*

Quebec's Minister of Canadian Intergovernmental Affairs, the Hon. Benoît Pelletier also indicated that Quebec "…does not object" to the bill, and views the proposed eight-year terms to be among the class of limited institutional reforms that can be undertaken

unilaterally at the federal level.*(5:90-91)* However, he devoted the major portion of his remarks to a discussion of the significance of the Senate as a federal institution, and Quebec's opposition to federal unilateralism in any areas (such as an elected Senate) that Quebec views as requiring provincial agreement. Ontario's position differed from that of Alberta and Quebec: the Hon. Marie Bountrogianni, Ontario's Minister of Intergovernmental Affairs and Minister Responsible for Democratic Renewal argued that Bill S-4 needs to be viewed as a first step in a process of reform that will inevitably require constitutional negotiations, and called on the Government of Canada not to go down this path while other priorities, such as infrastructure and child care, remain unaddressed.*(5:53)*

The Committee also received letters from representatives of two provinces and one territory in response to its invitation to all jurisdictions to contribute views. Newfoundland and Labrador Premier the Hon. Danny Williams did not comment specifically on Bill S-4, but raised general concerns about an incremental approach to reform and asserted the need for provincial and territorial involvement in discussions of change to important features of the Senate. Saskatchewan Minister of Government Relations the Hon. Harry Van Mulligen generally rejected incremental reform and indicated support for an elected, effective and representative Senate. He expressed concern about changes that might increase the apparent legitimacy of the Senate without ensuring that it is effective and democratic, and called for a process that engages Canadians in a dialogue that would define a purpose for comprehensive reform. The Premier of the Northwest Territories, the Hon. Joe Handley thanked the Committee for its interest, but indicated Senate reform is not a priority of his government at this time.

Another witness who opposed Bill S-4 based his argument on claims that it does not achieve significant change, which will require comprehensive reform (involving constitutional negotiations). Thus, John Whyte, Senior Policy Fellow of the Saskatchewan Institute for Public Policy, concluded his remarks to the Committee with the declaration: "I urge Senate reform, not this gesture."*(4:57)* In a similar vein, Peter McCormick, Chair of the Department of Political Science at the University of Lethbridge, asserted that the change to eight-year terms, by itself, would not really improve anything.*(4:17)*

Several witnesses argued that, in the absence of elections, eight year terms would simply enhance the appointment power of the Prime Minister, by increasing the number of appointments to be made. In the words of Philip Resnick, Chair of Political Science at the University of Victoria, who also acknowledged the appeal of fixed terms: "Because Senate appointments currently fall within the purview of the Prime Minister of the day, any Prime Minister with a majority government lasting two terms or more, such as the Chrétien, Mulroney or Trudeau governments, would be able to ensure that the Senate was made up of wall-to-wall Liberals or Conservatives of his own appointment, by the time he left office."*(brief, p. 2)* Without some method of ensuring that future appointments are made on advice, Prof. Resnick declared himself unconvinced that term limits would result in genuine improvement. Furthermore, he expressed scepticism about the

likelihood of achieving the constitutional change that, in his view, would be needed (see "Advisory Elections, below).

Other witnesses also expressed concern about the impact of eight-year terms if the Prime Minister continues to appoint senators. For example, Gordon Gibson, Senior Fellow in Canadian Studies, Fraser Institute, voiced concerns that limited terms in the context of an appointed Senate would simply be seen as a perpetuation of patronage, and reinforce cynicism. He described the effect of Bill S-4 without elections as "…almost unthinkable in my opinion,"*(4:8)* and concluded his opening statement with the following advice:

> Bill S-4 should not be further considered and voted upon without adding to it and merging with it the companion legislation in respect of advisory elections. *(4:12)*

Some witnesses expressed preferences for terms other than eight years. For some, this was not so much a matter of ensuring the right balance between turnover and permanence, as of ensuring the best timing of elections (see "Advisory Elections," below, for a recommendation of nine year terms). Considering Bill S-4 as a standalone measure, a number of witnesses, including Janet Ajzenstat, Professor Emeritus, Political Science, McMaster University, and Andrew Heard, Associate Professor, Political Science Department, Simon Fraser University, argued that eight years is too short a period, threatening the erosion of the strong institutional memory created by long-serving senators that provides the existing Senate with a distinctive strength.*(1:70-71)* Prof. Heard, who recommended a 12-year term, provided data indicating that assignments to committee chairperson positions and other leadership roles in the Senate are concentrated among senators who have served 12 years or more, reflecting an informal seniority system that recognizes the time required to develop the needed institutional and substantive knowledge.*(3:36-37)*

Similar concerns led Stephen Scott, Professor Emeritus, Faculty of Law at McGill University, to propose longer terms as part of a creative solution to a problem that troubled a number of witnesses: the possibility that substantial differences in the purpose and function of an appointed and elected Senate may make terms that are appropriate for one model inappropriate for another. He recommended that Bill S-4 be amended to provide for terms of 9 or ideally 11 years, with shorter terms (more appropriate for an elected Senate) coming into effect upon a joint address of the two Houses of Parliament, which could occur once a satisfactory electoral process is in place.*(5:65)*

Gerald Baier, Canadian Bicentennial Visiting Professor, MacMillan Centre for International and Area Studies, Yale University, provided the Committee with data on the frequency of very lengthy terms in the existing Senate, and how big a difference eight-year terms would make. According to Prof. Baier, only one senator has ever served a term of 45 years or longer, and 28 senators have served terms of 35 years or more. All of these were appointed before 1965, when the mandatory retirement age was established. Only 8 senators appointed since 1965 have served 30 years or more. On this basis, Prof. Baier argued that excessively long terms in the Senate are not a significant problem, and noted that the average length of terms in the existing Senate is only around 11 years,

not vastly greater than the 8 proposed. However, a fixed eight-year term would curtail the already limited number of long-serving and highly experienced senators, and could deprive the Senate of an existing source of strength and distinctiveness. *(brief, p. 4)* Mr. Seidle also argued that the change in the average length of service would likely be modest, but differed from Prof. Baier in his argument that a change to the Constitution precluding the lengthy terms currently undertaken by some senators must be seen as significant, on its own.

Renewability

Several witnesses argued that the potential benefits of eight-year terms would be accompanied by significant disadvantages, if the renewable eight-year terms envisioned in Bill S-4 are not accompanied by the creation of an electoral process to guide the appointment of senators. They argued that, if the existing appointment process is left intact, senators desiring re-appointment might become less independent in their functions, and less inclined to be critical of the government as the end of their term approached. Prof. Azjenstat was emphatic on this point: "…I think it may give the appearance that some senators are not acting independently but are gunning for a second or third term."*(1:70* Prof. Baier and Mr. Seidle voiced the same concern, and the latter recommended that S-4 be amended to make terms non-renewable, as did Prof. McCormick.*(4:20)*

Prof. Heard also argued against renewable terms, as potentially threatening to "…erode the independence of individual senators and the Senate collectively as an institution."*(3:38)* He supported his views with data presented as indicating relatively high levels of independence from partisan pressures achieved in the present Senate: for example, 62% of 125 votes in the Senate between 2001 and 2005 saw one or more senators either voting against the caucus leader's position or formally abstaining, and only 34% of senators voted with their party in all votes during this period. In questioning, however, he agreed that during this period independence never went so far as to result in the defeat of a government bill.

Prime Minister Harper suggested that concerns about the impact of prospective renewal on independence are open to question. Given the importance of party affiliation in our political system, senators serving eight year terms in the existing Senate would likely continue to be guided by party loyalties rather than personal ambitions. He also suggested that elections imply the possibility of re-election, if that is the choice of voters. Since the government intends to provide for elections in some form, concerns about the impact of renewable terms on senators appointed without an electoral basis may therefore be a non-issue. He went on to say, however, that if senators felt strongly that terms should be non-renewable, "…the government would be flexible in making that amendment..."*(2:12)*

Few witnesses defended renewable terms in the absence of elections. C.E.S. Franks, Professor Emeritus of Political Science at Queen's University, suggested that renewability may be beneficial, as a means of preserving an existing strength of the Senate: the wisdom and experience senators are able to bring to their work as a result of

long-term service. However, in response to questioning, he agreed that renewable terms, without moving to an electoral basis for representation, could be seen as "getting close to a worst case scenario."*(1:46)*

The three provincial ministers who appeared before the Committee took three distinct approaches to the issue of renewability. The Hon. Benoît Pelletier indicated that the Government of Quebec believes the terms should be non-renewable, to safeguard the independence of senators from the executive. The Hon. Gary Mar, presenting Alberta's position, argued for renewable terms, but renewability was seen as a requirement for an acceptable election process rather than as a desirable feature of terms in an appointed Senate. Ontario Minister Bountrogianni refrained from specific comment on the issue of renewable terms.

Independence and Accountability

The concerns about the impact of renewable terms on the ability of senators to function independently provoked discussion among several witnesses about what the Fathers of Confederation may have meant in 1867 when they originally ascribed this characteristic to the Senate, and whether independence means the same thing today. Prof. Azjenstat indicated that the property qualification was originally seen as a support for independence, because wealth insulated senators from bribery and related forms of monetary influence. Mr. Seidle observed that our association, today, of the concept of independence with independence from partisan influence could not have been what the Fathers of Confederation had in mind, because modern disciplined political parties had not developed at that time. He suggested that other possible meanings, such as "alternative, enlightened, informed" may be more relevant today.*(1:58-59)* Both reiterated concerns that the renewability of terms could undermine independence, in whatever sense it may be conceived. A number of witnesses, including the Hon. Benoît Pelletier, emphasized the importance of legislative independence from the executive. Prof. Heard argued that the independence needed from senators now is political independence, i.e., the practical ability to vote against the position of their party caucus. While renewable terms may be compatible with the quasi-judicial independence exercised by some administrative tribunals, Prof. Heard argued that political independence is more vulnerable. It would be a "novel development" for prime ministers to reward senators for voting against their party positions by renewing senatorial terms.

David Smith, Professor Emeritus at the University of Saskatchewan, drew specific attention to the implicit tension between the independence envisioned for the Senate by the Fathers of Confederation, and the heightened accountability to voters sought by the government through the combined effect of term limits and advisory elections. He argued that election "…links the senator to a constituency to which he or she is accountable. Such a change fundamentally alters the federal system and the arrangement of Parliament's parts as set down by the Fathers of Confederation." On this basis, he called for referral of the government's proposals to the Supreme Court of Canada, for a definitive judgement as to whether the degree of change contemplated is compatible with the established role of the Senate as a protector of regional and other minorities, acting with substantial independence from the executive.*(brief, p. 2)*

The Constitutional Issue

Prof. Smith's concerns about renewable terms point to the central constitutional issue raised by our expert witnesses: whether Bill S-4 can be enacted exclusively by Parliament, or also requires agreement by at least seven provincial legislatures representing at least 50% of the population of all the provinces.

Most witnesses appearing before the Committee favoured a largely textual approach, focussing on the wording of sections 42 and 44 of the *Constitution Act, 1982*. This approach holds that section 44 grants Parliament an exclusive general amending power in relation to the Senate. From this general power, four specific matters are removed and changes to them are made subject to provincial agreement. These four matters are: the powers of the Senate; the method of selecting senators; the number of members by which a province is entitled to be represented in the Senate; and the residence qualifications of senators. According to this approach, Parliament can reform the Senate on its own except for changes in these four areas.

Among the expert witnesses advancing this approach were constitutional law professors Peter W. Hogg, Peter Hogg, Scholar in Residence, Blake, Cassels and Graydon, Patrick Monahan, Dean, Osgoode Hall Law School and Prof. Scott. In the words of Prof. Hogg:

> It seems to me that the best interpretation of what happened in 1982 was that it overtook the ruling in the *Upper House Reference*. In other words, the 1982 amending procedures now say explicitly which changes to the Senate cannot be accomplished unilaterally by the Parliament of Canada; they are the four matters in section 42 that I mentioned earlier. Other aspects of the Senate can be changed under section 44.*(4:36-37)*

Other witnesses adopting a variation of this approach to statutory interpretation were the Honourable Gérald-A. Beaudoin and Gérald Tremblay. It is noteworthy that a number of the political scientists and other witnesses who focussed on institutional issues also took this approach. In the words of Mr. Seidle: "If in doubt, should it be referred to the Supreme Court of Canada? First, I do not think there is any doubt on section 44 […]the amending formula, in comparative terms is very clearly drafted."*(1:38-38)*

The second interpretive approach, which was raised in the course of the Committee's proceedings but found little support among the constitutional law experts, holds that in addition to the four matters where the Constitution specifically requires provincial agreement, there is a further restraint on Parliament's power to amend the Constitution in relation to the Senate. Parliament cannot act on its own if an amendment would affect the "fundamental features, or essential characteristics" of the Senate. This approach incorporates the reasoning of the Supreme Court of Canada in the *Upper House Reference*, as discussed in the Constitutional Background section of this report.

Witnesses who favoured this approach paid particular attention to the length of the term limits proposed in Bill S-4, because of the possibility that they could undermine a central role of the Senate in providing "sober second thought" within the legislative process.

They also explored the implications of renewable terms for a second fundamental feature of the Senate: its relative independence.

Professor Guy Tremblay from the Faculté de droit, Université de Laval, in a short written submission to the Committee, expressed the view that Parliament could not act alone in reducing Senate tenure. He rejects the view that section 44 of the 1982 Act has overtaken the *Upper House Reference*. Bill S-4, in his view, would alter a fundamental feature of the Senate as it would affect one of the roles originally contemplated for the Senate, namely as a house of sober second thought.

Even among witnesses who attach continuing importance to the *Upper House Reference*, there were differing views about its implications, however. In the view of Professor Monahan, the specific amending procedures in the *Constitution Act, 1982* dealing with Senate tenure have superseded the *Upper House Reference*, because they reflect an attempt to codify those matters which the Court regarded as "essential characteristics" of the Senate.*(5:8)* He argued, however, that action by Parliament on its own to establish term limits for senators would be consistent with the pre-1980 or pre-1982 situation since, in that period (in 1965), Parliament enacted amendments to the Constitution affecting Senate tenure, when a retirement age of 75 was introduced.

Similarly, Warren Newman, General Counsel, Constitutional and Administrative Law Section, Department of Justice Canada, commented on the continuing relevance of the *Upper House Reference*. While he indicated that he had no hesitation in concluding that Bill S-4 came squarely within the amending procedure in section 44, in response to questions from the Committee, he described the case as a "very important precedent." *(2:29)* He stated that the text of sections 42 and 44 of the *Constitution Act, 1982* is clear that any changes to the essential characteristics of the Senate would require a complex constitutional amendment involving the provinces. He submitted, however, that since the enactment of the new amending procedures in the 1982 Act, the essential characteristics are laid out in section 42, "for the most part."*(2:27)* He added that an interpretation of sections 42 and 44 of the 1982 Act would be incomplete without considering the Court's comments in the *Upper House Reference*. According to Mr. Newman, it is a matter of degree whether a reduction of Senate terms would affect an essential characteristic of the Senate, and thus require the more complex amending formula in section 38(1) of the 1982 Act. A one year term, for example, would not pass constitutional "muster."*(2:28)*

Prof. Heard cautioned that while he believes that section 44 permits Parliament to act alone in reducing Senate tenure, it is possible that the Supreme Court of Canada could place some limits on this exclusivity, over and above those limits already prescribed by section 42. The Court could draw upon the *Upper House Reference* and prohibit Parliament from altering the essential characteristics of the Senate or Parliament. Given the doubts raised about the effect of the *Upper House Reference* on Parliament's exclusive amending power and the lack of recent guidance from the Supreme Court of Canada, Prof. Heard submitted that it would be prudent and preferable to assume that the *Upper House Reference* is still valid. Otherwise Parliament would be free to reduce Senate tenure to "such absurdly short terms that the upper house could lose all meaning."

Prof. Heard expressed the view that a renewable, shortened Senate term would be a "direct threat" to the independence of senators and would change an essential characteristic of the Senate. He indicated that this aspect of Bill S-4 is the most problematic from a constitutional perspective and (as seen above) called for amendments to address this problem.

Representing Diversity

A number of witnesses argued that the Senate has come to play a unique role in the representation of minority groups, especially those who are typically underrepresented in the House of Commons.*(1:28)* Prof. Franks, among others, cautioned the Committee about the danger that an electoral system for the Senate could impede its capacity to represent such minorities, unless specific arrangements are made to achieve minority representation. Mr. Seidle supported this concern, but drew attention to several approaches that could partly address it. He noted that proportional representation systems in some countries require political parties to alternate women and men on the lists of candidates from which representatives are chosen, while others provide for the representation of aboriginal peoples by designating seats for this purpose. Including some appointed seats within an elected legislature was also mentioned as a means to ensure minority representation.*(1:42-43)*

Several strong proponents of an elected Senate, such as Alberta's Hon. Gary Mar, were sceptical about the likelihood of obtaining consensus about a group representation formula in the context of negotiations about an electoral process.*(3:75)* Richard Simeon, Richard Simeon, William Lyon Mackenzie King Visiting Professor of Canadian Studies, Weatherhead Centre for International Affairs, Harvard University, argued that the representation of minorities that he termed "…the electorally disadvantaged" has emerged as a legitimate purpose for the Senate, and warrants strengthening. This could be achieved, easily and in the short term, through a reformed appointment process, perhaps involving a Senate nominating council in each province, made up of members of the House of Commons representing that province as well as members of the provincial legislature.*(4:61)*

Advisory Elections

(a) Institutional Issues

In his September 7, 2006, appearance before the Committee, Prime Minister Harper argued that the government's broader accountability and democratic legitimacy objectives cannot be met without some form of electoral process for senators. Reflecting this, he declared: "As yet another step in fulfilling our commitment to make the Senate more effective and more democratic, the government, hopefully this fall, will introduce a bill in the House to create a process to choose elected senators."*(2:8)*

Numerous witnesses supported an elected Senate, arguing broadly that to be effective within a democratic political process, the Senate requires the legitimacy that would be provided by elections. Thus, in the words of Mr. Whyte: "The case for Senate reform is

overwhelming. Political power in legal democracies is accountable power.*"(4:53)* He went on to argue that the fact that senators are unelected undermines the Senate in four related ways: it does not reflect democratic choice; it receives minimal attention from the media or public; there is popular distrust of senators, and confusion about who they really represent; and senators are not accountable to Canadians for the work that they do. Mr. Gibson said that it was clear to him that elections to the Senate would be "unacceptable without term limits," but that it was equally clear that term limits are "unacceptable without an electoral system."*(4:9)*

The Committee also received opinions on the appropriateness of eight years as the interval between advisory elections. Prof. Azjenstat, argued that eight-year terms should be avoided because they could lock Senate elections into the same schedule as elections for the House of Commons (under proposed legislation to establish a fixed election date), which would tend to make an elected Senate to similar to the House of Commons. She recommended 9 year non-renewable terms. In contrast, a number of proponents of an elected Senate argued that 8 years is too long. According to Mr. Whyte: "Six years represents about as much distance between the term of government and the Senate appointment as I feel the traffic will bear. Electing half the Senate every three years helps compress the responsibility lines between the government and the legislators."*(4:56)*

Several witnesses expressed opinions about the kind of electoral system that might be appropriate for Senate advisory elections. There was broad agreement that a conscious effort should be made to differentiate these elections from those employed for the House of Commons, so as to minimize the danger that the Senate might merely duplicate the representation provided by the House. Proportional representation, which would ensure that public support for the various parties is accurately reflected in the Senate, was mentioned favourably by a number of witnesses. Prof. Simeon, for example, stressed the importance of getting the electoral system right, if the move to an elected Senate is made: proportional representation could be designed to foster diverse representation, as well as more accurately reflecting the preferences of voters. On the other hand, a seriatim process, in which a province-wide election is held whenever a Senate vacancy occurs would reproduce and exacerbate the under-representation of minority views that already occurs in House of Commons elections.*(4:61-62)* Daniel Pellerin, Visiting Assistant Professor, Political Science Department, Colgate University, provided the Committee with a detailed proposal for indirect elections (by regional groupings of provincial legislators), which he argued would ensure the distinctiveness of the composition of the Senate, and ensure that it would complement rather than duplicate the representation of the House of Commons.*(4:88)* Indirect elections were favoured, for similar reasons, in a written brief received from David Goetz, of Ottawa.

The Hon. Gary Mar provided the Committee with an extensive review of the rationales supporting Alberta's longstanding commitment to a Triple "E" Senate. Ultimately, this would require a formalized (i.e. mandatory rather then merely advisory) election process which, in the Alberta model, would involve elections held by each province, with candidates running either as independents or as members of provincial political parties, so as to maximize the likelihood that the Senate will serve as a forum for representing

provincial interests. His view was that a federally-run electoral process would inevitably involve federal political parties, and tend to make the Senate "…a mere echo of the House of Commons rather than an independently elected body with a separate and different composition and perspective."*(3:64)* In response to questioning, he did not flatly reject a federal election process. However, he stressed that a provincial process would be better.

A broader concern about elections of any kind – that they could lead senators to assert a democratic mandate that would bring the Senate into conflict and potential deadlock with the House of Commons – was also discussed. Prof. Franks suggested that the Senate could adopt procedural constraints that would govern its use of the power to reject legislation from the House of Commons, and thus reduce this threat.*(brief, p. 7)* For Prof. Ajzenstat, the dynamic that an elected Senate might reflect remains unclear, but an appointed Senate avoids this danger.*(1:77-78)* Prof. Scott also expressed concern about Senate elections, arguing that they risk disruption of an acceptably functioning parliamentary system through the creation of a more assertive Senate.*(5:68)*

(b) Constitutional Implications

The possibility that advisory elections would require a constitutional process involving provincial ratification was raised by several witnesses, including Mr. Seidle and Prof. Resnick. For the latter, this prospect was decisive. He described the Constitution as "…something of a third rail in Canadian politics," and expressed strong doubt that Canadians are ready for broad constitutional reform at this time.*(3:26)*

This issue affects the likelihood of such elections, and the length of time that may be required to establish them. It is therefore relevant to the Committee's consideration of Bill S-4, and the Committee has accordingly welcomed views from the witnesses who appeared before it.

The method of selecting senators is one of the listed exceptions to Parliament's exclusive power to amend the Constitution as it relates to the Senate. The constitutional question raised by advisory elections, or any form of consultative selection process, is: do they constitute alterations to the method of selection of senators? According to witnesses who appeared before the Committee, the answer depends upon the extent to which the Prime Minister's discretion to recommend individuals to serve as senators is fettered.

It appears to be undisputed that the Prime Minister's power of recommendation that arises by constitutional convention cannot be fettered by ordinary legislation. This point was made by several expert witnesses including Professor Hogg, who emphasized that any legal fetters on the Prime Minister's discretion would breach the Constitution of Canada.*(4:41)* If, however, all that is involved is a process by which to select a pool of people, from which the Prime Minister could make a selection, then there would not likely be any objection on constitutional grounds. Professor Monahan took essentially the same position in his evidence *(5:12-13)*, as did Professor Scott.*(5:67-68)*

Mr. Pelletier, on behalf of the government of Quebec, cautioned that any proposal to provide for an elected Senate would require an amendment to the Constitution and concurrence of the provinces (presumably under the procedure in section 42). He refrained, however, from attempting to provide a definitive answer in response to questions about whether a consultative process or advisory election process would require provincial agreement, in the absence of knowledge about the details of such a process. He did, however, indicate that the answer to such a question would depend upon whether the consultative process had the indirect effect of transforming the Senate into an elected body.*(5:89)*

Mr. Pelletier enlarged on the significance of the Court's opinion in the *Upper House Reference*. He expressed the view that the Supreme Court of Canada established that the Senate, in its essential characteristics, is based on a compromise at the time of Confederation in establishing a federal system. The original mandate of the Senate as a defender of regional or provincial interests imposes a further limit on the exclusive powers of Parliament in respect of Senate reform.*(21 September 2006, 5:85)* Mr. Pelletier emphasized that any reforms to the Senate, in his view, must conform to the role intended for the Senate to reflect regional and provincial interests, the interests of minorities and what he described as the "Canadian duality."

There was general agreement that Bill S-4 is not linked to prospective advisory election legislation in any way that precludes consideration of the Bill as a stand-alone measure. Professors Hogg and Monahan, were of the view that Bill S-4 could survive as a stand alone measure, regardless of whether the government proceeds with legislation on a consultative process or not. Professor Monahan, in particular, affirmed that Bill S-4 is a valid stand alone measure. It does not appear to be linked to any other piece of legislation, in his view. This view was shared by former Senator Beaudoin.*(5:26)*

Additional Matters

Mr. Seidle recommended that Bill S-4 be amended to remove the $4,000 property qualification that senators are presently required by the Constitution to meet. At the time of Confederation, this requirement limited membership in the Senate to possessors of significant personal wealth. According to Mr Seidle, it should be seen as an "odious anachronism," although in practice it is primarily an inconvenience to appointees who have to make special arrangements to meet it.*(1:33)*

Prof. Heard drew attention to Bill S-4's prospective elimination of the mandatory retirement age of 75, and suggested that this would be a mistake. He argued that, while life expectancy rates have been increasing over the last century, a mandatory retirement age of 75 is relatively high and responds to the reality that debilitating infirmities and illnesses become increasingly frequent in this age range. Prof. Heard called for the re-instatement of a mandatory retirement age of 75. Otherwise, contrary to its objectives, the Bill would "…abolish the one change we have had since Confederation that actually did achieve bringing some new life into the Senate."*(3:39)*

The Process of Reform

The Committee was told by Prime Minister Harper that Bill S-4 is a step in the reform of the Senate, and a form of advisory elections is planned for the near future. While many witnesses alluded to the challenges posed by comprehensive reform initiatives that have occurred in the past, several also raised concerns about an incremental approach. Prof. Franks, among others, stressed that the major Senate reform issues – terms in office, the distribution of seats, the method of selection and the powers of the Senate – are interrelated. "The four areas of reform are inseparably related to one another. They need to be considered together."*(brief, p. 1)* While this view did not prevent Prof. Franks from supporting Bill S-4, similar concerns led Mr. Whyte to argue that the bill is "counter productive to reform and should not be pursued."*(4:63)*

Other witnesses shared concerns about a piecemeal approach to reform. Mr. Gibson told the Committee there is "a rule of complex systems in which you cannot change only one thing." He went on to testify that

> Many apparently simple and innocuous changes in complex systems can have unintended consequences. The democratic governance of the Canadian federation is exactly such a complex system, and Bill S-4 would be exactly such a change. I would suggest, … that it be handled with all the caution that that implies.*(4:12)*

In further testimony, Mr. Gibson added that "serious Senate reform cannot be incremental. These things are so intertwined and so many tradeoffs are involved, you have to deal with them all at once."*(4:19)* In similar vein, Professor McCormick argued that S-4 represents "minor jigging to an existing system which has some strengths and some weaknesses." He added that "maybe we should step back rethink about it a little bit."*(4:14)* Both Mr. Gibson and Prof. McCormick expressed the view that beginning the process of Senate reform by dealing with length of senatorial term represents dealing with the simpler, more tractable issues first, leaving more difficult aspects of reform until later. This approach, in their opinion, would merely make the harder issues more difficult to resolve. An opposite approach involving consideration of the larger and more contentious issues first would make it even easier to deal with simpler issues later on. *(4:31)*

A related view was expressed by Mr. Seidle, who argued that the government has not communicated a vision of what the Senate will ultimately become, and that unless we know what the destination of this voyage is intended to be, it is very difficult to make good decisions along the way.*(1:33-34)* It is noteworthy, however, that this concern did not lead him to qualify his support for Bill S-4. Instead, he called for the commencement of a new national conversation about the Senate, and what Canadians want its mission to be. Such an exploration could address, and might also help to determine, the process to be followed in achieving comprehensive reform as well as the direction it should take.*(1:34)*

In contrast, some other witnesses singled out the incremental approach to reform as a positive aspect of Bill S-4. Prof. Simeon, for example, disagreed with witnesses who called for comprehensive reform, arguing that the growth of democracy in countries such as the U.K and Canada has happened in incremental steps. Especially if the focus is on improving upon existing strengths of the Senate, such as its sober second thought function, long-term policy studies and technical review of legislation, incremental reform can bring meaningful improvements with minimal risks.*(4:70)* Mr. Gibbins applauded Bill S-4, partly because it buys time that could enable more careful thought than has yet occurred about the kind of electoral process needed to support the role of the Canadian Senate. More immediately, he praised Bill S-4 as demonstrating that incremental change is possible:

> I have been deeply frustrated in recent years by the commonly made argument that, yes, Senate reform is desirable, but it must be comprehensive; because it must be comprehensive, it involves constitutional reform; and because constitutional reform is impossible, any movement on Senate reform must be impossible. …Bill S-4 demonstrates to me that modest reforms are possible, that we can begin the process without being terrified about what might await us further down the road. *(3:7)*

Mr. Gibson and Prof. McCormick called for an approach similar to that called for by Mr. Seidle, advocating the creation of a consultative mechanism modelled after the citizens' assembly exercise in British Columbia. Such an assembly, they proposed, could be seized with the subject of Senate reform and whose recommendations could be subject to a national referendum. Mr. Gibson said that a fundamental premise underlying the work of the British Columbia citizens' assembly was that "talking about reforming an electoral system is a clear conflict of interest for politicians," a premise that has application with regard to Senate reform. As he told the Committee, "[f]undamental institutions of democracy really belong to the people, not to the politicians."*(4:23)*

OBSERVATIONS AND CONCLUSIONS

> *Parliamentary institutions are themselves inherently evolutionary. Based largely on convention and precedent, they have evolved from those of a centralized and powerful European monarchy to those of a modern North American federal democracy with remarkable continuity, and continue to evolve today to allow a larger role for communities and individual members.*
>
> *This evolutionary pattern has become ingrained in the Canadian temperament. On several occasions in our history, Canadians have been invited to stray from this path, to break with the past, to join with others or to abandon each other. The final verdict of the people has always been to keep the links unbroken, with the past and with each other.*
>
> *The Canadian way is the path of gradualism, flexibility and liberty.*
>
> Special Joint Committee of the Senate and the House of Commons on a Renewed Canada, *A Renewed Canada*, February 1992, p. 7-8.
>
> *I believe in Senate reform because I believe in the ideas behind an upper house.*
>
> Prime Minister Harper, Proceedings of the Special Senate Committee on Senate Reform Issue 2 – Evidence, 7 September 2006

A Vision To Guide Reform

One hundred and thirty nine years have now passed since Canada came into being. The first steps toward the level of democracy we now enjoy began earlier, in the British North American colonies, with the creation of popularly elected assemblies. Elected representative government had long been sought after and was still recent in the colonial experience.[28] However, at this stage, colonial governors appointed by Great Britain still exercised executive power with the advice of executive councils that they themselves appointed.

It was only in the 1840s, following rebellions in Upper and Lower Canada, that Britain instituted responsible government for its North American colonies, and not through a formal Constitution but by way of instructions issued to governors by the Colonial Office in London.[29] The establishment of the principle that the executive functions of

[28] Representative institutions were first established in Nova Scotia (1758), Prince Edward Island (1769) and New Brunswick (1784). Elected lower houses were created for Upper and Lower Canada by the *Constitutional Act* of 1791 –not in or by the colonies, but by Great Britain.

[29] Responsible government was implemented in Nova Scotia in 1848 followed shortly after by the United Province of Canada.

government be performed by members of a popularly-elected assembly – responsible government -- witnessed the entry of the "democratic core of British parliamentary government" into Canada's constitutional system.[30] The institutional foundations for the Canada that emerged in 1867 were thus set in the fading days of colonialism.

In the latter decades of the nineteenth century, however, democratic principles of government were still relatively new and untested. Indeed, democracy was regarded with some caution among significant and influential portions of colonial society and this cautious view was shared by those who advocated the move toward union of the British North American colonies.[31] Thus, the mechanisms created by colonial representatives to give practical expression to democratic principles as the basis for the new country included institutional checks and balances and restrictions on the extent of democratic participation.

The franchise was limited, as was the ability to seek and attain elected office. Large parts of Canadian society were excluded from participation and were thus not represented in deliberative bodies. And the Senate, inspired by the British House of Lords, was purposefully created as a check on the popularly elected House of Commons. In words now familiar to many Canadians, Sir John A. Macdonald said of the Senate that

> There would be no use of an upper house if it did not exercise, when it thought proper, the right of opposing or amending or postponing the legislation of the lower house. It would be of no value whatever were it a mere chamber for registering the decrees of the lower house. It must be an independent house, having a free action of its own, for it is only valuable as being a regulating body, calmly considering the legislation initiated by the popular branch and preventing any hasty or ill-considered legislation which may come from that body, but it will never set itself in opposition against the deliberate and understood wishes of the people.[32]

Canadians today would be hard pressed to consider the Canada of 1867 a fully mature democracy. But Canada's Constitution has, to paraphrase Lord Broughton, ripened and endured. And so has Canada's democracy, which has now evolved and become more comprehensive. The franchise and the ability to hold elective office has been expanded to include women and minorities and the Constitution, once regarded as belonging to governments, is now seen by Canadians as theirs.

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[30] Peter H. Russell, *Constitutional Odyssey: Can Canadians Be a Sovereign People?*, University of Toronto Press, Toronto, 1992, p. 15

[31] Russell writes that there was "scarcely a whisper of popular sovereignty in Canada's Confederation movement." Ibid, p. 12. This does not mean, however, that the impulses of Canada's founders were anti-democratic. As one of the Committee's witnesses, Professor Janet Ajzenstat writes: "It is sometimes suggested that Canada's founders rejected democracy altogether. Wrong. The system of checks and balances described in the 1867 Act [Constitution Act] is supremely a formula for liberal democracy." Azjenstat, "Origins of the Canadian Senate," *Dialogues*, summer 2006, p. 5.

[32] Canada, Legislative Assembly, February 6, 1865, cited in *Canada's Founding Debates*, Janet Ajzenstat, Paul Romney, Ian Gentles, and William D. Gairdner, editors, Stoddart Publishing Co. Ltd., Toronto, 1999, p. 80.

Despite the criticism that the Senate is frequently subjected to, it has performed remarkably well and demonstrated an ability to adapt to changing circumstances. As an institution, contrary to some assertions, the Senate has not been oblivious to the world around it but has been quite attuned to the expectations of Canadian society. As our democracy and constitutionalism have matured, so has the Senate evolved in keeping with changing perceptions about the scope and role of representative institutions.

The Senate has also evolved to become more reflective of the makeup of Canada. In February 1930, Senator Cairine Reay Wilson became the first woman appointed to the Senate.[33] Thirty-three women now sit as senators. The first senator of Aboriginal birth was appointed to the Senate in 1958 – two years before the federal franchise was extended to Aboriginals living on reserves.[34] There are currently seven senators who are Aboriginal Canadians.

Senators also come from a wide variety of professional backgrounds. Although the legal and business professions have been most represented (236 lawyers and 107 businesswomen and men, including business executives), farmers (88), physicians (59) teachers (53) authors (50) journalists (47), professors (37) and executives, both business and other (27) have served Canada and Canadians in the Upper House.[35] Most of these individuals have come to the Senate following years of practice in their professions; many of them have already served in other levels of government, as both elected and non-elected officeholders. As C.E.S. Franks observed in his classic work *The Parliament of Canada*, "many extremely able and experienced Canadians sit in the Senate."[36] Another scholar of Canadian politics, Dr. J. R. Mallory, has written that it should not be forgotten that

> The Senate contains a number of former ministers and M.P.s with long experience of public life and expert knowledge of many highly technical branches of law and administration. Their contribution to the consideration of legislation is not a negligible one, and is one well worth retaining.[37]

As the Senate has evolved, it has made a valuable contribution toward good governance in Canada. As the founders foresaw, the Senate has been an effective revising chamber, making technical changes that improve the texts of legislation coming from the House of Commons without introducing new principles or modifying the original intent of a bill.[38] Like other aspects of the Senate's work, its work as a revising chamber benefits from the Senate's capacity to combine a degree of individual independence with the practice of the government-opposition dynamic, supported by a procedural environment that enables

[33] Canadian women won the right to vote in federal elections in 1918.
[34] Senator James Gladstone, Independent Conservative, appointed 31 January 1958.
[35] Source, Library of Parliament, Parlinfo, 10 October 2006.
[36] C.E.S. Franks, *The Parliament of Canada*, University of Toronto Press, Toronto, 1987, p. 189.
[37] J.S. Mallory, *The Structure of Canadian Government*, Gage Publishing, Toronto, 1984, p. 258.
[38] Franks, 1987, p. 190.

opposition parties to exert an influence beyond their numbers. This ensures rigorous scrutiny and full debate of legislative measures, to the benefit of all Canadians.

Senators have also made an invaluable contribution toward policy making, principally through their work in Senate committees. The reports of many Senate committees have attracted praise, and are of continuing value to those who participate in making public policy. Among the reports that come immediately to mind are: the Special Senate Committee on Poverty (Croll Committee) landmark study released in 1971; the report of the Senate Special Committee on the Mass Media (Davey Committee) tabled in late 1970; the Senate Special Committee on Science Policy (Lamontagne Committee) whose report was released in three volumes in 1970, 1972, and 1973 respectively; and *Soil at Risk*, a significant 1984 report of the Standing Senate Committee on Agriculture, Fisheries and Forestry. More recently, the work of the Standing Senate Committee on Social Affairs, Science and Technology on the health care system in Canada, including the 2006 report on mental health, mental illness and addiction, are widely recognized as leading contributions in the ongoing effort to improve the delivery of medical services for Canadians. All of these, as well as many other reports produced by Senate committees, have enriched our understanding of important policy issues and provided concrete solutions to resolve seemingly intractable problems.

Conclusions

In her testimony before this Committee, Prof. Azjenstat indicated that the "general aim of reform should be to look back as well as forward." (Issue 1, 6 September 2006) Looking back, it is clear that the Senate has been a remarkably successful institution that has managed to complement, rather than complicate, the work of the democratically elected House of Commons. One has to be mindful of this success, cognisant of its various sources, and careful when contemplating reform to ensure that changes build on the Senate's institutional strengths while minimizing its shortcomings. Members of the Committee have attempted to meet this standard in their deliberations upon the subject-matter of Bill S-4, and have arrived at several conclusions that we believe can contribute to further consideration of the Bill in the Senate, and elsewhere.

Conclusion 1: Reference to the Supreme Court

Desirable as evolution within the framework of democratic principles may be, many have expressed concerns about the ability of Parliament, unilaterally and without the express support of provincial legislatures, to proceed with the creation of limited terms for senators. Based on the legal advice it has received, the government is firmly of the view that the change being proposed in Bill S-4 can be accomplished under the amending formula in Section 44 of the *Constitution Act, 1982*, as envisioned in the Bill. Under this Section, Parliament can "exclusively" amend the Constitution in relation to the executive government of Canada, the Senate and the House of Commons.

Our discussions with constitutional scholars and legal experts have yielded, for most members of the Committee, convincing arguments that the government has chosen the correct approach to making this change. These witnesses generally felt that the

Constitution was sufficiently clear on this matter and that a reference to the Supreme Court of Canada to clarify and resolve the matter is not required.

Bearing in mind that it is the subject-matter of the bill that has been referred to the Committee, most Committee members have concluded that there appears to be no need for additional clarity on the constitutionality of Bill S-4 as a condition precedent to the Senate proceeding with the consideration of the Bill as proposed.

Conclusion 2: Term Limits for Senators

While a variety of views were expressed about the desirable length of a senatorial term, virtually none of our witnesses dismissed the creation of a term limit *per se* and, indeed, most strongly supported it. These witnesses pointed out that limited terms would dispel the image, so harmful to the Senate, of "jobs for life," and re-invigorate the Senate with a constant influx of fresh ideas. Most members of the Committee found these assertions to be persuasive.

The Committee also notes that, in previous deliberations on the Constitution of Canada, various committees of the Senate have unanimously favoured the creation of limited terms for service in the upper house of Canada's Parliament. In the view of most Committee members, the arguments made in these reports remain sound.

Accordingly, following careful deliberation on the subject-matter of Bill S-4 and finding no reasonable grounds to withhold approval in principle, most Committee members endorse the underlying principle of the bill: that a defined limit to the terms of senators would be an improvement to Canada's Senate.

The Challenging Trade-Offs Of Senate Reform

As the "What We Heard" Section of this report makes clear and as one might expect, our expert witnesses differed extensively among themselves concerning the details of Bill S-4. Views varied widely concerning the advantages and disadvantages of an eight year term, preferable alternatives, and the renewability of the terms. Furthermore, witnesses disagreed over whether terms appropriate for an appointed Senate are likely to continue to be appropriate for one that is, in whatever fashion, elected.

Taken by themselves, these differences suggest a preliminary conclusion. There may be no single "right answer" to questions about the particulars of Bill S-4. If there were, we would have expected it to be apparent among the reasonable cross-section of experts in relevant areas of scholarship who appeared before the Committee during its hearings.

Subsequent deliberations among Committee members, equally, did not result in agreement about the answer to these questions. Rather, they pointed to a series of trade-offs that are reflected in the contending views of witnesses, and appear to be embedded in the basic options that are available for reform of the Senate. Key trade-offs involved in selecting a term limit for senators are as follows:

- Lengthy terms tend to foster institutional memory and independence, and thus support the Senate's capacity for sober second thought, but also preclude early removal of senators who are not serving the public interest.
- Shorter terms increase the turn-over of senators and will tend to make the Senate more vibrant and (in an elected Senate) reflective of public opinion, but are less supportive of the Senate's sober second thought role.
- Renewable terms would enable some senators to serve for lengthy (cumulative) terms, thus achieving the advantages of longer terms but, on the other hand, would tend to constrain the independence of senators by making lengthy terms conditional upon external decisions to re-appoint (by the Prime Minister or, in an elected Senate, by voters).
- Non-renewable terms foster independence and support the Senate's sober second thought role, but remove accountability (either to a Prime Minister for re-appointment, or to voters at election time) and may allow individuals to lapse into inactivity or inattention to the public interest.
- Appointed terms can vary highly in length, while most electoral systems require a relatively short term (enabling the frequent renewal of democratic mandates). The term length appropriate for an appointed Senate may therefore not be appropriate for an elected Senate.
- An elected upper chamber would possess democratic legitimacy, but elections reinforce partisanship (because of the central role of parties in elections), and may thus create barriers to the "sober second thought" function and policy studies requiring long time-frames. Also an elected body might feel obliged, by its democratic mandate, to oppose the House of Commons, resulting in deadlocks.
- An appointed upper chamber enables the deliberate representation of designated groups and minorities, and the time of its members is not taken up by electoral and constituency demands, but it may lack the legitimacy to uphold regional and other interests against the elected House of Commons, and members may not have an incentive to invest themselves heavily in its work.

Proposals, including the term limit proposal set out in Bill S-4, seek to achieve a desirable balance between the competing advantages involved in the various trade-offs. These trade-offs are not simple, and Committee members continue to have diverse views concerning them. The following table provides, for consideration by senators and others, the major design options recommended by witnesses before the Committee.

Issue	Rationale	Recommendation
Eight-year terms	Circulation of ideas and people, allows time to get up to speed, but not to coast.	Accept.
	Not fully compatible with sober second thought, strength of corporate memory roles.	Amend to a longer term.
	Appropriate terms for an appointed and elected Senate may be different, therefore create two stages.	Amend to provide for a longer term, with provision for shorter terms upon joint address of the two Houses of Parliament.
Renewability of terms	Needed in order to allow people to be re-elected in advisory elections.	Accept.
	Needed and should be explicit.	Amend bill to state that terms are renewable.
	Could undermine the independence of senators, and thus the role of the Senate	Amend bill to provide that terms are not renewable.
Advisory Elections	Needed, as a basis for increased legitimacy, and greater effectiveness within the legislative process.	Recommendation could state general requirements for government to take into account: • minority representation, • provincial representation (or regional), • proportional representation,

		• minimization of partisanship (single transferable vote systems).
	Dangerous. Could lead to overassertive Senate, deadlocks with House, and erode "sober second thought" role.	Recommend that government not proceed with election legislation, retain appointed Senate.
Additional changes	Thirty year age requirement is discriminatory.	Amend bill to add a provision deleting this from the *Constitution Act, 1982*.
	Removal of mandatory retirement at age 75 conflicts with the intent of the Bill.	Amend bill to restore mandatory retirement at age 75.
Additional actions	National debate about the Senate and its purposes is needed as a basis for comprehensive reform.	National debate be initiated by government.

In the course of its deliberations, the Committee has also been made aware of the recent proposal to reform the British House of Lords (see Part I, "Institutional Background"). This proposal appears to offer a very distinctive approach to the trade-offs of Upper House reform, and may warrant further examination as the Senate proceeds with its consideration of Bill S-4. The proposal to elect 70% of the House of Lords to non-renewable 12-year terms provides a measure of elected legitimacy, but because of the length of the terms, their non-renewability, and the presence of the 30% of Lords who would remain unelected, the House of Lords would not acquire a sufficient degree of legitimacy to challenge the House of Commons or deadlock Parliament. As well, the existence of an appointed 30% could enable deliberate representation of designated groups and minorities, including the people of lengthy political experience who make a distinctive contribution to the Senate today, and the non-renewability of the term would

ensure that election-driven party activity would not deflect Senate time from the "sober second thought" function and long-term committee studies.

Advisory Elections – Some Observations

Bill S-4 is silent on the subject of advisory elections but, during his appearance before the Committee, the Prime Minister indicated the government's intent to establish a form of consultative or advisory process for use in the selection of senators.

Witnesses were uniform in their opinion that the reform goals set by the government are desirable, and agreed with the Prime Minister that Bill S-4 by itself would not achieve them. Rather, in order to fulfill the overall intent of reform, some means by which the preferences of Canadians could be taken into consideration when Senators are named needs to be established. Members of the Committee also agree with witnesses who advised that the details of such a process will need to be very carefully developed, in order to achieve the desired advantages while preserving important strengths already realized by the Senate today.

Over the years, the existence of an appointed Senate has allowed for the representation of various segments of the Canadian population that do not readily find representation in the House of Commons. This is an important contribution, allowing the Senate to complement the representation provided by the House of Commons within Canada's democratic process. Any means chosen to achieve a more democratic Senate should avoid disturbing this characteristic and, if possible, enhance it. While the first-past-the-post elections used for the House of Commons are not congenial to the representation of minorities, proportional representation models, for example, employ lists of candidates that can be designed to favour the election of representatives of minorities and disadvantaged groups.

Another concern that preoccupied the Committee involved a second characteristic of the Senate – the minor role that partisanship plays in its deliberations. The Senate acts as an institution in which multiple perspectives, including party loyalty, come into play and provides an atmosphere in which issues can be examined in a relatively non-partisan way. This also, from the Committee's standpoint, is a feature of the Senate which can and should be retained when embarking on changes intended to make the upper house more democratic in nature. Electoral systems enabling voters to assign preferences to individual candidates across party lines do not eliminate parties or partisanship, but they foster attention to the merits of individual candidates as well as political parties, and might thus be distinctively appropriate to the culture of the Senate.

Finally, Committee members believe that the development of any consultative or advisory election process must be carefully considered with a view to the constitutionality of such a process. Prof. Hogg and other expert witnesses who appeared before the Committee indicated that the creation of an advisory election process could require resort to the "7/50" amending procedure (section 38(1) of the *Constitution Act, 1982*) if it were found that the existence of an advisory election process fettered the discretion of the Prime Minister to recommend senators. Such an amendment could not

be undertaken under section 44 of the *Constitution Act, 1982*. On the other hand, if the process only results in the selection of a pool of candidates from which the Prime Minister were free to choose individuals to recommend to the Governor General, then constitutional concerns may not arise. As the presentation made by the Hon. Benoît Pelletier, Quebec's Minister of Canadian Intergovernmental Affairs, clearly indicates, this concern is not merely constitutional, but potentially intergovernmental and political. We commend it to the government's attention, as advisory election legislation is developed.

Concluding Remarks

Like many of the witnesses who appeared before us, including the Prime Minister himself, members of this Committee believe that while the Senate needs to be reformed because of its shortcomings, it is worth reforming because of its strengths.

Over the years, the Senate has evolved to make a unique contribution to the Canadian democratic process, providing representation that complements that of the House of Commons by reflecting, in particular, the minority regions and the social diversity that has come to be a central part of the Canadian identity. Its "sober second thought" role, involving technical revisions to legislation and long-term policy studies, also benefits from the vast experience of its members, in politics and government as well as a wide variety of other walks of life.

Our support for the approach of incremental reform reflected in Bill S-4 reflects these institutional realities, as well as the political and intergovernmental challenges associated with more fundamental reform. It also responds to a new openness to constructive alternatives that we have noted among those who contributed to our hearings, in which a number of longstanding advocates of the Triple "E" senate reform model expressed interest in other options. Bill S-4 represents a new option, for practical change. We believe limited terms for Senator can build on existing strengths of the Senate, and help to unlock its unrealized potential.

If the Government of Canada is considering further reforms, as suggested by Prime Minister Harper when he appeared before this Committee, we are hopeful that such reforms will continue the momentum created by Bill S-4. However, careful attention will need to be given to major technical challenges in order to get the consultative process for selecting Senator right, balancing the difficult trade-offs and responding to the constitutional considerations that are identified in this report.

In any reform of the Senate, special attention needs to be given to the representation of aboriginal peoples, the northern and coastal inhabitants, official languages minorities, visible minorities, persons with disabilities and women.

In addition, the representation of the first inhabitants of Nunavik needs to be addressed. These people have been formally without representation in the Senate since the boundaries of Quebec were extended to include these lands, but the

boundaries of the 24 senatorial districts of Quebec were not adjusted to include what is now known as Nunavik.

Finally, members of this Committee wish to note that its work on Bill S-4, as well as its report on the Murray-Austin motion referred to the Committee on June 28, 2006, represent only a beginning of the "comprehensive review of Senate reform" that the Committee was established to undertake. Other issues of incremental reform that the Committee proposes to address in the near future, as it proceeds with this work of comprehensive review, include:

- Correction of the loss of representation to Nunavik, in Northern Quebec, that occurred when the modern boundaries of Quebec were established without changes to the boundaries of the Quebec senatorial districts;
- An examination of s. 26 of the *Constitution Act, 1867*, which provides for the appointment of 4 or 8 additional senators (to enable a Prime Minister to overcome deadlocks);
- A review of rules relating to absenteeism and other unacceptable conduct in s. 31 of the *Constitution Act, 1867*, to ensure that they are both fair and effective;
- A review of the property qualification, and of the related provisions in the *Constitution Act, 1867* that require each of Quebec's 24 senators to hold property valued at $4000 in one of the 24 divisions established in that province;
- The possible election of the Speaker of the Senate; and
- Development of a model for a modern elected Senate.

Wednesday, September 6, 2006

C.E.S. (Ned) Franks, Professor Emeritus, Queen's University

Leslie Seidle, Senior Research Associate, Institute for Research on Public Policy

Janet Ajzenstat, Professor Emeritus, Political Science, McMaster University

Roderic Beaujot, Professor, Sociology, University of Western Ontario

Thursday, September 7, 2006

The Right Honourable Stephen Harper, P.C., M.P., Prime Minister of Canada

Privy Council Office
Matthew King, Assistant Secretary to Cabinet, Legislation and House Planning
Dan McDougall, Director of Operations, Legislation and House Planning

Department of Justice Canada
Warren J. Newman, General Counsel, Constitutional and Administrative Law Section

Tuesday, September 19, 2006

Roger Gibbins, President and CEO, Canada West Foundation

Gerald Baier, Canadian Bicentennial Visiting Professor, MacMillan Centre for International and Area Studies, Yale University

Philip Resnick, Professor, Political Science, University of British Columbia (by videoconference)

Andrew Heard, Associate Professor, Political Science Department, Simon Fraser University

The Honourable Gary Mar, Minister of International and Intergovernmental Relations, Government of Alberta

Wednesday, September 20, 2006

Peter McCormick, Chair, Department of Political Science, University of Lethbridge

Gordon Gibson, Senior Fellow in Canadian Studies, Fraser Institute

Peter Hogg, Scholar in Residence, Blake, Cassels and Graydon

John Whyte, Senior Policy Fellow, Saskatchewan Institute of Public Policy

Richard Simeon, William Lyon Mackenzie King Visiting Professor of Canadian Studies, Weatherhead Centre for International Affairs, Harvard University (by videoconference)

David E. Smith, Professor Emeritus, University of Saskatchewan

Daniel Pellerin, Visiting Assistant Professor, Political Science Department, Colgate University

Thursday, September 21, 2006

Patrick J. Monahan, Dean, Osgoode Hall Law School

The Honourable Gérald-A. Beaudoin, Professor Emeritus, Faculty of Law, University of Ottawa and former Senator

Gérald R. Tremblay, Partner, McCarthy, Tétrault.

The Honourable Marie Bountrogianni, Minister of Intergovernmental Affairs and Minister Responsible for Democratic Renewal, Government of Ontario

Stephen Allan Scott, Professor Emeritus, Faculty of Law, McGill University

The Honourable Benoit Pelletier, Minister responsible for Canadian Intergovernmental Affairs, Francophones within Canada, the Agreement on Internal Trade, the Reform of Democratic Institutions and Access to Information, Government of Quebec

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